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THEME: HONOURING THE CHIEF JUSTICE MR JUSTICE LUKE MALABA'S OVER FORTY YEARS OF JUDICIAL SERVICE

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Foreword

It is with great pride and a deep sense of gratitude that I write this Foreword to the MSU Law Review Special Issue 2026, dedicated to acknowledging an illustrious judicial career of the Honourable Chief Justice Luke Malaba on the occasion of his retirement after more than forty years of distinguished judicial service to the Republic of Zimbabwe.

Over forty years is not merely a measure of time. It is a measure of devotion. Chief Justice Malaba commenced his legal career as a Magistrate and, through decades of hard work, intellectual integrity, and unwavering commitment to justice, rose to lead the entire judiciary of Zimbabwe as its Chief Justice. His journey mirrors, in many ways, the journey of our own university, Midlands State University, an institution that rose from humble beginnings into an academic giant in its 25 years of existence.

The Chief Justice has presided over a period of profound constitutional transformation in Zimbabwe. The transition to the 2013 Constitution, the interpretation of fundamental rights, the development of administrative law and labour jurisprudence, these are not abstract legal developments. Equally significant is his role in modernising the machinery of justice itself. It was under his leadership that the Judicial Service Commission developed and launched the Integrated Electronic Case Management System (IECMS) in 2022, a transformative platform that has fundamentally changed how Zimbabweans access and experience the courts. Undeniably, the legacy of Chief Justice Malaba will be felt in courtrooms and communities for generations to come.

The partnership between Midlands State University and the Judicial Service Commission in this Special Issue is a statement of shared values. Both institutions are driven towards building a better Zimbabwe. The judiciary does so through the administration of justice; the university does so through education, research, and the cultivation of critical thought. This Special Issue is the product of that partnership, and I am proud that it is the MSU Law Review that is giving it expression.

Midlands State University has, since its founding, positioned itself as an institution that is responsive to the needs of its stakeholders and society at large. As a university, we are proud of academic contributions like this one, which demonstrate that academic excellence and national service are, in fact, inseparable.

The articles, case notes, and reflective essays gathered in this volume offer rigorous and wide-ranging scholarly engagement with Chief Justice Malaba's

jurisprudential legacy. They span constitutional law, human rights, administrative law, labour law, and comparative perspectives – a breadth that reflects the remarkable scope of the Chief Justice's own jurisprudential contribution. Every contribution has been subjected to the MSU Law Review's peer review process, ensuring the scholarly rigour that our readers have come to expect from an institution of academic excellence.

Alongside the academic articles, this volume carries reflections and tributes from distinguished members of the bench, bar, and academia. I am particularly moved by these personal testimonies, which remind us that behind every landmark judgment there is a person – one who has given years of quiet dedication to an often demanding and thankless public calling. They speak to the Chief Justice not only as a jurist, but as a mentor, a colleague, and a servant of the people.

The Special Issue is a must read for stakeholders in the justice delivery system such as judicial officers, legal practitioners, academics, students, researchers, and all those who are invested in the health of Zimbabwe's democratic and constitutional order. I encourage you to read it not only as a tribute to one great jurist, but as an invitation to reflect on the kind of the justice delivery system and society that we are all called upon to build and to protect.

To the contributors, reviewers, and the editorial team, I extend my sincere congratulations. You have produced a volume that MSU and Zimbabwe can be proud of. And to the Judicial Service Commission, I express my gratitude for the trust and collaboration that made this initiative possible.

Finally, to the Honourable Chief Justice Luke Malaba on behalf of Midlands State University, its Council, its Senate, its staff, and its students I say: thank you. Thank you for over forty years of judicial service. Thank you for a legacy that will continue to shape the law and the lives of Zimbabweans long after the final gavel has fallen. We wish you a retirement full of the peace and fulfilment that so many years of principled public service richly deserve.

Professor Victor Ngonidzashe Muzvidziwa

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May 2026

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A ZIMBABWE IN WHICH WORLD CLASS JUSTICE PREVAILS! *TRIBUTE TO CHIEF JUSTICE, HON. LUKE MALABA*: REFLECTIONS ON JUDICIAL LEADERSHIP AND THE ENTRENCHMENT OF CONSTITUTIONAL JUSTICE AND HUMAN RIGHTS PROTECTION

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Abstract

On 14 May 2026, Chief Justice, Hon. Luke Malaba will retire after more than 40 years of judicial practice in a legal history that has intermingled with the constitutional evolution of the Constitution of Zimbabwe, 2013. This eulogy, written in the collective voice of the current judges of the Constitutional Court, celebrates His Lordship's jurisprudence and institutional legacy, informed by the understanding that human rights depend not only on adjudication but equally on the institutional conditions that allow courts to effectively enforce constitutional rights with legitimacy, efficiency and fairness. The article discusses six landmark cases: Chimakure and Others v Attorney-General 2013 (2) ZLR 466 (S); M & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Others 2016 (2) ZLR 45 (CC); Greatermans Stores (1979) (Pvt) Ltd & Anor v Minister of Labour & Anor 2018 (1) ZLR 335 (CC); S v C (A Juvenile) (Justice for Children's Trust and

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2 Bachelor of Law - BL (1977) and a Bachelor of Laws – LLB (1978) both acquired from the University of Rhodesia. Justice of the Constitutional Court.

3 Bachelor of Law (BL) (1982) and a Bachelor of Laws (LLB) (1983), both from the University of Zimbabwe. Justice of the Constitutional Court.

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6 Bachelor of Laws – LLB degree from University of Zimbabwe (1975) and obtained a Master of Laws degree at the University College London (1977). Justice of the Constitutional Court.

Zimbabwe Lawyers for Human Rights Intervening as Amici Curae) 2019 (2) ZLR 12 (CC); Sogolani v Min of Primary & Secondary Education & Ors 2020 (2) ZLR 1312 (CC); and Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor 2018 (2) ZLR 743 (CC). What runs through all of these cases is the use of human dignity as a justiciable right (section 51) and an interpretive value (section 46) to give transformative meaning to the Declaration of Rights. Beyond adjudication, the article assesses His Lordship's institutional contributions digitisation (IECMS), sentencing guidelines, judicial training and infrastructure as constitutional gains that enhance access to justice and uphold the dignity of all court users. The article concludes that Chief Justice Malaba's legacy is both doctrinal and institutional: one that has both informed the interpretation of constitutional rights and enabled the conditions for justice delivered with integrity and dignity to all before the courts.

Key words: *leadership, constitutional justice, human rights protection, human dignity, transformative constitutionalism, judicial administration*

1. Introduction

This is a tribute to Chief Justice, Hon. Mr. Luke Malaba ('His Lordship') at the conclusion of a judicial career closely intertwined with the constitutional transformation ushered in by the Constitution of Zimbabwe, 2013. Written from a collective judicial voice, it reflects both on his jurisprudential contributions and on his leadership of the judiciary. The purpose is to consider not only the development of constitutional doctrine under his tenure but also the broader institutional vision that has shaped the administration of justice.

The tribute proceeds from the understanding that the protection of human rights is not achieved through adjudication alone. It depends equally on the institutional frameworks, internal discipline and reforms that enable courts to hear, determine and enforce constitutional claims with authority, efficiency and fairness. In this regard, the legacy of a Chief Justice extends beyond the judgments he authored; it is also found in the enduring structures and conditions he fostered towards the proper administration of justice.

As current judges of the Constitutional Court of Zimbabwe, we are mindful of the constraints that arise from writing a tribute to a fellow judge. Our reflections cannot mirror the tone or distance of external academic commentary, nor can we approach judicial decisions as if they were detached objects of critique. Judicial restraint does not demand silence. Rather, it calls for fidelity to the Constitution, careful engagement with established authority, and measured reflection of matters already within the public domain.

It is in this spirit that we pay tribute to Chief Justice Malaba's judicial leadership and contribution to constitutional justice and the protection of human rights in Zimbabwe.

2. The New Constitutional Order

The Constitution of Zimbabwe, 2013 is framed in terms that announce a break with constitutional indifference. Section 2 of the Constitution of Zimbabwe, 2013 declares the Constitution supreme and invalidates any law, practice, custom or conduct inconsistent with it. Section 3 of the Constitution of Zimbabwe, 2013 places at the centre of the constitutional order the rule of law and fundamental human rights and freedoms. This transition was not simply a redistribution of institutional functions. It was a recasting of the normative foundations of public power, grounded in constitutional supremacy and transformative constitutionalism.

As we have affirmed in Zimbabwean jurisprudence, the Constitution is now the supreme touchstone against which all exercises of public power must be measured. That understanding is echoed in the Court's own jurisprudence. In *Chironga* v *Minister of Justice & Ors 2020 (2) ZLR 633 (CC)* it was observed as follows*:*

> One of the crucial elements of the new constitutional dispensation ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Constitution of Zimbabwe, 2013 ("the Constitution") adopted the rule of law and supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy.

This passage captures the constitutional ethos with precision. The 2013 Constitution requires all institutions of the State to operate under a supreme normative order that takes rights seriously. It also requires courts to interpret and apply rights through a purposive, value-conscious and justice-oriented method. The force of that requirement is strengthened by section 46 of the Constitution of Zimbabwe, 2013, which directs every court, tribunal and forum, when interpreting the Declaration of Rights, to give full effect to the rights and freedoms enshrined in Chapter 4 of the Constitution of Zimbabwe, 2013 and to promote the values that underlie a democratic society based on openness, justice, human dignity, equality and freedom. The constitutional architecture thus places human dignity at the centre of interpretation before any single case is even decided.

The institutional place of the Constitutional Court within this new order must also be recalled. Section 166 of the Constitution of Zimbabwe, 2013 establishes the Constitutional Court as a superior court of record, while section 167 of the

Constitution of Zimbabwe, 2013 makes it the highest court in all constitutional matters. The Constitution has nevertheless provided, in the Sixth Schedule of the Constitution of Zimbabwe, 2013, for a transitional period during which the Constitutional Court would consist of the Chief Justice, the Deputy Chief Justice and judges of the Supreme Court sitting as judges of the Constitutional Court for seven years after the publication date. It is within this evolving institutional framework that Chief Justice Malaba's jurisprudence contributed to the consolidation of constitutional supremacy and the strengthening of judicial authority in constitutional adjudication.

The importance of that transition has also been noted in scholarly discourse on the Constitution of Zimbabwe, 2013. The constitutional value system, as A Moyo explains, is one that plainly favours a modern constitutional state shaped by democratic governance, constitutionalism, separation of powers and the rule of law.[7] The rights jurisprudence that emerged during Chief Justice Malaba's tenure should therefore be understood as part of a larger process by which the Constitution of Zimbabwe, 2013 was given practical and institutional meaning.

3. Human Dignity and the Interpretive Ethos of the Court

If one seeks the organising idea that best explains the Court's human rights jurisprudence during this period, it is human dignity. Section 51 of the Constitution of Zimbabwe, 2013 provides in full: "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected."

We observe that the brevity of the provision does not diminish its reach. Dignity is expressed as an inherent attribute of the human person and as a right that attracts judicial protection. Through section 46 of the Constitution of Zimbabwe, 2013, it is also made one of the values through which all rights are to be interpreted. Dignity therefore operates both as a right and as an interpretive standard. That dual role is important in a constitutional court. It enables the Court not merely to vindicate a specific guarantee where it is directly infringed, but to ensure that the broader treatment of persons by law, by institutions and by adjudicative processes remains consistent with their constitutional worth.

Southern African scholarship has long emphasised this dual function of dignity. Cameron described dignity in constitutional jurisprudence as both a foundational value that informs the interpretation of all other rights and a fully justiciable right.[8]

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7 Constitution of Zimbabwe, 2013.

8 E Cameron, 'Understanding Human Dignity' available at https://www.concourt.org.za/images/phocadownload/justice_cameron/Oxford-Dignity-and-Disgrace-June%202012-revised%20final.pdf (Accessed on 19/03/26).

G. Ferreira similarly observes that the modern human rights project has treated the protection of dignity as a central concern and that dignity often becomes the hinge on which difficult conflicts between rights, culture and public power turn.[9] These observations are not foreign to the Constitution of Zimbabwe 2013. They help explain why dignity has been such an influential constitutional idea in the Court's jurisprudence.

The contribution of Chief Justice Malaba to the development of human rights jurisprudence is best appreciated through the judgments that marked the Court's engagement with expression, marriage, labour justice, punishment, religious freedom and constitutional review itself. Many of these judgments were written for the court by his Lordship. For that very reason they require careful consideration. They should not be praised because they are his. They must instead be considered for what they did to the law, for the constitutional values they articulated and for the protection they afforded to rights-bearing persons in concrete settings.

4. Freedom of Expression

The trajectory begins with *Chimakure &Ors* v *Attorney-General* 2013 (2) ZLR 466 (S), a groundbreaking judgment authored by His Lordshship. The litigation arose from the criminal prosecution of journalists under a provision that penalised the publication of false statements prejudicial to the State. The final constitutional ruling struck the provision down. The impact of that decision on human rights jurisprudence was substantial. It affirmed that under the Constitution of Zimbabwe, 2013, criminal law could no longer be used in a manner that imposed a severe and constitutionally unjustified chilling effect upon public speech. It also marked an early insistence that inherited statutory restraints upon political and public discourse had to submit to the demands of constitutional justification.

The significance of *Chimakure & Ors* v *Attorney-General* 2013 (2) ZLR 466 (S) is not confined to the immediate protection of freedom of expression. It also lies in the Court's willingness to insist that constitutional supremacy reaches into statutes long treated as ordinary incidents of governmental power. In this sense the case was part of the judicial responsibility of making the Constitution real. Freedom of expression was vindicated, but the deeper constitutional lesson was

9 G Ferreira, 'Human Dignity and Other Relevant Concepts in International and South African Law' (2019) 52 Comparative and International Law Journal of Southern Africa, available at https://unisapressjournals.co.za/index.php/CILSA/article/download/5258/4475/48009 (Accessed on 19/03/26).

that the State's preferred methods of control must themselves answer to rights, proportionality and constitutional values.

5. Marriage, Childhood and Equal Worth

That same constitutional method is visible in *M & Anor* v *Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* 2016 (2) ZLR 45 (CC), widely referred to as *Mudzuru.* In that case the Court declared that no person, male or female, may enter any marriage or union before attaining the age of eighteen years. The human rights impact of the decision has rightly been acknowledged as transformative. The judgment protected the rights of children, vindicated equality and struck at a practice that had exposed girls to profound vulnerability. The decision was not only a ruling on age. It was a constitutional statement about personhood, agency and the equal moral worth of children.

The contribution of *M & Anor* v *Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors* 2016 (2) ZLR 45 (CC) to jurisprudence is clear. It demonstrated that the Court would read the Constitution as an integrated whole, with section 78 of the Constitution of Zimbabwe, 2013 on marriage interpreted together with section 81 of the Constitution of Zimbabwe, 2013 on children's rights and with the Constitution's broader concern for dignity and equality. It also demonstrated an openness to international and comparative materials in the interpretation of domestic rights. In that way the judgment modelled a constitutional method that was faithful to text while alive to the wider normative environment in which rights are understood. The Court drew upon the African Charter on the Rights and Welfare of the Child and upon the jurisprudence of other constitutional courts in the region, showing that Zimbabwe's constitutional project is part of a broader African commitment to human rights.[10]

The scholarly reception of *M & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors 2016 (2) ZLR 45 (CC)* has underscored these dimensions. Sloth-Nielsen's review of the case identified its significance in relation to standing, its purposive use of international and foreign law and its interpretation of the constitutional provisions relevant to child marriage.[11] Later scholarship on children's rights jurisprudence in Zimbabwe has similarly treated the case as one

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10 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), art 21. Available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf (Accessed 19/03/26).

11 J Sloth-Nielsen, '*Recent Developments: Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs N.O. & Others'* (2016) African Human Rights Law Journal, available at https://www.saflii.org/za/journals/AHRLJ/2016/27.pdf (Accessed on 19/03/26).

of the Court's trailblazing rulings.[5] It is difficult to disagree. The judgment enlarged the practical reach of the Declaration of Rights and gave meaningful constitutional content to the protection of children.

6. Labour Justice And Fairness

The Court's human rights contribution also extends into the field of Labour law. In *Greatermans Stores (1979) (Pvt) Ltd & Anor* v *Minister of Labour & Anor* 2018 (1) ZLR 335 (CC) the Court was required to consider constitutional challenges to legislation enacted in the aftermath of widespread employment terminations following *Nyamande & Anor* v *Zuva Petroleum (Pvt) Ltd & Anor* 2015 ZLR 186 (S). The matter was legally complex and socially charged. What gives it human rights significance is the court's engagement with fairness, labour protection and equality within a constitutional frame. *Greatermans Stores (1979) (Pvt) Ltd & Anor* v *Minister of Labour & Anor* 2018 (1) ZLR 335 (CC) is instructive because it shows that human rights jurisprudence is not confined to cases that present themselves in the familiar language of civil liberties. The Constitution of Zimbabwe, 2013 protects fair labour practices. The Court's treatment of the dispute therefore formed part of the constitutional effort to regulate the consequences of market power and legislative response in a manner consistent with legality and social justice. In this respect the judgment belongs to the broadening of constitutional jurisprudence beyond the traditional confines of declaration of rights into the lived material conditions of workers and their families.

The case also reveals a judicial sensitivity to the fact that constitutional adjudication often takes place against pressing institutional and economic realities. Human rights adjudication in labour matters may require the court to mediate between competing claims of legality, predictability, fairness and social protection. A mature constitutional court does not shrink from that task. It instead insists that even in such difficult contexts the Constitution remains the controlling frame. As His Lorship stated in the judgment: *"The Constitution does not withdraw from the field of labour relations; it enters it and requires that all labour practices conform to its demands."*[12]

7. Punishment, Humanity and the Child

The centrality of dignity emerges with special clarity in *S v C (A Juvenile) (Justice for Children's Trust and Zimbabwe Lawyers for Human Rights Intervening as Amici Curae)* 2019 (2) ZLR 12 (CC). The case arose when a juvenile offender, having been convicted of a crime, was sentenced to receive corporal punishment. The question before the court was whether judicial corporal punishment imposed

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12 *Greatermans Stores (1979) (Private) Limited t/a Thomas Meikles Stores and Another* v *Minister of Public Service, Labour and Social Welfare* CCZ 2/18 at p 15 of the cyclostyled judgment.

upon a juvenile offender could survive constitutional scrutiny under section 53 of the Constitution of Zimbabwe, 2013, which protects every person from cruel, inhuman or degrading treatment or punishment. In answering that question the court did more than invalidate a statutory provision. It articulated a jurisprudence of punishment grounded in the intrinsic worth of the human person. The court's reasoning placed dignity at the centre of the analysis. The point is captured in words attributed in later scholarly discussion to the judgment itself:

> Human dignity is a special status which attaches to a person because he or she is a human being. Human dignity is inherent in every person all the time regardless of the circumstances or status of the person. Human dignity is not a creature of State law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it.[13]

Those words matter in at least three ways. First, they make clear that rights do not arise from official grace. The State does not confer dignity. It is required to respect it. Secondly, they establish dignity as a value that endures regardless of circumstance, including criminal conviction. Thirdly, they explain why the constitutional review of punishment cannot turn only on tradition, utility or convenience. Once a form of punishment is incompatible with the inherent dignity of the person it falls foul of the Constitution of the Constitution of Zimbabwe, 2013.

The impact of *S v C (A Juvenile) (Justice for Children's Trust and Zimbabwe Lawyers for Human Rights Intervening as Amici Curae) 2019 (2) ZLR 12 (CC)* on human rights jurisprudence is profound. It removed judicial corporal punishment from the range of constitutionally permissible sanctions, strengthened children's rights and affirmed a rehabilitative approach to juvenile justice. It also affirmed that the best interests of the child cannot be invoked to justify treatment that violates dignity. As later scholarly commentary observed, the judgment used dignity as a core value in shaping the interpretation of children's rights and punishment under the Constitution.[14]This position is consistent with earlier jurisprudence such as *S* v *Ncube* 1987 (2) ZLR 246 (S), which emphasised

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13 I. Magaya, 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe,' De Jure Law Journal vol.54 n.1 Pretoria (2021). Available at https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602021000100002 (Accessed on 19/03/26).

14 I Magaya, *'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' (2021) De Jure, available at https://www.scielo.org.za/scielo.php?pid=S2225-71602021000100002&script=sci_arttext.*

humane punishment and aligns with our broader dignity-based approach to constitutional interpretation.

8. Religion, Belonging and Constitutional Community

A similarly important application of Constitutional values appears in *Sogolani* v *Min of Primary & Secondary Education & Ors* 2020 (2) ZLR 1312 (CC) at p1321H. The case concerned the compulsory recitation of the national pledge in schools. The Court held that compulsion of that kind infringed the rights to freedom of religion and conscience and violated the parental right to determine the religious upbringing of one's children. Yet what gives the judgment a particular force is the way in which it connected religious freedom to membership in the political community. His Lordship stated for the Court:

> The mere recitation of the national pledge will thus amount to a repudiation of their religious values and, in essence, will amount to a public announcement that they do not belong to the political community. Concordantly, those who do not share the faith as formulated in the pledge will be cast as unpatriotic even though they respect the culture and national heritage but only do not wish to do so in a religious context. This is needless and unnecessary exclusion, marginalisation which will effectively make them feel like second-class citizens and is discriminatory on religious grounds.

This was a powerful constitutional insight. The judgment recognised that rights are sometimes infringed not only through material disadvantage or explicit sanction, but through compelled forms of civic belonging that cast dissenters as outsiders. *Sogolani **(supra)*** therefore expanded the Court's human rights jurisprudence in at least two respects. It gave concrete protection to freedom of religion in the educational sphere, and it linked that protection to dignity, equality, and constitutional inclusion. The child, the parent and the dissenter are all affirmed as members of the polity whose constitutional worth does not depend upon conformity in matters of conscience.

9. Lytton Investments and the reach of Constitutional Review

The culminating point of this line of jurisprudence is *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd & Anor* 2018 (2) ZLR 743 (CC). The importance of that case lies in its confrontation with a difficult but unavoidable constitutional question: whether the decision of the Supreme Court in a case involving a non-constitutional matter infringed the applicant's fundamental rights to equal protection of the law and to a fair hearing? The Court's answer was careful, novel, and constitutionally significant. It did not collapse constitutional litigation into an ordinary appeal, nor did it permit the cloak of finality to immunise all judicial error from constitutional scrutiny. Instead, it clarified the distinctive role

of constitutional review and the conditions under which judicial decisions may be challenged for infringing rights.

In later cases and summaries of its jurisprudence, the Court's characterisation of its own constitutional office has been repeatedly quoted in the following words by His Lordship:

> The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.

The importance of *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd & Anor* 2018 (2) ZLR 743 (CC) to human rights jurisprudence lies in its insistence that constitutional supremacy extends to all institutions of the State, including courts, while also preserving the integrity of the judicial hierarchy and the specialised jurisdiction of the Constitutional Court. The case laid a principled foundation for the proposition that a litigant may invoke section 85 where a judicial decision is said to have violated a fundamental right, provided the complaint is truly constitutional and not a disguised appeal. That is a significant development. It confirms that constitutional review is not limited to executive and legislative action. It now extends to the judicial function itself.

There is, in our view, a fitting jurisprudential completeness in this. Through *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd & Anor* 2018 (2) ZLR 743(CC), His Lordship has laid a foundation upon which the court may continue to explore the implications of constitutional review for all exercises of public power, including judicial power. The case marks an important turning point and recognises that fidelity to the Constitution requires courts to remain within the discipline of the principle of legality.

10. Judicial Leadership Beyond Adjudication

Judicial leadership, however, extends beyond the authoring of judgments. The Chief Justice occupies an office in which legal principles and institutional stewardship constantly meet. The office bears its own fair share of pressures and responsibilities: the need to improve systems, to reduce delays, to strengthen professional competence and to ensure the proper physical and procedural environment for adjudication, among other responsibilities. That wider field of work is important because it has a direct bearing on the administration of justice and therefore on the practical protection of rights.

The milestones achieved under His Lordship's stewardship are highlighted and discussed in accordance.

11. Digitisation of the Courts

Technology is the backbone of development and innovation. One of the most visible developments of recent years has been the digitisation of court processes through the Integrated Electronic Case Management System (IECMS). The significance of that development should not be reduced to administrative modernisation. Delay, opacity, and inaccessibility in court processes may impair the effective enjoyment of rights. A constitutional order committed to justice with reasonable promptness must therefore take seriously the procedural means by which access to court is made real.

For judges who worked in a paper-based environment over many years, the transition to a digital platform was not a small administrative change, but a significant administrative overhaul. It changed how litigants file, how records move, how hearings are managed and how the system is experienced by practitioners, court staff and the public. In that sense digitisation becomes part of the lived constitutional promise that justice should be accessible, orderly and reasonably prompt. It is entirely proper to regard that development as one component of a broader rights-protective judicial legacy.

12. Sentencing Guidelines

A second institutional development is the adoption of sentencing guidelines which is significant to judicial consistency. In Zimbabwean legal usage, that term has a settled meaning and should be used as such. The introduction of sentencing guidelines into the criminal process and the subsequent promulgation of the Criminal Procedure (*Sentencing Guidelines*) Regulations, 2023 (SI 146 of 2023), represent an effort to advance consistency, transparency and principled reasoning in sentencing. These are values of immediate constitutional significance. Sentencing is one of the most direct points at which State power encounters the individual. Consistency and fairness in that field are inseparable from equal protection of the law and from the dignity of the accused person as well as the interests of society.

13. Judicial Training

The third strand in buttressing the judicial system is judicial training. Courts do not administer themselves. Judicial methods, professional ethics, sensitivity to the realities of litigants and awareness of the constitutional values that should animate adjudication, all require continuing formation. Judicial training is therefore not external to the rights of protection. It helps determine whether legal

guarantees are understood in ways responsive to the living conditions of those who come before the courts.

Training also has a collective institutional dimension. It permits the sharing of experience across levels of the judiciary, promotes coherence in constitutional understanding and sustains the intellectual discipline necessary for rights of adjudication in a changing legal environment. To support judicial training is therefore to support the continuing capacity of the courts to breathe life into the Constitution in a principled and informed way.

14. Court Infrastructure and the Dignity of Justice

The same may be said of court infrastructure. The construction and improvement of courthouses can, at first sight, appear remote from the themes of constitutional justice and human rights. On reflection, the opposite is true. The place in which justice is administered influences public confidence, accessibility, safety, functionality and the way litigants and witnesses experience the authority of the law. A court building is not merely a shell around legal decision-making. It is part of the environment in which the State encounters the person.

For that reason, it is entirely apt to connect improvements in court infrastructure with the constitutional promise of dignity. Litigants, witnesses, court staff and judges all benefit when the spaces of justice project judicial *decorum* and reflect seriousness, accessibility and respect for persons. The constitutional State speaks through its institutions. It also speaks through the condition in which those institutions receive the public.

13. Conclusion

By way of conclusion, our tribute to the legacy of His Lordship, the Chief Justice, cannot be confined to the *corpus* of judgments authored during his tenure. It must be understood in the fuller constitutional sense, as encompassing both jurisprudence and the institutional conditions that make the realisation of rights possible. Considered in that light, the career of Chief Justice, Hon. Luke Malaba reflects a sustained engagement with the demands of a transformative Constitution and a deliberate effort to give practical meaning to its promises.

Jurisprudentially, the body of work that emerged during his tenure reveals a consistent fidelity to the supremacy of the Constitution and to the centrality of human dignity as both a right and an interpretive value. The cases considered demonstrate a Court attentive to the lived implications of constitutional guarantees**,** whether in the protection of expression, the safeguarding of children, the shaping of labour justice, the humanisation of punishment or the affirmation of religious freedom and belonging. They also reflect a Court conscious of its own

constitutional office: one that exercises review with discipline, preserves the integrity of judicial hierarchy and insists that all public power, including judicial power, remains subject to constitutional justification.
All this was achieved under His Lordship's able stewardship.

Equally significant, however, are the institutional reforms and administrative measures that accompanied this jurisprudential development. No judicial legacy is without complexity nor is any constitutional project ever complete. The work of giving full effect to the Constitution is, by its nature, ongoing and yet the measure of a judicial career may properly be taken from the extent to which it strengthens the capacity of the courts to carry that work forward. In this respect, the contribution of His Lordship lies not only in the decisions that will continue to guide future courts, but also in the systems, disciplines and institutional culture that will sustain constitutional adjudication beyond his tenure.

We therefore conclude, in a collective judicial voice, by acknowledging a legacy that is at once doctrinal and institutional: one that has shaped the interpretation of rights, reinforced the authority of the Constitution and contributed to the conditions under which justice may be administered with integrity, efficiency and respect for the dignity of all who come before the courts.

IN THE SHADOW OF A TITAN: REFLECTIONS ON A LEGACY OF JURISPRUDENCE, ADMINISTRATIVE PROWESS AND REFORM: TRIBUTE IN HONOUR OF HON. MR. LUKE MALABA, CHIEF JUSTICE OF ZIMBABWE, ON THE OCCASION OF HIS RETIREMENT

HON. MRS. JUSTICE MARIA DUBE [1]

Abstract

This paper reflects on the life, judicial philosophy, and leadership of former Chief Justice, Hon. Luke Malaba, assessing his impact on Zimbabwe's judiciary. It analyses his key judgments, which advanced constitutionalism, human rights, and the rule of law, particularly in protecting vulnerable groups. The paper also examines his administrative reforms, the introduction of the Integrated Electronic Case Management System (IECMS), the Performance Management frameworks, and institutional changes that improved efficiency, transparency, and accountability. Further attention is given to his defence of judicial independence, efforts to expand access to justice through infrastructure development, and the establishment of the Judicial Training Institute of Zimbabwe (JTIZ) for ongoing capacity building. The paper concludes that Malaba's tenure transformed Zimbabwe's judiciary into a modern, efficient, citizen-centred institution, leaving a lasting legacy.

Key words: *Judiciary Transformation; Constitutionalism; Access to Justice; Integrated Electronic Case Management System (IECMS); Performance Management; Judicial Training and Capacity Building*

1. Introduction: The jurist and the architect

To the ordinary man, the Chief Justice is an embodiment of constitutional finality and the final arbiter at law. Conversely, for those of us on the bench who served and worked closely with Chief Justice Hon. Mr Luke Malaba, we viewed him in many other different ways. Chief Justice Hon. Luke Malaba was not only been an eminent jurist who had an illustrious career on the bench but a figure head of justice and the architectural foundation upon which our own judicial careers as junior judges are anchored. He was a symbol of judicial accountability and constitutionalism who steadfastly upheld the rule of law and resolutely protected the independence of the judiciary. He was also a champion of judicial reforms which heralded the introduction of key initiatives that transformed the Zimbabwean judiciary and justice delivery system into what it is today, the envy

[1] BL (UZ), LLB Hons (UZ); Judge of the High Court of Zimbabwe. Judge President of the High Court of Zimbabwe.

of many judiciaries. He was perceived as a true father figure who guided and mentored judicial officers with wisdom and lightened our chambers and courtrooms providing a cool, stabilising shed under which we learnt the art and skill of decision making and administering the courts.

He has been a visionary leader, eminent jurist and a pillar and guiding light whose retirement marks the conclusion of a transformative era in the judiciary. To serve under Chief Justice Malaba has not only been pleasurable and enriching but has meant working in the shadow of a titan whose contribution to the judiciary of Zimbabwe will leave an indelible mark which will forever be cherished.

2. Champion of human rights and vulnerable groups

Malaba CJ's distinguished career in the judiciary spans more than four decades, having begun his career as a magistrate and progressing through the ranks to become the Chief Justice of Zimbabwe. Achieving this milestone is a testament to his dedication, perseverance and unwavering lifelong commitment to justice. Over the course of this period, the Chief Justice built up institutional knowledge, wisdom and administrative expertise that few can match.

His professional journey showcased sustained and profound commitment to upholding constitutional principles, promotion of human rights, the rule of law, and institutional excellence. This journey is marked by deep intellect, expertise, wisdom and deep understanding of the practice of law that brands him as an eminent jurist of our time. His excellent grasp of the law, understanding of Zimbabwe's constitutional journey, made him a steady hand guiding the judiciary. His academic brilliance was legendary, having penned numerous landmark decisions that shaped jurisprudence and many judgments written over the years are frequently cited and featured in law reports. These judgments have contributed towards shaping legal precedent, the judiciary's direction and impacted society and will endure forever and serve to guide judges, magistrates, law students and scholars alike influencing decisions in subsequent cases.

A reading of the numerous judgments penned by the Chief Justice in the different areas of the law reveals embodiment of passion, fairness and neutrality in how he interpreted the law. The judgments are masterclasses in clarity, reminding us that a well-reasoned decision is the best defence of the rule of law, making it transparent and accountable. In the constitutional arena, the Chief Justice proved himself a champion of human rights, through the exhibition for the advancement of the rights of women, children and the marginalised. Malaba CJ has been instrumental in shaping Zimbabwe's constitutional landscape - often taking bold and progressive steps in order to safeguard provisions of the Constitution.

His most significant impact arguably lies in his interpretation of section 78 of the Constitution of Zimbabwe, 2013 in *Mudzuru & Anor v Ministry of Justice & Ors*,[2] where he addressed a systematic ill, child marriages. Two young women both married before they had attained the age of 18 approached the Constitutional Court challenging the constitutionality of section 22(1) of the Marriage Act [*Chapter 5:11*], which permitted girls to marry at 16 with parental consent while boys had to be 18. They also challenged customary and religious practices that permitted child marriages. Malaba CJ used transformative constitutionalism to tackle entrenched social injustices by holding that the practice of child marriage is unconstitutional and that no person, male or female who is under the age of 18 may enter into a marriage, including an unregistered customary marriage and struck down section 22(1) of the Marriage Act [*Chapter 5:11*]. This watershed judgment exhibited judicial activism, reflecting a shift from legal formalism to prioritising human dignity and protection of vulnerable groups. It altered the law ensuring that both genders are treated equally and addressing historical gender imbalances.

In the realm of protection of the law and strict adherence to constitutional timelines set in the Electoral Act,[3] the Chief Justice (then Deputy Chief Justice), wrote a dissenting judgment in *Mawarire v Mugabe N.O. & Others*.[4] The applicant had approached the Constitutional Court seeking an order compelling former President, Robert Gabriel Mugabe, to proclaim the date for general elections before the expiry of Parliament's constitutional term. Mawarire argued that failing to hold elections on time would leave the country without a legitimate Parliament, which would undermine constitutional governance. The majority judgment, citing the need for protection of the law, agreed and ruled that the President had a constitutional duty to ensure elections were held before the term of Parliament ended, ordered that the harmonised elections be conducted by 31 July 2013 holding that the failure to fix an election date before the expiry of parliament was a violation of the applicant's rights. Malaba CJ in his dissenting judgment, warned against the judiciary delving into executive powers holding that section 58(1) of the Constitution of Zimbabwe, 2013 gives the President power to fix a day or days for the holding of elections to fall within a period of four months. This judgment highlighted the ability of the Chief Justice to engage in high level constitutional debate. His approach is often cited as the more practically grounded interpretation of the electoral law.

2 2016 (2) ZLR 45 (CC).
3 Electoral Act [*Chapter 2:13*].
4 *Mawarire v Mugabe N.O. & Others* 2013 (1) ZLR 469 (CC).

Perhaps the most high-profile case of his career *is Chamisa v Mnangagwa & Ors*[5] where Malaba CJ authored the unanimous judgment of the court dismissing an election petition challenging the 2018 Presidential results. The judgment reinforced the principle that "he who asserts must prove" with the burden of proof resting on the petitioner to provide clear and convincing evidence of irregularities. In addition, it introduced the first-ever live broadcast of court proceedings in Zimbabwe, promoting "transparency and accountability". In *Mutambara v Attorney General,*[6] Malaba CJ dealt with the tension between free speech and the dignity of the judiciary and examined whether the offence of "contempt of court" was a permissible limitation on the right to freedom of expression under the Constitution. This case supports the Chief Justice's belief that while the judiciary is open to criticism, its authority must be protected to ensure the rule of law.

His commitment to safeguarding the rights of vulnerable groups extends beyond the courtroom showing a genuine passion for creation of a just society. As Chief Justice, he walked the talk, using his position to amplify the voices of vulnerable groups of people. He believed in a judiciary that is accountable to the people, his philosophy being that a right is meaningless if the person holding it cannot have access to justice. He inspired judges to see themselves as guardians of the Constitution. In most of his speeches to judges, he spoke passionately about the duty of the courts towards the rights of the marginalised emphasizing that the judiciary is the guardian of the law and should not take a passive role in matters involving vulnerable groups. In one paper,[7] he spoke of the DUTY of the courts towards the vulnerable as follows:

> The obligatory nature of inherent human dignity makes access to justice a must on the basis that every person, regardless of social, economic and political status or condition, is equal to the other person before the law and has a right of access to justice when his or her rights have been infringed. A duty is imposed upon the courts to protect the public from flagrant human rights abuse. The Constitution is an evolutionary document that embodies the recognition of the enjoyment and fulfilment of everyone's rights

The era of his tenure as Chief Justice has left an indelible imprint on the legal fraternity and is carved into the very foundational stones of our courthouses. His

5 2018 (2) ZLR 251 (CC).

6 2015 (2) ZLR 14 (CC).

7 *Access to justice for the poor, vulnerable and marginalised people in Zimbabwe*, paper presented on The Occasion of the 2022 Right of Access to Justice Symposium University of Zimbabwe, 1 July 2022.

standing as an eminent jurist speaks to his commitment and contributions to justice.

3. A vision for world-class justice

Whilst Malaba CJ was a respected authority in the courtroom, he did not confine himself to the bench. He was a man who had many facets. He excelled not only in crafting judgments and decision making but was able to balance this role with the mandate to administer the judiciary. Perhaps the most lasting part of his legacy was one that will not be found in law reports. A hallmark of Chief Justice Malaba has been his drive and commitment to modernising the judiciary. He drove a number of reforms in a bid to improve court efficiency and access to justice.

When he became Chief Justice, he did not inherit a world-class judiciary and refused to settle for the *status quo*. He envisioned, "*A Zimbabwe in which world class justice prevails."* His vision sought the attainment of quality justice, a feat which could not be accomplished by writing judgments alone. This is a powerful vision that places emphasis on commitment to justice delivery, fairness and service excellence. The Chief Justice did not settle for "good enough". He consistently challenged judges to measure themselves against the best in the world. He taught us that "World-Class Justice" is not an elite status but a promise that every citizen, regardless of quality or status, has access to justice, receives a fair and expeditious trial. He did not compromise on quality. The Chief Justice's vision focused on a multi-facetted approach to justice delivery with particular emphasis on expeditious resolution of matters, ensuring independence and impartiality of judges, transparency and accountability, access to justice, and continuous improvement of judges, magistrates and staff.

Expeditious delivery of justice was the symbol of the Chief Justice's tenure, which was marked by a steadfast pursuit of timely justice. The Chief Justice taught judicial and non-judicial officers to value expeditious delivery of justice and that "justice delayed is justice denied" is not just a cliché, but a failure of a justice delivery system. His vision for world class justice instilled a culture of speed, sense of urgency and showed us that quality work and accuracy are a vital component of it. His greatest gift to judges and magistrates was the lesson that time is a judicial resource. He taught judicial officers to value the expeditious delivery of justice, instilling a culture where efficiency is a moral imperative. By insisting on timely delivery of judgments and adherence to professional standards, he has fostered a culture of accountability within the courts. His thrust of ensuring timely resolution of matters brought relief to litigants reinforcing public confidence and trust in the judiciary.

Chief Justice Malaba drove numerous initiatives, which included dismissing idle matters, close monitoring and evaluation of performance of judges, setting timelines within which matters had to be set down and finalised, close monitoring of delivery of reserved judgments, clearance of case backlogs and reducing delays. The deadlines to write reserved judgments by set dates set by the Chief Justice and heads of courts whilst onerous at times, will serve as a benchmark for us as we move forward. He emphasized on a regime of strict monitoring and evaluation of performance of judges and magistrates' work output to ensure faster clearance of cases. He instilled in heads of courts the need to always ensure that case backlogs were kept under check by prioritizing cases and focusing on delivering reserved judgments timeously.

4. Performance management and evaluation of judges

In 2024, the Judicial Service Commission under the stewardship of the Chief Justice, introduced a system to manage and evaluate performance of judges' work, a novel concept for judges. The introduction of judicial performance management and evaluation of judges' work fostered a culture of accountability, increased transparency to the judiciary and service excellence. Consequently, thereof, we have witnessed closer and increased oversight of judicial performance and improved judicial decision making and administration which has the effect of enhanced public trust and confidence in the judiciary. Through performance management and evaluation, it has become easy to identify training needs of judges, disciplinary concerns, capacity building and development for judges and magistrates thereby enhancing judicial performance.

5. Modernization of the judiciary through technology

The Honourable Chief Justice was a digital architect who brought the judiciary into the digital age. The quest for quality justice led the Chief Justice to recognize that justice cannot be served by 16th-century methods in a 21st-century world. Having realised that the judiciary needed to adapt to changing times and technological advancements to meet growing demands and needs, he introduced an electronic case management system, a game changer. His visionary implementation of the Integrated Electronic Case Management System (IECMS), a system that involves using digital tools to manage cases, track their progress and access court cases. This initiative qualifies him as a digital champion.

The IECMS is a massive project being implemented across all courts and is in its final stages. Implementation of the system started with the first phase of the IECMS in May 2022 with the Supreme Court, Constitutional Court and Commercial Division of the High Court going on board first. The second phase saw the Administrative and Labour Court going digital. The third phase was launched in September 2023 to incorporate the High Court of Zimbabwe as a

whole and the Office of the Sheriff. Currently the system is being rolled out at the Magistrates Court as part of the fourth phase. Implementing a technological reform of this magnitude took commitment, courage, foresight and determination. By undertaking such major technological reforms, the Chief Justice exhibited bold leadership. The introduction of the IECMS dragged legal corridors out of the era of dusty paper files, misplaced or lost pleadings, manual delays into the smart digital age. The IECMS introduced improved case management, allowed access through online portals, reduced paperwork and allowed for faster processing of cases, thereby promoting transparency accountability, timely and expeditious resolution of matters.

To court administrators, the IECMS has become a useful and effective tool for monitoring and evaluation of performance of judges, streamlining processes and improving transparency and efficiency. By digitizing court records, the Chief Justice ensured that the court's processes are open to scrutiny, fostering a deeper public trust in the administration of justice. He proved that world-class justice must be as accessible as it is authoritative. This reform transcended mere technical modernization, fundamentally enhancing transparency, accountability, and public trust and confidence in the administration of justice. IECMS has been a game changer not only for the judiciary but the litigants as well. For the first time in the history of litigation in Zimbabwe court processes are filed online making it easier to file cases, track case progress and access documents. Digitisation allows digital tracking of cases and improved communication between court officials and litigants. Through IECMS, litigants can track progress of their cases from the comfort of their own homes or offices. Gone are the days when litigants and their legal practitioners were routinely required to attend courts for hearings. Virtual hearings have increased access to justice, allowing litigants to attend hearings remotely from anywhere in the world let alone rural areas of Zimbabwe. With a click of a button, a judge is able to monitor and assess his performance. Heads of Courts or Divisions are also able to monitor case flow of a court or individual judge and come up with appropriate interventions.

Because of his administrative foresight, "justice delayed" has finally begun its retreat. Courts now leverage on technology to clear cases, manage records and boost access to justice. Through this initiative we have witnessed speedy resolution of cases, reduced backlogs and transparency and improved access to justice.

The Chief Justice's visionary leadership ushered in efficiency and convenience. The IECMS stands as proof of the Chief Justice's forward-thinking leadership and commitment to innovation. Institutional reform is seldom simple often requiring commitment, careful planning and execution. His steadfast approach paved the

way for meaningful change reflecting a judiciary that is responsive to contemporary demands and prepared to create a culture of modern, transparent justice and meet future challenges. The IECMS has become the envy of judiciaries around the world. Since its inception, the Zimbabwean judiciary has received a steady flow of judiciaries seeking to learn and benchmark from this jurisdiction. Before the implementation of the electronic case management system, the Judiciary of Zimbabwe benchmarked against several countries and came up with its own home-grown system. Through strategic planning and effective implementation, Zimbabwe has since outpaced other jurisdictions in terms of efficiency.

Speaking at the end of the first term symposium[8] the CJ, said that it is now time to embrace the ''transformative power of Artificial intelligence, noting that AI will enable greater efficiency, faster processes and improved service delivery. Nonetheless, he cautioned that technology must not, "supplant the human element that is essential to judicial reasoning''. He also highlighted the importance of sustaining public trust and confidence in the judiciary in the age of AI and called on judicial officers to uphold the highest standards in the delivery of justice while embracing innovation. The introduction of AI is viewed as a natural progression of Malaba CJ'S digital reforms which should see the enhancement of research capabilities.

6. Role in enhancing independence and accountability of the judiciary

Beyond the courtroom and in the realm of judicial independence, Chief Justice Malaba played a steadfast and principled role. In his role as a judge, he promoted independence of the judiciary by maintaining impartiality in decision making, upholding the rule of law and resisting external pressures. As Head of the Judiciary, he sent a powerful message that justice must be administered without fear or favour no matter what.

Through his leadership, the judiciary has maintained its institutional autonomy while continuing to interpret and apply the Constitution faithfully. Chief Justice Malaba always emphasized the importance of independence of the judiciary, accountability and transparency. As Chief Justice and Chairperson of the Judicial Service Commission, he encouraged a spirit of accountability for judges work and always reminded us of the duty to account to the people of Zimbabwe placed upon judges by the Constitution of Zimbabwe and that public confidence in the judiciary depends on assurance that judicial officers perform

8 Keynote address on the Occasion of the End of First Term Judges Symposium, held under the theme "*The Application of Artificial Intelligence Technology in the processes and proceedings of the judicial service*", Elephant Hills, Resort, Victoria Falls, Zimbabwe, 29 March 2026.

their duties efficiently and ethically. He has overseen mechanisms that promote discipline, performance monitoring and ethical compliance. His leadership has reinforced the principle that accountability strengthens, rather than weakens judicial independence of judges. His experience spanning decades has reinforced the understanding that independence of the judiciary must be defended not only in theory but in practice. At the same time, he has recognised that independence must be balanced with accountability. He modelled how to engage with the executive and legislative branches with a spirit of cooperation that never compromised judges' judicial integrity and independence.

7. Training and capacity building

A great leader is measured by the skill and strength of those he leads. Chief Justice Malaba understood that a modern judiciary is only as good as the skills of its judicial officers and staff. He ensured that all were equipped to handle the demands of a modern judiciary. Under his stewardship, we saw a commitment to sharpen skills through professional training and development. The Chief Justice prioritized and encouraged continuous learning and professional development of judges, magistrates and staff equipping them with the requisite skills, not just in law, but in capacity building, skills enhancement, judicial ethics, case management, technology proficiency and emerging legal trends, ensuring we were never overwhelmed by the evolving demands of our work. At various Colloquia, the Chief Justice delivered papers on various legal topics and issues showing his legal prowess and extensive knowledge. He understood that a modern system is only as good as the hands that operate it. Under his leadership, the judiciary became a place of continuous learning. Through various training programmes introduced during his tenure, judges received nurturing which has transformed us into the well-rounded judges we have become, fully equipped with the requisite skills to handle our work.

Malaba CJ saw training and capacity building not merely as a human resources function but an exercise of institutional strengthening. This is evidenced by his approach in the establishment of the Judicial Training Institute of Zimbabwe (JTIZ), to steer capacity building for judicial and non-judicial staff. The institute embodies the Chief Justice's passion for knowledge and mentoring in a bid to achieve a well- rounded judge and is making a huge impact in achieving a well-equipped judge. The capacity building is also about mentoring with a culture of growth through learning rather than punishing the judges for errors they make.

8. Infrastructure development

Whilst most Chief Justices are content with the philosophy of the law, Chief Justice L. Malaba was a man of action and went beyond the courtroom. He led with dignity, driving meaningful reform and modernisation thereby elevating the

judiciary to greater heights of excellence. His “era" will be defined by an unprecedented expansion of the judicial footprint. He bridged the gap in access to justice by overseeing expansion of judicial infrastructure. He often reminded judges that the judiciary derives its power from the people,[9] advocating that the courts should move closer to the people.

Under his stewardship, we saw courts rise where there were previously none and existing ones refurbished into state-of-the-art facilities. This the JSC did in mostly remote areas of the country like Lupane and high-density townships like Cowdry park in Bulawayo, Epworth and Mabvuku in Harare, in that way bringing justice closer to citizens and increasing access to justice and convenience by reducing travel distances. By opening additional High Court seats and a network of Magistrates’ Courts across the country, he brought the law and enhanced access to justice to the people’s doorsteps. This trajectory represents a shift from centralized to decentralisation of courts thereby addressing historical infrastructure deficits that required litigants to travel long distances to courts.

The Chief Justice’s commitment to judicial expansion and decentralization saw the physical establishment of new High Court seats in Chinhoyi and another in Kwekwe which will soon be opened and a number of magistrates courts as a fulfilment of the promise of accessible justice. He took great strides to improve access to justice thereby fulfilling his vision for “Justice for All". He understood that the physical state of a court and access to justice reflects the dignity of the law itself.

Perhaps the most notable achievement under institutional reform is the introduction of a standalone Commercial Court, a division of the High Court in 2022 to provide a specialised forum for resolution of commercial disputes more efficiently and effectively. The court has seen reliable and expeditious resolution of commercial disputes, growth of expertise in commercial law and practice. In navigating the judiciary through institutional developments, technological transformation and evolving public expectations, the Chief Justice demonstrated institutional loyalty.

9. Stakeholder engagement and collaboration

The Chief Justice’s tenure was marked by a shift towards multi stakeholder participation. He embodied that the judiciary was not an island. While the judiciary is independent, it does not exist in a vacuum. One of the most vital lessons we learnt was the importance of close collaboration and cooperation with other key

9 Section 62 of the Constitution of Zimbabwe, 2013.

stakeholders in the administration of justice.[10] For the wheels of justice to turn smoothly, each stakeholder is vital. The Chief Justice bridged the gap between the bench, the Bar, the Zimbabwe Republic Police, the Zimbabwe Prisons and Correctional Services by setting up, the National Council on the Administration of Criminal Justice to improve efficiency and effectiveness in the administration of criminal justice, enhance coordination amongst stakeholders, tackle challenges affecting the criminal courts and promote accountability in the justice delivery system. He urged a multi-sectoral approach to resolving challenges besetting the criminal justice system. Since its inception, the wheels of justice have begun to move more swiftly. The major outcome of the Council is the faster resolution of criminal cases in both the High Court and Magistrates Courts as evidenced by the high clearance rate of criminal cases. The revival of fast-track courts in the magistrates' court is one of the major successes of Council. The setting up of a new High Court Circuit in Gokwe to deal with incessant backlogs in murder cases saw a marked decrease in pending murder cases and has seen the backlog in murder cases decreasing. All the successes recorded by Council are credited to the visionary leadership of the Chief Justice and cooperation and collaboration of key stakeholders in the justice delivery system which has seen as a unified whole.

10. Leadership Style: Transformational and Transactional Leadership

Looking at the contribution of Malaba CJ to the judiciary over the years, a pattern of leadership emerges. It is fair to say that his leadership style is both transformational and transactional.[11] Transactional leadership is based on a system of "contingent rewards" or monitoring where the leader clarifies expectations and provides rewards or corrections based on performance.[12] This style emphasizes the importance of structure, hierarchy, and performance standards to maintain organizational stability. He led a regime of strict monitoring, evaluation, and performance management to ensure day-to-day efficiency. He is seen actively monitoring deviations from standards, mistakes, and errors in performance and taking corrective measures when appropriate. CJ Malaba monitored the performance of the judiciary to ensure that objectives and standards are achieved,

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10 Theme for the 2025 Legal Year, *"Building Public Confidence in the Judiciary Through Multi-Stakeholder Participation*".

11 Kelloway, Barling and Helleur (2000) state that transformational leadership is adaptive in nature, dual-focused type of leadership style. The leadership style changes and responds to different situations. Northouse (2016) suggests that the majority of leadership models that focus on relationships between leaders and their followers are subject to transactional management.

12 Day. D & Antonakis. J, "Leadership: Past, present and future" Research Gate January (2012).

The Chief Justice played a pivotal and transformative role in the justice delivery system in Zimbabwe. The transactional side kept the wheels of justice turning daily, while the transformational side ensured those wheels were moving toward a more just and enlightened destination. His formidable administrative skills transformed the judiciary into a high-performing organization. He proved that an eminent jurist must also be a visionary manager. His initiatives will outlast his tenure, benefit future generations and we are proud beneficiaries of the projects he implemented.

Malaba CJ led the judiciary to great heights with a number of other positive changes being recorded during his tenure. As a transformational leader, his leadership was inspiring, stimulating, and considerate of the needs of the judiciary and contributed to commitment, loyalty and satisfaction. Judges had deep loyalty to their jobs and enjoyed their work. He challenged followers to surpass anticipations in performance, reinforced the self-conceptions of followers and fostered personal and mutual identification of followers with the values and goals of the Judiciary as well as his own.

CJ Malaba utilized vision and inspiration to change the culture of the judiciary, moving it towards "World-Class Justice", a vision that is appealing and inspiring to followers, challenging the *status quo* and encouraging creativity, such as the shift from "16th-century methods" to the digital age. We see him throughout his tenure as Chief Justice, acting as a mentor or coach to attend to each follower's needs, often described as a "father figure" or "master mentor". His approach in *Mudzuru* (supra) reveals a change in the law to protect children/women and demonstrates that his leadership was not just administrative, but deeply jurisprudential.

Chief Justice Malaba effectively balanced transformational and transactional leadership styles. To put this into perspective, a leader cannot just be a visionary (transformational) because the law requires order and predictability; nor can they just be a manager (transactional) because the law must evolve to meet societal needs. The two styles of leadership converged under his leadership. By utilizing both, a leader ensures that the organization not only has a "guiding light" for the future but also the "discipline" and "steady hand" required to function effectively in the present. This duality is encapsulated in his renowned motto, **"The Chief Justice Asks"**, which challenges judicial officers to approach their responsibilities with diligence: *"Are you at work or on a frolic of your own? Do you know what to do? How to do it? And why you do it? Then do it now".* This philosophy sets the tone for a results-oriented service culture. This is what the Chief Justice had to say about the questions he posed in this motto:

> When I became Chief Justice five years ago, I posed the following CJ Asks Questions. Those questions were important and relevant then as they are now. I'm still asking the same questions; answers to which guarantee a conscientious, efficient and effective public officer, and to which I have never had the opportunity of explaining the meaning and implication. You cannot expect subordinates to answer the questions if as leaders you are unable to answer them. It is bad enough for an ordinary member of staff to be on a frolic of his or her own, but it is worse when it is coming from a person in leadership. One would have been on a "frolic of your own", instead of serving clients at the front office, when one is busy playing with one's cell phone or misusing organisation facilities for personal gain. When one is at work, one must do the right thing. In other words, one must perform duties and functions of the position It is a fact that every institution needs to be goal oriented and the strategic plan is meant to engrave the essence of the JSC's vision, goals and strategic priorities. An institution without goals and ambitions is more like a ship without a compass to direct its course. Goals help us know the correct steps to take and channels to be followed. As the JSC, we have one common cause rooted in the attainment of world class justice. There cannot be talk of focused leadership and efficiency of an organization when there is no clarity on what is to be achieved and the direction to be taken.[13]

This leadership style combines firmness with mentorship, authority with approachability and tradition with innovation. He led with discipline, vision and a drive for excellence, qualities encapsulated in his enduring call to duty. He ably guided the judiciary, promoted justice, accountability and transparency. His strong leadership skills gave the judiciary direction and helped shape the character of the judicial system.

This philosophy has not only defined his personal approach to service but sets the tone for a judiciary committed to efficiency and accountability. His leadership qualities are marked by discipline, clarity of purpose and an unwavering focus on performance, integrity and a good work ethic. This powerful exhortation reflects a leadership style grounded not only on accountability but professionalism.

His motto challenges judicial officers and court staff alike to approach their responsibilities with diligence and integrity. The motto is not merely rhetorical; it sets the tone for a culture of responsibility and results-oriented service within the judiciary. His guiding motto continues to resonate as a call to purpose and professionalism within the courts. His impressive leadership skills transformed the judiciary into a high-performing institution and demonstrates that a great legal mind does not just interpret the law and write good judgments but can also be a

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13 Keynote address by the Chief Justice at the JSC Leadership Convention, 30 October 2021.

visionary leader with the ability to influence others and change the judiciary for a better tomorrow. As Zimbabwe's justice system continues to evolve, his legacy of strong, principled and forward-looking leadership transformed the judiciary and will remain an enduring foundation for the rule of law. This motto has gained recognition and popularity with other judiciaries internationally.

Beyond his administrative prowess, Chief Justice Malaba played a pivotal role in mentoring junior colleagues, sharing invaluable expertise, experience and giving guidance thereby challenging them to be more than just "deciders" of cases by demanding that they be scholars. He did not only teach judges the practice of law but how to judge and for that matter to be good and well -rounded judges. He mentored judges on the nuances of judicial temperament and encouraged them to decide cases with confidence and to have the courage to stand by difficult decisions. The Chief Justice can best be classified as a master mentor who did not just share the law and his experiences but shared himself also.

I categorise myself as one of the Chief Justice's students who benefitted immensely from his brilliance, exuberance and culture of mentorship. As a sitting judge, I found his judgments incredibly insightful. They brought clarity to complex legal issues, helped my understanding of jurisprudence and shaped my judicial philosophy. I had the privilege of serving under him as the Judge President of the High Court of Zimbabwe. When I assumed office as Judge President, he took me under his wing at a time when I had very limited experience in administering the courts at this high level. He showed me the ropes, offered practical wisdom and valuable insights on court management and administration, for which I am truly grateful. In him, I found inspiration, a patient leader who generously shared his expertise and experience. His leadership style is about listening, guiding and empowering. He was approachable, effective and efficient and an action-oriented leader. He was more than just a leader to me but a mentor, who guided me every step of the way thereby providing a safe space for me and an opportunity to learn and grow under his leadership.

He continuously trained and mentored judicial leaders on leadership. Hon. Malaba motivated followers and also encouraged and strengthened the effectiveness of the judiciary team. I am reminded of a leadership convention held for Heads of Courts and JSC departments where he presented a paper under the theme, ''*Focused leadership to enhance efficiency in the judiciary.*''[14] He urged leaders within the JSC to be focused and place the interests of the organisation ahead of his or her personal interests and made the following observations:

[14] Keynote address by the Chief Justice at the JSC Leadership Convention, 30 October 2021 p7.

> As judicial administrators, you have a responsibility, if not an obligation, to support the courts so that every Zimbabwean is able to enforce his or her fundamental rights in terms the Constitution and access justice as close to their homes as possible. These rights include rights for people with disabilities. Each of you holds a position of responsibility. You are expected to provide leadership in ensuring provision of quality service to consumers thereof. You are also expected to exercise supervision of subordinates. You therefore need to understand and appreciate your responsibilities as a leader. What qualities are expected of you as a leader, do you know them, do you understand them and do you know how to put them into practice. Do you also know how to make use of those qualities in ensuring that the justice delivery system is efficient and effective? These are some of the questions that are to engage your minds during the course of this conference. The most important and fundamental qualities required of a leader in a public institution such as JSC is that he or she must be a focused leader. This requires full and undisturbed concentration of his or her work. This calls for a leader who is passionate about his or her work and who is geared for the success of the organisation. A focused leader is not selfish or self-centred. A focused leader should place the interests of the organisation ahead of his or her personal interests. It is through focused leadership that one is able to fight and defeat corruption, inefficiency, laziness and lake of cooperation. A focused leader should be exemplary by leading from the front so that subordinates are able to follow the good deeds that he or she exhibits in promoting the interests of the organisation. Holding a leadership position requires appreciation of and adherence to principles by which one defines the vision of the organisation for the direction he or she sets for all to follow. Leading must always be guided by standards, otherwise such a leader would be destined to fail.

This quotation summarises his type of leadership which is people centred. The Chief Justice didn't just tell leaders to be focused and work hard. He inspired them to see themselves as guardians of a constitutional democracy**.** This is the "high-level" leadership that builds a legacy.

As the Judge President, my own trajectory as a leader has been profoundly shaped by his stewardship. Chief Justice Malaba has been an inspirational mentor to me who fostered a supportive environment and influenced my growth as a leader. His doctrine of accountability encapsulated in the motto, “The CJ Asks,” influenced my growth significantly; by posing the questions he did, he influenced my transition from passive management to active leadership. Under his leadership, I learnt to lead the High Court more effectively. My own approach to leadership now mirrors his.

His mentorship was instrumental in my growth as an administrator. Working in the shadow of a titan was both daunting and enlightening. Transformational leaders motivate others to do more than they originally intended and often even more than they thought possible. That was my experience with him. The Chief Justice set the bar high. His work ethic and high standards were demanding. He is a leader with high expectations requiring me to up my game. His commitment to duty and high standards pushed me to match his standards and to excel beyond what I thought possible. I am deeply grateful for the invaluable lessons learnt.

Whist he was a titan at law; he remained warm towards colleagues and was always approachable and happy to lend a hand. In a profession that can often be lonely and cold, he brought a warmth that transformed the bench into a community. He inculcated a culture of respect and collegiality amongst judges who over the years have developed a culture of supporting each other in and outside the workplace enabling them to share challenges and insights thereby impacting their wellness, performance and work culture. He was firm to correct us, but kind enough to catch us when we stumbled. To those of us he led, he was our father figure always available to render wisdom and guidance on life on the bench, the heavy burden of the gavel and good work ethics. As Chief Justice, he promoted professionalism, impartiality and became a symbol of integrity and stability in the judiciary. He left a legacy.

11. Conclusion

Throughout his distinguished career, the Chief Justice has exhibited resilience, intellectual depth and an unwavering commitment to service. What Chief Justice Malaba's tenure as a judge has also demonstrated is that a renowned Chief Justice should not merely have excellent legal knowledge and experience in deciding cases but should also focus on modernisation and reform of the judiciary. He or she must not only have strong leadership and management skills but also have integrity and effective communication and interpersonal skills for effective leadership.

The Chief Justice was an architect of change who transformed the judiciary into a high-performing institution. The success of the system goes to the Chief Justice's vision and leadership. He proved that a good judge can also be a visionary leader through his many different initiatives. For Malaba CJ, his leadership was not just about changing rules, it was about changing the *mindset* of the Zimbabwean Judiciary. He shifted the judicial identity from a traditional, reactive entity to a proactive, "World-Class" service provider.

To serve under Chief Justice Luke Malaba has been to labour in the shadow of a titan. It is a shadow that did not blacken our courtrooms, but rather offered a cool,

steadying shade under which we learnt the delicate craft of judging from a man who was as much a father as he was a jurist. He leaves the bench stronger, more modern, and more unified than he found it. We as his colleagues salute him not just as our leader, but as the Titan who showed us that one can be both a brilliant administrator and a compassionate father to the law. His retirement marks the conclusion of a transformative era in the judiciary.

As the Chief Justice retires, we will feel the impact of his drive and discipline and strive to maintain the momentum he built. He is leaving a legacy of integrity and fairness. The Chief Justice is leaving the judiciary stronger than he found it, has left a lasting impact on justice delivery and paved the way for the next generation of judges. As he leaves the judiciary, he must be comforted by the fact that he has left a legacy that will forever be etched in our law reports and courtrooms. As he retires, the shadow he cast remains. It is a shadow defined by intellectual rigor, administrative genius, and parental care. He leaves us with better systems, better buildings, and most importantly better versions of ourselves. We no longer stand in his shadow; because of his mentorship, we now stand *beside him*, ready to carry the light he fostered.

Though he is retiring from the bench, he is not truly leaving us. We find solace in the fact that we will continue to make use of the structures he helped put up. His judgments are a lasting legacy teaching and guiding future generations to come. We will be able to read, cite and be guided by the reported judgments he penned, learn from the various principles of law enunciated in them and tap from the administrative skills he imparted. He will continue to teach, mentor and speak to us through the judgments he wrote. We pledge to carry on the legacy he is leaving. We are comforted by the enduring legacy he leaves. Whilst his physical presence in the judiciary will be sorely missed, the impact of his leadership and guidance will remain deep seated.

As the Chief Justice retires, I would like to take this opportunity to express my gratitude for the opportunity to serve under his leadership. May his retirement be as distinguished as his service and as rewarding as the legacy he leaves behind. As he enters a well-deserved retirement, I wish him joy, peace and happiness.

PERSPECTIVES ON THE RIGHT TO REMAIN SILENT IN ZIMBABWE

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Abstract

The right to remain silent in Zimbabwe has developed from being a narrowly recognised right under the Lancaster House Constitution (LHC) to a clear constitutionally protected right under Constitution of Zimbabwe Amendment (No. 20) Act, 2013. This contribution traces the development as well as the transition of the right to remain silent from a marginally protected right to a constitutionally entrenched right at both pre-trial and trial stages. The 2013 Constitution introduced a comprehensive bill of rights with explicit protection of the right, but the operational Criminal Procedure and Evidence Act [Chapter 9:07] provisions that flow from the previous legal regime prior to the 2013 Constitution have weakened the practical application of the constitutionally entrenched right. This has invariably led to legal uncertainty regarding the scope and application of the right to remain silent in the adjudication of criminal matters. The article concludes by making recommendations on enhancing the practical application of the right.

Key words: *right to remain silent, pre-trial rights, self-incrimination, adverse inferences, constitutional alignment*

1. Introduction

The right to remain silent is an important procedural mechanism of a fair trial in criminal justice regimes. The right is closely associated with principles of a fair trial such as the presumption of innocence, the protection against self-incrimination (*nemo tenetur se ipsum accusare*), and the rule that the prosecution bears the *onus*.[3] In constitutional systems, this right is not just a mere procedural formality but an important protection mechanism to accused persons against coercive criminal investigations and prosecutions.[4]

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3 See MT Mokoena, 'The Right to Remain Silent: A One-Eyed Approach to Truth-Seeking?' (2015) 2(1) *Journal of Law, Society and Development* 2,3 & 11.

4 See for example T van der Walt and S de la Harpe, 'The right to pre-trial silence as part of the right to a free and fair trial: An overview' (2005) 5(1*) African Human Rights Law Journal* 70; C Theophilopoulos, 'The So-Called Right to Silence and the Privilege Against Self-Incrimination' (2002) 18 *South African*

In Zimbabwe, the normative context of the right has experienced constitutional changes at both pre-trial and trial stages. In the earlier constitutional dispensation, under the Lancaster House Constitution (hereinafter the LHC), the right existed in limited capacity and was limited by the provisions of the Constitution and the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter the CPEA) that permitted adverse inferences to be drawn.[5] The enactment of the 2013 Constitution marked a pivotal transformation by expressly ensuring the right is afforded during the two-tier pre-trial and trial stages.[6] However, certain provisions of the CPEA remain in force and continue to have consequences that are inconsistent or difficult to reconcile with clear constitutional provisions. As shall be discussed later in this article, this creates legal uncertainty in the right's practical application relating to constitutional supremacy, legislation conformity, and judicial interpretation.

2. Historical context of the right to remain silent in Zimbabwe

It is important to give context to the assessment of the right to remain silent in Zimbabwe. Zimbabwe is a former British colony. The colonial past can be summarised as follows. The British government enacted the Southern Rhodesia Order-in-Council on 20 October 1898. The said legislation conferred authority to the British South African Company (BSAC) to govern the country. The 1898 Order-In- Council may appropriately be called the first written constitution under which Britain as the colonial power governed the colony.The BSAC administration lasted until 1923. Thereafter, the settler regime through a referendum that excluded the indigenous or native population, voted in favour of what was called responsible government against the option of joining the Union of South Africa. The colonial power granted the settler administration responsible government status on 1 October 1923.

The next significant development in the constitutional setup of the colony was the formation of the Federation of Rhodesia and Nyasaland in 1953. The Federation comprised Southern Rhodesia now Zimbabwe, Northern Rhodesia now Zambia and Nyasaland now Malawi. The federal government was based in Southern Rhodesia. The Federation lasted for 10 years before disbanding in 1963.

Journal on Human Rights 505; I Dennis *The Law of Evidence* 4th Ed 2010 p. 198.

5 See Section 18 of the Lancaster House Constitution, see also Section 189 and 257 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

6 See Section 50 and 70 of Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

The next significant event was the Unilateral Declaration of Independence (UDI) in 1965 by the white minority government. This government was to endure the brunt of the war of independence waged by the indigenous people who organised themselves into political parties that formed armies which fought to overthrow the settler regime. UDI was followed by the adoption of the 1965 Rhodesia Constitution which purported to proclaim independence from Britain. The UDI Constitution created *inter alia* legislative and judicial institutions. Rhodesia remained a *de facto* independent State from Britain. However, *de jure,* it remained a British colony because Britain did not recognise or grant it independence.

The last pre-independence constitutional milestone was the creation of Zimbabwe Rhodesia in 1979. The Zimbabwe Rhodesia Constitution created *inter alia* legislative, judicial and other institutions of administration. This constitutional order in as much as it purported to be independent of Britain failed to gain international recognition.

The Zimbabwe Rhodesia regime and the liberation parties through international efforts engaged in talks to end the war. The talks culminated in the signing of the Lancaster House agreement in December 1979. The agreement was followed by the negotiation and adoption of the Constitution of Zimbabwe.[7] The British government seconded a Governor Lord Soames to run the country on an interim basis pending the holding of elections. The elections were held and Zimbabwe was born on 18 April 1980 as an independent State from British colonial rule.

The constitutional history of Zimbabwe as summarised above shows that the existence of the judiciary was a standard feature over the period. What is however significant to note for purposes of the article is that the right of an accused person to remain silent was not addressed prior to the 1979 LHC. In the LHC, the right was addressed without prominence. As far as the position prior to 1979 was concerned, the Criminal Procedure was modelled on a hybrid law in force at the Colony of Good Hope as of 10 June 1891[8] and English customary law because of the country's colonial legacy. All prior constitutions starting with the 1898 Order-In-Council only provided for the accused person's right to protection of the law and to legal representation at the accused's expense. If an accused person chose to remain silent, such choice amounted to an exercise in futility because adverse inferences would be drawn against the accused for choosing to remain silent.

The LHC was amended a record 19 times before the adoption of the current Constitution in May 2013. None of the amendments addressed the right of the accused person or suspect to remain silent. The 2013 Constitution legislated for

7 SI 1979/1600 of the United Kingdom.
8 Section 89 of LHC.

the right to remain silent as an absolute right at both pre-trial and trial stages. Subsidiary legislation to the constitution and in particular, the CPEA was not amended to reflect the absolutism of the right. The lack of alignment of the CPEA with the Constitution has posed a challenge in the judicial application of the right. As will be discussed later on, there is a *lacuna* in the application of the law in this regard. Some judicial officers choose to apply the provisions of the CPEA as misaligned with the Constitution while others simply refer to the right to remain silent in name without applying it in practice.

3. Lancaster House Constitutional Order

Under the LHC, the right to remain silent was recognised in a limited manner. Notwithstanding this, the LHC had provisions for protection of fair trial rights. It nevertheless did not explicitly provide for the right as an absolute protection applicable at both pre-trial and trial stages. The practical application of the right had different legal implications at the pre-trial and trial stages as the following discussions will show.

3.1. The right to remain silent at pre-trial stage

The 1979 Constitution for the first time explicitly included a provision that dealt with the right of every person to protection of the law in Section 18. The provisions spelt out rights of persons charged with criminal offences. The rights included, *inter alia*, fair trial rights and the requirement that the accused is deemed innocent until proven guilty before an independent and impartial lawfully constituted court. The right to remain silent was not specifically provided for as such but in a manner of prohibiting the compulsion of the accused from giving evidence at the trial as set out in section 18(8) thereof.

The constitutional provisions aforesaid must be read together with the provisions of section 50 of the same constitution which provided for the powers of "Parliament to make laws for the peace, order and good government of Zimbabwe". One piece of legislation that governed and still governs criminal procedure in Zimbabwe is the CPEA. It is a very old piece of legislation first enacted by sections 55 and 56 of the 1898 Order-In-Council. The CPEA is a consolidation of rules related to procedures, evidence and incidental matters that inform the conduct of criminal prosecutions in Zimbabwe.

The right to remain silent in the LHC did not extend to suspects and accused persons before being brought before the court for trial. This position was made clear by the Supreme Court in the case of *Poli v Minister of Finance and Economic Development and Another*[9] where in determining whether section 18(8) could be

9 1987 (2) ZLR 302 (S).

read to mean that no person could be forced to give information that might incriminate him before trial, Dumbutshena CJ stated that,

> In construing section 18(8) assistance will be had from determining the meaning of the word 'trial' or the phrase 'at the trial'. It appears… that 'at the trial' should be read together with the phrase 'who is tried' appearing in the same sentence. Read as such, there can be no other meaning to the phrase 'at the trial' other than that the person or the accused is appearing before the court at a judicial investigation of his case.[10]

It followed from the quoted *dicta* that the protection against self-incrimination provided by section 18(8) and practicable through invoking the right to remain silent was only recognised when the person concerned was being tried in court at his trial.[11] The provision did not extend to the pre-trial stage.[12]

The void created by the omission in the LHC to provide for pre- trial rights in relation to exercising the right to remain silent was addressed in sections 257 and 258 of the CPEA which were not incorporated in the Constitution.

It is necessary to consider the provisions of the aforesaid sections in some detail. Section 257 outlines that,

> Where in any proceedings against a person evidence is given that the accused, on being—
> (a) questioned as a suspect by a police officer investigating an offence; or
> (b) charged by a police officer with an offence; or
> (c) informed by a police officer that he might be prosecuted for an offence; failed to mention any fact relevant to his or her defence in those proceedings, being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned when so questioned, charged or informed, as the case may be, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.

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10 At 309.

11 At 310.

12 See also *S v Mazorodze* 1989 (1) ZLR 278 (H) at 288-289. In In *Re Chinamasa* 2000 (2) ZLR 322 (S) Blackie J at page 11 of the cyclostyled judgment stated, 'It is difficult to see how this submission can be sustained in either logic or law. A defence outline produced outside the hearing of [a] case is not evidence at a trial falls outside the scope of the clear wording of section 18 (8)*'.*

The provision is a replica of section 18(8) of the LHC in regard to the consequences attendant on the accused person or suspect who elects to exercise the right to remain silent upon arrest. The consequences remain that the court draws inferences against the person and treats the persons silence or omission of detail where the person decided to answer to the enquiry or charge by police as corroborative of the State's evidence. The effect of the provisions of section 257 were to indirectly criminalise the exercise of the right to remain silent. This is so because the provision imposed an adverse sanction against the accused person who might be mindful to keep silent during an investigation by the police. Keeping silent would be treated as corroborative evidence against the accused person. Giving an answer to police enquiries or upon a charge being preferred was not an option either because a failure to mention facts which the court at trial would consider that they should have been mentioned would lead to the drawing of an adverse inference corroborative of any other evidence. If an accused person keeps his silence, adverse inferences are drawn. If one elects to answer in his or her defence, a residual risk remained. The court then draws an adverse inference which is taken as corroborative of any other evidence against the accused person.

Section 258 of the CPEA provides as follows:

> (1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.
> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

Put more aptly, section 258 implies that any evidence forced out of an accused person including self-incriminating evidence would be admissible against the accused at his trial if given by any witness notwithstanding that the information came into the witness knowledge as a consequence of a forced confession or statement. This therefore meant that the police could use any means to get statements or confessions from suspects and the courts can legally use such statements. Facts discovered through an inadmissible confession made by the accused are admissible in evidence at his trial. The prosecution can disclose in evidence that facts were discovered as a result of information given involuntarily by the accused and section 258 gives legality to this.

Reflecting on the provisions of section 258, Crozier and Feltoe opine as follows:

> If suspects are forced or tricked into confessing their guilt, as a result of the confession, the police find evidence against them – for an example, if they are forced to show the police where they hid stolen property – their confession cannot be revealed at their trial because it was not made voluntarily, but the Police can tell the court that they found the evidence as a result of what the suspects told them[13]

It is further observed that section 115 of the CPEA provides that adverse inferences can be drawn against the accused at the trial if, at proceedings held in terms of section 113 to confirm a statement allegedly made by the accused to the police, the accused remains silent and does not mention any fact which, in the circumstances, he could reasonably have been expected to have mentioned. If at his trial the accused challenges the statement when the prosecutor seeks to use it in evidence on the basis that he did not make the statement or he did not make the statement freely and voluntarily, the court may draw adverse inferences from his earlier failure to mention the facts. The adverse inference is similarly treated as evidence corroborative of any other evidence against the accused person.

It is therefore apparent that an accused person was not legally entitled to remain silent at pre-trial stage. The LHC made no provision for that right at that stage whilst sections 257 and 258 of the CPEA implicitly provided certainty that the right was not protected by placing sanctions adverse to the accused who was mandated to exercise the right. The accused was compelled to give evidence at pre-trial stage to avoid adverse inferences being drawn against him. Further, evidence forced out of the accused could be used against him. Simply put, the position was 'Keep silent at your own peril'.

3.2. The right to remain silent at trial stage

The LHC recognised the rights of the accused person to be deemed innocent until proven guilty and to remain silent. Section 18(3) (A) and 18(8) of the LHC provided respectively that:

> Every person charged with a criminal offence –
> (a) 'Shall be presumed innocent until he is proved guilty or has pleaded guilty'

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13 B.Croizer and G. Feltoe 'Have the procedural and evidential rules in criminal cases been properly aligned to the Constitution and are the new provisions on the death penalty for murder satisfactory?', *Zimbabwe Electronic Law Journal*, 1, p.5.

> (b) "No person who is tried for a criminal offence shall be compelled to give evidence at the trial.'

This right could be derogated from because of sections 18(3) (b) and 18(13) (e) which provided respectively, as follows-

> Nothing contained in or done under the authority of any law shall be held to be in contravention of –
> (b) Subsection (3) (a) 'to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.
> (e) Subsection (8) 'to the extent the law in question authorizes a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person,'

Significantly, although an accused person had the right to remain silent, he could do so at the risk of having adverse inferences drawn against him. Equally, placing the burden on the accused to prove particular facts detracted from the exercise of the right to remain silent.

As the only secondary legislation providing for the exercise of the constitutional right to remain silent at trail stage, the CPEA further addressed the right through various provisions. Sections 199(1) of the CPEA gives the prosecution and the court the power to question the accused person despite his election to remain silent. If the accused refuses to answer the court may draw adverse inferences against such accused person. The operative provisions of section 199(1) provide as follows-

> 199(i) if an accused… refuses to answer any question, he shall be asked to give his reasons for so refusing and, if he persists in his refusal, the court in determining whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.

For High Court criminal trials, an accused who is indicted for trial in the High Court was obliged to provide a written outline of his defence and to list his witnesses and summaries of their evidence prior to trial commencement. If he fails to disclose a relevant material fact in the defence outline, adverse inferences could

be drawn against him.[14] An accused who pleads not guilty in a trial in a magistrates court is obliged[15] to give an outline of his defence, and if he fails to disclose a relevant and material fact in the outline, adverse inferences may be drawn.[16] If an accused declines to give evidence in a trial, he may nevertheless be questioned by the prosecutor and the court.[17]

It is thus clear that the provisions of both the LHC and CPEA recognised the accused's right to remain silent. Where the accused exercised the right, he could not be convicted based upon his silence only. The State still had to bring forth evidence to warrant a conviction. Adverse inferences of guilt could not standing alone ground a conviction. Adverse inferences only came in as corroborative of other evidence. The State had to prove its case since the burden of proof rested on it. It is trite law that it is not for the accused person to prove his guilt or innocence[18] but for the State to prove its case and where applicable to disprove the accused person's defence beyond a reasonable doubt.

As highlighted previously, the accused's silence would not entitle the trial court to draw adverse inferences.[19] It was only upon refusing to answer questions put to him by the court and the State without just cause for such refusal that the adverse inferences could be drawn.[20] In such circumstances, if the accused is not willing to testify, the State and the court would thereupon exercise their right to put questions to him.[21] This clearly shows that despite the accused person remaining silent or exercising his right to do so, the court and the State can violate the right and require him to justify the decision to remain silent.

Section 189(2) of the CPEA provides that adverse inferences can be drawn if the accused pleads not guilty (or the magistrate enters a plea of not guilty because the accused refuses to plead) and, upon being called upon to give his defence outline, he fails to mention any fact relevant to his defence which, in the

14 Section 67(2) of the CPEA.
15 Section 188 of the CPEA.
16 Section 189(2) of the CPEA.
17 Section 198(9) of the CPEA.
18 See *S v Chogugudza* 1996 (1) ZLR 28 (H) where Gubbay CJ sated that, 'the presumption of innocence… lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities)).
19 G Linington (2001), Constitutional Law in Zimbabwe at 427.
20 *S v Makoni* 1981 ZLR 219 (S) at 220.
21 E. Chatikobo, 'The right to silence.' *Zimbabwe Law Review* 1987 Vol. 5 PP 242 at 243 that' … I strongly think that the court and the prosecutor can only question him on the merits of the case, that is to say on his involvement in the offence.'

circumstances existing at the time, he could reasonably have been expected to have mentioned. Such adverse inferences can be drawn by the court from this earlier failure to mention these facts when it determines his guilt for the offence charged or any other crime which he may be convicted of on that charge.

4. 2013 Constitutional dispensation

The 2013 Constitution which replaced the LHC incorporated an expanded Bill of Rights which was more reflective of international standards and guidelines. The rights of the accused person at both pre-trial and at trial stages are entrenched. The 2013 constitution has no claw back clauses on the exercise of the right to remain silent, which makes the right absolute and only subject to constitutional limitations. It is important at this juncture to evaluate the application of the right post 2013.

4.1. The right to remain silent at pre-trial stage post 2013

The Constitution guarantees the rights of accused persons upon arrest and detention in section 50 of the Constitution of Zimbabwe, 2013. Of particular note for purposes of this paper is Section 50(4)(a)(b) and (c) of the Constitution of Zimbabwe, 2013 which provides as follows-

> Any person who is arrested or detained for an alleged offence has the right--
> (a) to remain silent;
> (b) to be informed promptly— of their right to remain silent; and
> of the consequences of remaining silent and of not remaining silent;
> (c) not to be compelled to make any confession or admission;

The above is a progressive and robust provision and which guarantees the accused persons the right to remain silent at pre-trial stage. The rights are absolute and their invocation and enjoyment is not subject to the drawing of any adverse inferences or other sanction. The jurisprudential challenge now arises from the fact that although the right to remain silent is constitutionally provided for in relation to suspects at pre-trial stage, the CPEA has not been amended to harmonise it with the Constitution. The lack of harmonisation of the legislation has attracted some judicial questions and hesitation in the judiciary in relation to application of the right.

As an example, in addressing section 66 (6) of the CPEA which addresses the need for accused persons to prepare a defence at pre-trial stage, Chitapi J in *S v Chimuka*[22] stated that:

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22 HH 828/16.

'The summary of the State case and evidence of witnesses is necessary to enable the accused to properly prepare his defence to ensure a fair trial. The corollary to the summary of the State case is the accused's statement of defence. The accused is enjoined in terms of s 66(6)(b) to give an outline of his or her defence if any to the charge and is also required to list the names of the witnesses which he or she proposes to call to support his or her defence. The list of witnesses should be accompanied by a summary of the evidence of each such witness and in terms of particularity of, the summary of the evidence should "be sufficient to inform the Prosecutor-General of all the material facts on which he or she (the accused) relies in his or her defence". Section 67(2) of the Criminal Procedure and Evidence Act provides for adverse inferences which the court may draw from the accused's failure to strictly comply with s 66 (6) (b).

The provisions of s 66(6) of the Criminal Procedure and Evidence Act, accord with the provisions of s 70(1) (b) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which provides that an accused has the right to be promptly informed of the charge in sufficient detail to enable him or her to answer it. A moot point arises as to whether s 67(2) of the Criminal Procedure and Evidence Act on the drawing of an adverse inference can be said to be in conflict with s 70(1)(1) of the Constitution which gives the accused the right to remain silent and not to testify or be compelled to give self-incriminating evidence. This judgment does not seek to address the issue as it does not arise, nor has it been argued. Suffice however that in the view of the court there would be no conflict at all between the two legislative provisions where the accused has elected to testify. Where the accused has elected to remain silent, it would be a misdirection on the part of a court to draw an adverse inference from such refusal to testify.

The other relevance of the summaries of State case and defence outlines respectively is that the State and defence counsels are able to appreciate and analyse the evidence which either side seeks to adduce. In several cases the documents have presented an opportunity for convergence by the prosecution and defence leading to plea bargaining, the making of admissions to curtail the trial and the listing of agreed facts. On the part of the court, the trial judge and assessors will also read the documents and attune themselves to the nature of the case they will hear and prepare accordingly.

It follows that the court will expect that what is listed as available evidence will be adduced. The summaries aforesaid should therefore not be made up basing on conjecture but on available evidence. It is improper for the State to give a summary of case which is not supportable by the evidence which will then be called or is available. It has been said that a criminal trial should not be a game of hide and seek because justice should be seen to be done and it can only thrive where there is openness.'

Since the filing of the defence outline as envisaged in section 66(6) is required to be done before the accused person has pleaded to the charge, the process is a pre- trial procedure. Although the learned Judge left the issue of the constitutionality of section 67(2) as a moot point for future arguments and resolution, this discussion attempts to address the point. To answer the moot point, it can be concluded that trials should not be marred with surprise antics. Suspects or accused persons should prepare the evidence they intend to use. However, it is not their obligation to give any such evidence. A conviction should not be founded on the evidence of accused persons since the burden of proof is not on them. The right to silence is absolute. Adverse inferences should only be drawn where the State has established a *prima facie* case. An accused person should not be forced to give any evidence or be penalised where he elects to exercise his right to remain silent. Such approach is in tandem with the constitutional protection provided by the provisions of section 50(4) of the Constitution of Zimbabwe, 2013.

While the Constitutional Court of Zimbabwe has not yet delivered a definitive and landmark judgment specifically direct on the right to remain silent, its broader fair trial jurisprudence provides important interpretive guidance. In *Mudzuru & Another v Minister of Justice*, the Court affirmed that constitutional rights must be given a generous and purposive interpretation[23], a principle that militates against restrictive readings of provisions on the right to remain silent. Similarly, *Chironga & Another v Minister of Justice and Parliamentary Affairs & Others*[24] underscores the transformative nature of the 2013 Constitution as a clear departure from the pre-existing legal order of turning a blind eye to certain constitutional rights. Applied to provisions of the CPEA that permit adverse inferences from silence, these principles suggest that such provisions are constitutionally suspect. The absence of an abundance direct Constitutional Court authority therefore reflects an unresolved constitutional question rather than legal endorsement of the status quo.

Section 257 of the CPEA which compels an accused person to give evidence during investigations is arguably unconstitutional. It is not fair to expect an accused person to divulge all facts he is privy to. In The Final Report of the Balance in the Criminal Law Review Group of Ireland[25], it is posited that the right to remain silent does not necessarily mean that the suspect or accused person is

23 *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Orss* CCZ 12/15. See also *Smythe v Ushewokunze & Anor* 1997(2) ZLR 544(S) & *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S).

24 *Chironga & Another v Minister of Justice and Parliamentary Affairs & Others* CCZ 5/19.

25 See Final Report of the Balance in the Criminal Law Review Group (2007).

guilty. It may be that an accused is "shocked by the accusation and unable at first to remember some fact which would clear him." Taking it from the above, it is thus submitted that to then hold that the accused must then give all material evidence he could reasonably be expected to give serves no justice at all as certain facts are easily forgotten. What the court may consider a material fact whose mention has been omitted may not in the accused understanding be material. Sections 115, 189 (2) and 258 of the CPEA also fall short on the same basis that self-incrimination or silence should not be relied upon to admit evidence at the trial stage as such evidence will have been illegally obtained evidence. To admit illegally obtained evidence amounts to sanctioning an illegality.

Compelling suspects to divulge all evidence that may be relevant to their defence and then drawing adverse inferences where they fail to do so as provided for in the CPEA amounts to an injustice. A fundamental incident of a suspect's right to pre-trial silence is that no adverse inference can be drawn from exercising that right. [26] The drawing of adverse inferences in the circumstances amounts to enticement to self-confess as was rightly cautioned by Mason CJ as follows that,[27]

> "The denial of the credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of his or her exercise of the right of silence. Such an erosion of the fundamental right should not be permitted. Indeed, in a case where the positive matter of explanation or defence constitutes the real issue of the trial, to direct the jury that it was open to them to draw an adverse inference about its genuineness (sic) from the fact that the accused had not previously raised it would be to convert the righto remain silent into a source of entrapment."

It is argued that in an accusatorial criminal procedure system, such as in Zimbabwe, it is not advisable to limit the accused's right to pre-trial silence. [28] An accused person should be considered as a full legal subject with protected rights. The accused should be entitled to participate in his trial in any way he deems fit. Such entitlement should include the right to be allowed to rely on his right to remain silent as a way to conduct his defence, the so-called passive defence.[29]

4.2. The right to remain silent at trial stage post 2013

The Constitution provides for the accused's right to remain silent at trial stage. It extends further by protecting the accused from being compelled to give self-

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26 'Silence in Court- The Evidential Significance of an accused person's failure to testify' (1995) 18 *UNSW Law Journal* 130, 130.

27 *Petty & Maiden v R* (1991) 173 CLR 95, 101.

28 T van der Walt, Stephen de la Harpe (n 2 above).

29 JJ Joubert (ed) Criminal procedure handbook (2003) 10-11.

incriminating evidence. The particular provision which is section 70(1)(i) of the Constitution of Zimbabwe, 2013 specifically provides that "*Any person accused of an offence has the right to remain silent and not to testify or be compelled to give self-incriminating evidence*."

The effect of the provisions of sections 50(4)(a), (b), (c) and 70(1)(i) of the Constitution of Zimbabwe, 2013 covering both the pre-trial and trial stages is that, should an accused person elect to remain silent during police investigations, or if a charge is preferred and at his trial he refuses to outline his defence or give evidence, adverse inferences cannot be drawn from such silence. This is so because remaining silent is an exercise of a constitutional right. If, however, the State establishes a *prima facie* case against the accused during a trial, the accused or his lawyer may be wise to put up a defence or risk being convicted.[30] The court cannot however regard the accused person's silence solely as indicating guilt.

This position can be understood within the broader framework of constitutional interpretation adopted by the Constitutional Court. As previously noted in Mudzuru (*supra*) & Chironga (*supra*) cases, constitutional rights must be interpreted purposively and in light of the transformative nature of the Constitution of Zimbabwe, 2013. Applied to the trial context, these principles militate against any statutory provisions that permit adverse inferences to be drawn from an accused person's silence. Such provisions effectively undermine the presumption of innocence and risk shifting the burden of proof onto the accused, contrary to section 70 of the Constitution of Zimbabwe, 2013.

Direct Constitutional Court jurisprudence on the right to silence in Zimbabwe remains thin and underdeveloped. Currently, there is no substantive decision adequately addressing all corners of the right at Constitutional Court level. Existing jurisprudence engages it implicitly within the broader framework of fair trial rights. The question for discussion is that to date the provisions of the CPEA which are in contravention of the current Constitution are still on the statute books and in application. In terms of section 70(3) of the of the Constitution of Zimbabwe, 2013, in any criminal trial, evidence that has been obtained in a manner which violates any provision of the Declaration of Rights must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.[31] Section 258 A of the CPEA creates a derogation of the right to remain silent as it justifies admissibility of illegally obtained evidence.

30 B. Crozier and G. Feltoe (n 11 above) 3.
31 Ibid 5.

Emerging African constitutional jurisprudence underscores that the exclusion of improperly obtained evidence is important to the safeguarding fair trial rights.[32] This means the right to remain silent must therefore be understood not merely as a procedural safeguard but as a substantive constitutional guarantee linked to dignity, freedom from coercion, and the presumption of innocence.

The provisions of section 258A seek to stultify the discretion of the court to determine the circumstances in which evidence obtained in violation of the constitution would render the trial unfair. The provision is couched in peremptory terms in that the court is required to consider the existence of legislated factors as not having the effect of rendering a trial unfair. The section contains the following worrying provision under subsection (3):

> Evidence that is obtained in a manner that violates any provision of Chapter 4 of the Constitution, but which is admitted by a court taking into account the considerations referred to in subsections (1) and (2), shall not be regarded as rendering the trial unfair or otherwise as being detrimental to the administration of justice or the public interest

The provision is retrogressive because the reference to a criminal trial implies that the trial will have commenced. The Constitution is clear in section 70(3) of the Constitution of Zimbabwe, 2013 that the decision to exclude evidence that renders a trial unfair is a judicial function in which the court exercises a discretion whether or not to admit the evidence. To pass a law that interferes with the exercise of a constitutionally given discretion is arguably unconstitutional. There is no provision in the Constitution that allows for an Act of Parliament to be passed to circumscribe the circumstances or factors which should bind the court to hold that the admission of particular evidence obtained in violation of the bill of rights should not lead to a finding that a trial will be rendered unfair by admitting the evidence.

The effect of the right to remain silent is that the prosecution must prove the defendant's guilt beyond reasonable doubt. In cases of doubt the accused must not be put to his defence but should be acquitted in *dubio pro reo.*[33] Section 199(1) of the CPEA reverses the incidence of *onus* because if one has no duty to prove his guilt or innocence, he cannot be obliged to give a reason as to why he chooses to exercise his right to remain silent. The court is not justified in such

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32 See JD Mujuzi 'The admissibility in Namibia of evidence obtained through human rights violations' (2016) 16 *African Human Rights Law Journal* 408 – 409.

33 Judge Shahabuddeen and Judge Schomburg in Lunaj et al, ICTY a. Ch., 27 September 2007. See also Daryl Robinson, 'The Identity Crisis of International Criminal Law (2008) 21 Leiden Journal of International Law 925. See also Bemba Gombo ICC PTC II 15 June 2009 para 31).

circumstances to negate the accused person's right to remain silent by treating the silence as corroborative of the State's case.

Sections 258 and 258A on admissibility of illegally obtained evidence are unconstitutional since they still retain the common-law position, under which all relevant evidence was admissible no matter how it was obtained. Evidence obtained in violation of the Declaration of Rights, must be excluded in criminal trials if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.[34] It must follow that confessions and statements by accused persons obtained in violation of their right to remain silent with the object of avoiding inferences being drawn as well as the inferences themselves are all unconstitutional and should be inadmissible.

It is submitted that self-incrimination should be understood in the sense that a person will be guilty but accused persons sometimes tend to panic or get intimidated in court and are susceptible to say just about anything which they may think will exonerate them even if it actually incriminates them. This justifies the need to stick to the basics and limit as much as possible the making by the accused of any statements they may say which might not work in their favour. The law is a complex jungle for some individuals.

Crozier argues that,

> I should point out that even giving full allowance to the accused right of silence, if the State has established a *prima facie* case against him at his trial and he nevertheless elects to remain silent, the *prima facie* case may harden into sufficient evidence for a conviction[35] This is not because of his silence but because he has failed to disturb or rebut the case the State has made against him. That case, being uncontroverted, is regarded as proved beyond reasonable doubt. [36]

The above submission must be understood to mean that where an accused elects to remain silent such silence should not be used against him as evidence of guilt. However, should the State establish a *prima facie* case, and the accused does not give any evidence to the contrary then the *prima facie* evidence is taken as proven beyond a reasonable doubt. A conviction would in such circumstances ensue or follow.

It should be kept in mind that in terms limitations to the rights as provided for in section 70(3) of the Constitution of Zimbabwe, 2013, section 86(3)(e) provides

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34 Section 44 of the High Court Act [*Chapter 7:06*].
35 Section 50(8) & (9) of the constitution.
36 See Crozier B. *Criminal Procedure in Zimbabwe: Lecture Notes*.

that the right to a fair trial cannot be limited.[37] If therefore an accused is forced to give evidence upon a sanction, such conduct not only violates the constitution but renders the trial unfair. In explaining the importance of section 70 of the Constitution, Hungwe J[38] stated that these rights are entrenched for obvious reasons; to protect, to promote; to uphold and to ensure the realisation of the accused's fair trial. It should therefore remain trite that since the accused stands innocent until proven guilty, he is entitled to a free and fair trial. Once his right to silence is either limited or withdrawn without just cause, any evidence he gives would become not only unconstitutional but also illegal.

Section 70(3) provides that evidence obtained in a manner that violates any provision of Chapter 4 of the Bill of rights must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest. This means that the court is obliged to take into account any evidence that violates an accused person's right to silence. Takuva J indicated in *S v Mudyanadzo & Others* [39]that the spirit of section 70(3) is to prevent the use of evidence obtained from an accused person or any third party by torture. The right to silence is a consequence of protection from unjustified police interrogations some of which include torture. It is submitted however that it only makes sense that the right should be applied in its absolute form without any risk of inferences being drawn because failure to do so would expose suspects to unlawful police conduct like torture or inhuman and degrading treatment in a bid to solicit confessions from suspects or accused persons.

A suspect or accused should never be compelled to give evidence since the burden of proof is on the prosecution to prove beyond reasonable doubt the guilt of the accused. However, where the prosecution manages to prove a *prima facie* case, then the only logical response expected of the accused should not be to remain silent as a defence. In the case of *Weissensteiner v R*[40] it was pragmatically stated that where the prosecution had proved its case to a certain standard, the judge may give directions that from the facts it can be supported that an inference of guilt is supportable if there are facts from which it would be reasonable to expect the accused to answer or disclose if they were consistent with his or her innocence. The jury in such a case may take such silence into account, in deciding whether to draw the inference of guilt.

The CPEA (Act 2 of 2016) ("the Amendment Act"), which came into operation after the current Constitution was passed, has made several changes to the

37 Section 86(3) (e) of the Constitution of Zimbabwe, 2013.
38 *S v Bvuto* HH 94/18.
39 HB 92/15.
40 *Weissensteiner v R* (1993) 178 CLR 217 (HCA).

procedures to be applied in the investigation and trial of criminal cases and to some of the evidential rules used in criminal cases.[41] The principal aim of these amendments, as stated in the explanatory memorandum to the Bill presented in Parliament, was to align the CP&E Act with the Constitution.[42] However, this seems not to have been fully achieved in regards to the right to remain silent, more specifically when one considers the provisions of section 258 A of the CPEA.

5. Conclusion

The right to remain silent has had mixed fortunes in post-independence Zimbabwe. Under the Lancaster House Constitution, the right only extended to accused persons at trial stage. However, an analysis of both the Lancaster House Constitution and the CPEA reveals that the right was a superficial one as its effect and enjoyment was limited through the drawing of adverse inferences where one elected to invoke the right. The limitations forced accused persons to give even self-incriminating evidence so as to exonerate themselves. At pre-trial stage the Lancaster House Constitution had no provision for a suspect to exercise the right to remain silent. The CPEA impliedly put a nail on the coffin on the impact of the right by providing for the drawing of adverse inferences if the accused or suspect elected to keep his silence.

The Constitution of Zimbabwe, 2013 in line with international standards placed the duty on the State to protect both suspects and accused persons by extending the right to remain silent to both pre-trial and trial stages. The right is provided for as an absolute right. Since the new Constitution introduced a lot of changes to criminal procedure, the CPEA had to be aligned with the Constitution. The CPEA was amended by the CPEA Amendment Act 2016. The amendments fell far short of giving effect to the protection of the right of accused persons to remain silent. The failure to adequately address the issue has left the judicial landscape open to various interpretations and contradictory applications of the law relative to the exercise of the right to remain silent.

In conclusion it is argued that while the Constitution gives an absolute right to remain silent, the CPEA limits it by providing for the drawing of adverse inferences where the right has been exercised. In addition, suspects and accused persons are required to justify their decisions or election to invoke the right to remain silent.

41 B. Crozier and G. Feltoe (n11 above) 3.
42 Ibid.

THE CHIEF JUSTICE'S ROLE IN MODERNIZING THE JUDICIARY: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, CASE MANAGEMENT AND JUDICIAL EFFICIENCY

Hon. Mr. Justice J. Chilimbe[1]

Abstract

This paper will discuss how Chief Justice, Hon. Luke Malaba has been a transformational steward of the Zimbabwean judiciary through the jurisprudential prism of the Third World Approaches to International Law (TWAIL), in the context of his administrative reforms. Based on collegial interactions of the author with the Chief Justice, judicial speeches, Judicial Service Commission (JSC) strategic plans and select case law, the article argues that the tenure of Chief Justice Malaba is a systematic and coherent jurisprudential response to the systemic challenges facing a post-colonial judiciary tasked to deliver transformative justice to a historically marginalised citizenry. The methodology that the article uses is a doctrinal and institutional approach where one finds the administrative programme of the Chief Justice within the constitutional framework created by sections 163, 171, 176, and 189 of the Constitution of Zimbabwe, 2013, and the enabling provisions of the Judicial Service Act [Chapter 7:18]. The article assesses the key areas of administrative focus of the Chief Justice: the automation of court operations through the Integrated Electronic Case Management System (IECMS); the decentralisation and expansion of the superior and subordinate court network; the specialisation of the judicial divisions, especially the establishment of the Commercial Division of the High Court; and emerging trends in court-assisted Alternative Dispute Resolution and Artificial Intelligence in court proceedings. The article also contemplates on how the Chief Justice has continuously stressed judicial accountability, collegial professionalism and case management as being important enablers of jurisprudence that transformative justice, as opposed to managerial exercises. It finds that the convergence of administrative effectiveness and judicial excellence championed by Chief Justice Malaba is a meaningful and lasting contribution to the institutional modernisation of the Zimbabwean judiciary and the actualisation of the transformative ideals in the 2013 Constitution and the Agenda 2063 of the African Union.

[1] BL (UZ), LLB Hons (UZ); Judge of the High Court of Zimbabwe.

Key Words: *Transformative constitutionalism; Judicial administration and modernisation; Third World Approaches to International Law; Integrated Electronic Case Management System; Judicial independence and accountability*

1. Introduction

The sombre confines of High Court Harare`s B Court echoed with uncharacteristic cheer mid-morning on Friday 16 May 2025. The Chief Justice of the Republic, Hon. Malaba, (born on 15 May 1951)[2] cut cake, sang happy birthday and advised Harare High Court judges that love conquers all. The Chief Justice, a known stickler to formality and propriety, had three years earlier, described himself as "very cool",[3] in addition to his belief in the lot of a "happy and wholesome judge."[4]

How did the nation`s foremost judicial citizen end up in such a pleasantly avuncular role? A jurist approaching half a century of service in as grave, if not forbidding calling as superior court judge? A period which coincided with the nation`s most turbulent, controversial and memorable? From the longevity of Founding Father Robert Mugabe in office, to his removal in 2017. From a Statecraft that faced international pariah status, to the resilience of a nation that survived it all. From the land reform programme to hyperinflation which wrecked international records. From the national tragedy of Gukurahundi, to the Second Republic`s anticipated economic resurgence. From HIV-AIDS, Ebola, cholera and COVID-19 to countless droughts and floods. From the apprehension of Y-2K to the digital revolution. From the promulgation of a new Constitution in 2013, to the setting up of a stand-alone Constitutional Court.

A jurist who had presided over contestations over all manner of rights. From presidential campaigns[5] to ownership of the nation`s most popular football club[6]. From children`s rights,[7] to telling changes in corporate law.[8] The event in B Court, in my view, summed up in so many respects, the person and office of Chief Justice Malaba as the hereunder discussion attempts to demonstrate.

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2 His birthday falls seven days earlier than mine.

3 The CJ`s quip during an initial IECMS training session held on 10 March 2022 echoing the millennial trainer who interspersed her presentations with the statements "it's cool isn't it?" and "gimme a hi-five"

4 https://jsc.org.zw:8222/media/uploads/Draft_Closing_Remarks_-_1st_Term_Symposium_2022.pdf

5 *Chamisa v Mnangagwa & 24 Ors* CCZ 21-19.

6 *Dynamos Football Club (Pvt) Ltd & Anor v ZIFA & 2 Ors* SC 93-05.

7 *S v Chokuramba* CCZ 10-19.

8 *Metallon Gold Zimbabwe (Pvt) Ltd & 3 Ors v Shatirwa Investments (Pvt) Ltd & 3 Ors* SC 107-21.

2. Third World Approaches to International Law (TWAIL)[9]

If I may be so bold, the Chief Justice of Zimbabwe, the Honourable Mr Justice Luke Malaba, Head of the Judiciary and Judicial Service Commission (JSC), is in one way or another, an earnest disciple of the TWAIL perspective. My personal interpretation of the jurisprudential persuasion of the nation`s Chief Justice, issues from the privilege of my interactions with the Chief Justice at collegial, institutional and above all, judicial level, since my ascension to the Bench as a High Court judge in September 2021. The conclusion forms basis of this discussion.

3. A brief retreat into history

The 2013 Zimbabwean Constitution posited a framework to optimise the exercise of judicial authority. Tsabora, takes the view that "*Arguably, the 2013 Constitution provides a very progressive platform for the judiciary to flourish and play its vital role in a constitutional democracy."*[10] I agree. As one of the three arms of State under the doctrine of separation of powers, the judiciary`s mainstay is interpretation and application of the law.[11] This mandate is both traditional and constitutional. Impartiality, independence and effectiveness are essential to the exercise of judicial authority. Again, such requirements being traditional and constitutional. The primacy of judicial work is the adjudication of disputes, a function described as follows by one speaker:

> Our civil courts support the rule of law in three fundamental ways. Through their judgments, they help to guide behaviour. Promoting lawful conduct. Helping to minimise the prospect that disputes arise. They thus help to **prevent** disputes arising. Access to courts and, again to guidance given from their judgments, helps promote effective consensual resolution. Helping to minimise expenditure of party time and resources on dispute resolution and thus helping to promote the utilisation of those resources on the parties` primary and social economic activities. And the third way. Well, that of course, is **adjudication.**[12]

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9 A jurisprudential approach seeking deep seated changes to the international legal order (and thus hegemony) to deliver greater plurality, decolonisation and ultimately egalitarianism. See https://www.ejil.org/pdfs/34/1/3315.pdf

10 Tsabora J "The Judiciary in Zimbabwe`s Constitutional System: An Introduction" https://rwi.lu.se/wp-content/uploads/2022/09/The-Judiciary-and-the-Zimbabwean-Constitution.pdf accessed 4 April 2026.

11 Section 3(1) (a) and (b) and Chapter 8 of the Constitution of Zimbabwe, 2013.

12 Address by Lady Chief Justice Sue Carr, Chief Justice of England and Wales at the Standing International Forum of Commercial Courts SIFOCC in Doha, April 2024 at https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/25/2025/01/20.266_JO_SIFoCC-Fifth-Meeting-Report_FINAL_Jan2025_WEB.pdf.

In the yesteryear, the judiciary, controlling neither spear, purse nor polity,[13] was perceived as the least effective of the three arms of State. I refer to the famous passage by American constitutionalist Alexander Hamilton: -

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[14]

The judiciary became a symbolic embodiment of the law. Which law had to be certain, stable, consistent and predictable in order for it to function effectively. It was thus left to the judiciary, against many odds, to defend its domain, rationalise its workspace and deliver on obligation, thus gaining public confidence. The same public that generated the confounding swirl of controversies which the judiciary had to resolve. The very same public too, that remained oblivious of the internal and external contradictions which challenged the judiciary in its work. Bereft of the said enablers available to the other arms of State, the judiciary found sanctuary, through unrelenting ardour, in the erudite exposition of the law. Sacrifice, tradition, decorum, formality and soberness became hallmarks of the institution.[15]

4. The lectures in B Court

This genteel conviviality in B Court, (conjured on the spur by the event`s compere, the Honourable Mr Justice Mafusire), contrasted the just ended and rather stern lecture from the Chief Justice. The Chief Justice had called for an urgent engagement with Harare High Court judges following concerns over the sluggish run rate in setting down matters for trial or hearing, as well as the mortifying howlers in the issuance of court orders. His subsequent lecture was longish.[16] A lecture delivered in the Chief Justice`s familiar, steady, clear and firm oratory. An oratory which ensured, through perceptible anadiplosis, that the message was stressed and ideas threaded through. The Chief Justice, who was neither sharp and caustic (he can be sharp and caustic), dwelt on administrative and juridical

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13 From the famous words of American constitutionalist Alexander Hamilton in his Essay Federalist 78 published on 28 May 1788, https://constitutioncenter.org/the-constitution/historic-document-library/detail/alexander-hamilton-federalist-no-78- accessed 4 April 2026.

14 Hamilton, A. (1788). Federalist No. 78: The judiciary department. In *The Federalist Papers* https://avalon.law.yale.edu/18th_century/fed78.asp.

15 Judicial Service Act [*Chapter 7:18*] (JSC Act) and in particular, the Judicial Service (Code of Ethics) Regulations Statutory Instrument 107 of 2012 (JSC Code).

16 There being no transcript, the account rendered herein is my own paraphrase. The remarks also include commentary on a similar address by the CJ on 28 March 2025.

workstreams in the court registry, maintenance of diary, case and courtroom management. He gave advice on supervision of support staff, liaison with litigants and counsel, including resolution of complaints.

He reiterated that the judge`s main task was to resolve disputes between parties through application of the law. It was, in that regard, necessary for the judge to correctly identify the real controversy between the parties. Such duty entailed examining the validity of the *causa*, competency of the relief sought, and veracity of the defence. All these being communicated through pleadings meeting the standard and filed in accordance with the rules of court. These pleadings had to pass through the mill of dispositive interlocutories, pre-trial hearings and case management in order to truncate, resolve or properly map disputes for argument. Each step in the litigation process accorded the court and its litigants a wealth of opportunities to short-circuit and dispose of the dispute. Above all else, the judge had, through conscience and obligation, to read the papers before him or her assiduously. Proper preparation in turn, facilitated the expeditious conduct of trials and hearings. In the end - the prompt rendering of judgments.

A judge needed to be conversant with or even beloved of the law and procedure. Nothing empowered a judge in that regard, more than a diligent study of the papers, research, utilisation of the newly appointed judicial research officers and of course -consultation amongst colleagues. Without the conscience and diligence demanded by office, the recalcitrant judicial officer became but a tepid pretender unfit for public service. Indeed, previously, the Chief Justice had described judicial office as one carrying "*pivotal social importance*".[17] It demanded accountability, the very pre-requisite to judicial independence. Accountability meant submission to public scrutiny. Criticism of the judiciary was not only inevitable but both healthy and necessary. Such criticism had to meet the basic standards of civil engagement. Yet, threats, disrespect and intimidation of the judiciary under the guise of criticism was unacceptable.

He urged judges to take advantage of the multiple functionalities of the IECMS system to ease the judicial pain points of the past and deliver quality justice on time. Yes, priceless were the tenets of tradition, decorum and judicious disposition, but judges had to enhance the same through the fail-safe options offered by technology and organisational workflow processes introduced for the judiciary by the JSC.

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17 The Chief Justice`s opening remarks at the Judges Induction and Orientation 10 November 2021 https://jsc.org.zw:8222/media/uploads/Final_Draft_Opening_Remarks.pdf.

The Chief Justice reiterated the critical purpose served by court orders. He had dealt comprehensively with the subject in a paper titled "Presentation on How to Craft Court Orders" shared at the Second Term 2023 Judges Symposium held on 1 August 2023 at Gweru. That paper addressed not just the legal and jurisprudential considerations, but practical matters including composition, wording, clarity, precision, editing, signature, issuance, and publication. These nuggets, delivered off the cuff, constituted regular teachings albeit in different manner and style, at so many forums in the past. These pragmatic tips, upon immediate deployment by judges, saw the abatement of those stubborn challenges which had brought the Chief Justice on his visit. Possibly for the simple reason that he successfully engaged the conscience and compunction of each jurist in that room.

The curious outsider may well inquire. Are judges of so fickle a constitution that that they require regular motivational pep-ups from the Chief Justice? On matters well-within province? The answer lies mainly in the history and nature of the profession and partly in section 7(2) of the Judicial Service Act:

> 7(2) As a subject of constant public scrutiny, a judicial officer must accept personal restrictions that might be viewed as burdensome by the ordinary citizen. In particular, a judicial officer must conduct himself or herself in a way that is consistent with the dignity of the judicial office.

Those restrictions are onerous. And the same judicial work which soothes and satisfies the judicial officer`s soul also saps it in the process. The judiciary is a vocation rather than mere profession, but with neither physician, psychiatrist nor chaplain to aid it. Fatigue, doubt and familiarity can become formidable enemies to the judicial officer. The supportive interventions by the Chief Justice represented welcome collegiality. The reason too, why the Constitution created a framework for strong administrative support to the judiciary, the Chief Justice had, in his closing remarks at the Judges Symposium held in Masvingo three years previously on 2 April 2022, remarked as follows on the institution of a judge and public office: -

> I am happy that in no less than two presentations, the idea that a judge is not an individual entity but a constituent of an institution emerged. This, for me, would sum up one of the key takeaways of this Symposium. This reminds all of us that the shared attainment of the rule of law is tied to an individual's understanding of the role that he or she plays within the overall matrix of judicial operations. Resultantly, we are obliged to always situate our individual work as part of a broader scheme of judicial operations.[18]

[18] https://jsc.org.zw:8222/media/uploads/Draft_Closing_Remarks_-_1st_Term_Symposium_2022.pdf.

At the confluence of administrative efficacy and judicial excellence lay the holy grail of transformative justice. This point in my views draws from the fundamentals of TWAIL, a jurisprudence driven by real, effective and far-reaching transformation. The general consensus is that Africa is rebounding.[19] The African Union`s Agenda 2063 is firm expression of the continent`s desire to rid itself of a concretion of ills that have bedevilled its peoples for centuries.

5. Behind transformative constitutionalism

This conviction is replicated in several regional instruments[20] and national constitutions, including Chapters 1 and 2 of the Constitution of Zimbabwe, 2013. In that regard, transformative constitutionalism is intrinsic to national and continental developmental objectives at the heart of the jurisprudential persuasions of any nation. The developmental parameters and metrics set by institutions such as the AU and United Nations are all very well. But in order to reaffirm and deliver on these worthy objectives, it is necessary to commence with a reminder of the very source of the continent`s oppressive suite of ills. Dausab and Vries, writing in the commemorative book Namibia`s Supreme Court at 30 Years[21] commented that:

> An appreciation of transformative constitutionalism requires a rich understanding of the evolution of constitutionalism in Africa as a tool to realise the developmental agenda and set apace the decolonisation project.

The below passage exemplifies this sort of understanding. In the High Court decision of *Livison Chikutu & 2 Ors v Minister of Lands & 2 Ors* HH-2-22, MAFUSIRE J (as he then was), described the problem as follows at [13] page 7:

> The application is a compelling dissertation on the history of the occupation of the territory that is now present-day Zimbabwe; the savagery and ruthlessness that was associated with the forced dispossession of the local population of their resources, including land and cattle, and their virtual enslavement in the land of their births, all this by the incoming foreign white settlors. There can be no question that the Communal Land Act, particularly the vesting of title of such lands in any person other than the occupiers and

19 https://www.worldbank.org/en/news/press-release/2025/04/23/economic-growth-is-speeding-up-in-africa-but-uncertainty-clouds-outlook.

20 See for example, Chapter Three of the Consolidated Text of the Treaty of the Southern African Development Community and the Millenium Development Goals.

21 Duasab Y & Vries K, 'Transformative Constitutionalism in the Apex Court of Namibia: A Reflection of 30 Years of Jurisprudence' in Warikandwa, T.V and J. Baloro (editors). *Namibia's Supreme Court at 30 Years: A Review of the Superior Court's Role in the Development of Namibia's Jurisprudence in the Post-Independence Era*. Konrad Adenauer Foundation, 2022.

> users of that land, has its origins in the pathological hatred of the aboriginal races by the invading forces and the retrograde, self-serving conceptions and philosophies concerning the indigenous African. He was viewed as a congenital barbarian, a sub-human being and an uncivilised savage who, among other despicable traits, did not recognise land as being capable of private ownership, and therefore a commercially tradable commodity. The history presented by the applicants in this application rings true for virtually every piece of the African continent that was under colonialism. It is virtually impossible to narrate it with dispassionate detachment without getting emotionally entangled.

Colonialism was a dehumanising process. But through blood, toil and sacrifice, Africans dismantled it. Yet, Uhuru across Zimbabwe and her sister African nations did not deliver egalitarianism. Why not? Because not only had the past century`s alien intruders deleted the continent`s nations, states, empires and kingdoms, they wrecked the African`s sense of identity. Which rendered Africa vulnerable to all manner of manipulation. The perversity of internal and external forces combined to drain resources and opportunities, as it impeded effective sovereignty and democracy, thus drowning the continent in poverty and underdevelopment. The problems subsist to this day. The average African is condemned to a life of pain, indignity and cruel death. Theirs are the teeming poverty-riddled slums, rampant lawlessness, chaotic trades, choking traffic jams, mounds of garbage, and the famed open trenches flowing with sewage. So too must Africans endure the horrors of conflict zones typified by killings, rapes, displacements, statelessness and forced migration.

Oftentimes, governance and economic activity are at best, ineffectual mockeries incapable of rescuing African communities from the yoke of underdevelopment. At worst, they represent obdurate corruption and inefficiency, and extortionate commerce complicit in the siege of the masses. All these against an insuperable gap between the rich and poor and resource depletion. The Chief Justice, in his keynote address on Access to Justice for the Poor, Vulnerable and Marginalised People in Zimbabwe, commented as follows: “Who Are the Poor, Vulnerable And Marginalised People In Zimbabwe? [22]

Chronic poverty is the type that traps households into severe and multidimensional poverty and can take on an intergenerational form to the effect that those born in poverty live in it and bestow it on their children. The United Nations maintains that “Absolute poverty is a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on

[22] Presented on the occasion of the 2022 Right of Access to Justice Symposium, University of Zimbabwe, Harare on 1 July 2022, pages 13-14.

income but also on access to social services."[23] Vulnerability has been defined as "the probability or risk today of being in poverty or to fall into deeper poverty in the future due to disasters or shocks that would worsen the status quo."[24]

Marginalisation has been defined as "processes by which some groups of people are being pushed or kept out of the system, or being maintained in a peripheral, disadvantaged position within that system."[25] The United Nations Education and Scientific Cooperation Organisation (UNESCO) has defined marginalisation as occurring "when people are systematically excluded from meaningful participation in economic, social, political, cultural and other forms of human activity in their communities and thus are denied the opportunity to fulfil themselves as human beings.[26] Marginalised groups have been defined by The Orphans and Vulnerable Children (OVC) Policy as "persons in society who are deprived of opportunities for living a respectable and reasonable life that is regarded as normal by the community to which they belong."[27]

The Zimbabwean Government, in a bid to address such ills, crafted a recovery blueprint to which the judiciary is a part of.[28] As the nation awaits and progressively improves on economic activity, jobs, and roll out of social and infrastructural services, the judiciary must underpin the process through the rule of law. The judiciary must address fierce contestations over acquisition, exercise and transfer of sovereign authority. So too must it deal with human and economic rights. In resolving such conflicts, the Chief Justice and his administration of justice machinery are required to assert the rule of law. The rule of law being an indispensable enabler of national transformational aspirations. It is through the rule of law that society is freed from all manner of ills- ranging from lawlessness, violence, corruption, and poor governance and commerce. Prefacing the 2026 - 2030 JSC Strategic Plan, the Chief Justice stated thus:

> Importantly, the 2026-2030 Strategic Plan is aligned with the National Development Strategy 2 (NDS2), particularly the pillar on Peace, Security, and Social Cohesion. By improving access to justice from 60% in 2025 to a targeted 82% by 2030 and raising case disposal rates from 80% to 90%, the

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23 United Nations (1995), *The Copenhagen Declaration and Programme of Action, World Summit for Social Development*, 6-12 March 1995, New York, United Nations.

24 Pritchett, L et al. 2000. Quantifying Vulnerability to Poverty: A Proposed Measure Applied to Indonesia. Policy Research Working Paper No. 2437.

25 Turanjanin, V., Kovačević, A. Access to free legal aid in Serbia from the perspective of municipal services. *Discov glob soc* **3**, 148 (2025).

26 International Consultative Forum on Education for All (EFA Forum), UNESCO, *Status and Trends, 2000.*

27 ladslaus, M. "National OVC Policy." 2025.

28 See preface to the JSC Strategic Plan 2026-2030.

> judiciary will contribute meaningfully to national stability, investment confidence, and socio-economic development. As we embark on this new strategic cycle, I pay tribute to all judicial officers, magistrates, traditional leaders, administrative staff, and partners who continue to uphold the dignity of the courts under challenging conditions. I also extend gratitude to the Government of Zimbabwe for its continued support to the judiciary, and to development partners whose cooperation remains invaluable.

The Chief Justice`s empathetic disposition toward his country and continent`s tribulations is clear. His view is that the judiciary can contribute effectively to the transformation of nation and continent. He is correct. But there is a swell of adversities to be overcome. And one may commence with those emanating from the judiciary`s most faithful ally - the legal profession. Lawyers supply the judiciary`s pipeline as they also determine its product quality. Over the years, training, registration, monitoring and empowerment of legal practitioners in all sectors greatly improved professionalism. But there are still problems.

Two senior legal practitioners who coincidentally each served as President of the Law Society of Zimbabwe (LSZ), Simplicius Julius Chihambakwe[29] and Lloyd Mhishi[30] bemoaned the decline in standards. Echoing Chihambakwe, Mhishi observed thus in the preface to his book *Being the Best Lawyer* (described in the Foreword by LSZ Secretary, Edward Mapara as a "*Practice management manual*" and "*codified mentorship manual*"): -

> The number of legal practitioners found on the wrong side of the law has increased as the profession has also expanded. So many small firms have sprouted up only to collapse in a few years or even months under a cloud of numerous misdemeanours and unprofessional, unethical and unworthy practices and misconduct. Many seek to enter this profession on the perceived glitz and glamour of the profession evidenced by the rise in law schools and enrolments. Without the knowledge that successful law practice requires much more than just a degree certificate, dreams are eventually shattered if not the destruction of lifetime careers.

6. The confluence of administrative efficacy and judicial excellence

Since assuming office in 2017, the Chief Justice has consistently documented such and other challenges faced by the justice delivery system. Through instruments and events including the JSC strategic plans, the opening of courts, legal years, important milestones and conferences, he has spoken about resources constraints, limitations in court network, manpower deficiencies and others. He has spoken as well on access to justice, judicial accountability and

29 Chihambakwe, *Growing out of Poverty* Heritage Publishing House, 2019, 114.
30 Mhishi *Being the Best Lawyer*-Mhishi Trust, 2023.

independence, constitutionalism, in addition to lecturing on various aspects of substantive and procedural law.

In this respect, I take the view that Chief Justice Malaba recognised, not as a truism but solution, the criticality of the judiciary and the institutional functionality of its support processes. Indeed, it cannot be naysaid that institutional efficiency is prerequisite to effectiveness in any undertaking. But the historical and traditional background of the judiciary tended to limit its capacity and consciousness in addressing such challenges. After all, tradition forced the judiciary to focus on core products, namely judicial decisions and jurisprudence. To this, I conclude that the Chief Justice in any event, did no more than attend to the very basic requirements of obvious duty.

Tradition, the Constitution and statute demand the judiciary and its supportive JSC to attain the requisite level of organisational efficacy. This discourse focuses, in that regard, on the unfashionable side of jurisprudence: -administration. Tsabora edited a compendium of compelling essays traversing various aspects of the the Judiciary and the Zimbabwean constitution.[31] One chapter, written by the Editor himself, is dedicated to the "The Administrative Framework for the Judicial Function in Zimbabwe." I found this instalment insightful. I will turn to it shortly. The question of administrative efficiency as a cog in the justice delivery system`s engine goes beyond mere organisational propriety. It intersects with jurisprudential, legal and in particular, constitutional considerations. The Acts of Parliament establishing the superior and subordinate courts of Zimbabwe, together with such tribunals` rules of court, are in essence, a compendium of operational and administrative processes designed to usher in citizens` substantive rights. The Chief Justice has, beyond exhorting adherence to those rules, gone further to ensure compliance through automation and other fail-safe administrative processes. This approach commences the process to translate the transformational ideal. Left unrealised, ideals generate fatigue and disillusionment. Respected Zimbabwean banker and clergyman Dr Julius Makoni recognised the dangers of such and observed many years ago that "Ideological exhaustion can only further impede the mobilisation of the masses for the battle against underdevelopment".

31 Tsabora, J. (Ed.). (2022). *The Judiciary and the Zimbabwean Constitution*. University of Zimbabwe Press.

[32]Similarly, the Chief Justice stated as follows in a paper delivered at the International Judicial Conference, New Delhi, India[33]:-

> Democracies have therefore gone a step further by laying down in the same Constitutions all the requisite institutional measures to ensure that these guarantees are effective and are realised by the intended beneficiaries. The realisation seems to have been that it would be unfair and hollow to want a goal, while ignoring the proper means of achieving it.

7. Select areas of the Chief Justice`s administrative focus

7.1. Building Blocks: The Chief Justice, Judiciary and the JSC

The Chief Justice is the Head of the Judiciary, Constitutional Court and Supreme Court by virtue of section 163(2) of the Constitution. He is concomitantly Chairperson of the JSC in terms of section 189 (2) of the Constitution. In the decision of *Hashiti & Anor v Seedco Limited* HH 615-24, the High Court[34] commented, at page 24- thus on the role of the Chief Justice: -

> [77] Which brings me to my eighth comment. In *Rosenfeldt*, I drew attention to the fact that Part 3 of the Constitution created a body corporate-the Judicial Services Commission. Its function being to support and enable fulfilment of the constitutional obligations of judicial institutions. By s 189, the Constitution deliberately reposed the leadership of the JSC in the Chief Justice, the very same jurist serving as the Head of the Judiciary. The obvious conclusion being that by framing ss 171(3) and s 176, the drafters of the Constitution were well-aware of the significance of efficient organisational arrangements in the dispensation of justice, including the exercise of jurisdiction.

Tsabora proffers an in-depth analysis on the purpose, structure and relationship of the JSC[35] with the Chief Justice and other institutions of State.[36] He comments thus: -

> A judicial administrative system provides the tools, instruments and environment for judicial officers to perform their work efficiently and effectively. The administrative system is thus responsible for establishing the

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32 At page 123 of his book Bon-vivant Banker-Bishop, A life in my day-Dorrance Publishing, 2023.

33 The Judiciary as a Guardian Against Populism: Comparative Perspectives on Protection of Constitutional Values.

34 In a matter that I decided.

35 Established in terms of the Judicial Service Act [*Chapter 7:18*] as read with section 189 of the Constitution of Zimbabwe, 2013.

36 Tsabora, (n 30) above.

> support system for all judicial officers, particularly judges and magistrates. The support framework includes aspects of financial administration, human capital development, discipline and servicing and developing judicial infrastructure. In practice terms, the administrative system deals with virtually everything related to administrative activities except actual adjudication itself.
> Under the Zimbabwean context, the judiciary administrative functions are shouldered by the Judicial Service Commission. It is thus first and foremost, an administrative body with administrative functions. However, in practice, the JSC has an advisory, supervisory, consultative and regulatory mandate. This mandate enables the JSC to create and sustain a suitable environment for the Judiciary to function efficiently in order to deliver on its constitutional functions……this means that the JSC`s administrative role extends beyond mere provision of stationery and desks; it now extends to judicial selection processes through conducting public interviews and even making regulations governing the judiciary.

7.2. Modernising the Judiciary and JSC

In 2017, Honourable Malaba CJ succeeded the late former Chief Justice Chidyausiku. Tribute must be paid to former Chidyausiku CJ, his Commissioners and then Secretary, Hon Mrs Justice Rita Makarau (now a Judge of the Constitutional Court) for laying the foundations of a solid institution in both the judiciary and JSC. Equally, Chief Justice Malaba, Deputy Chief Justice Hon Mrs Justice Elizabeth Gwaunza (also a Judge of the Constitutional Court), and their colleagues on the current JSC demand credit. Seamlessly, they took over and progressed the modernisation and decentralisation work commenced by their predecessors. The judiciary and JSC have since undergone conceptual and physical transformation manifesting variously through refurbishment, retooling, automation in addition to decentralisation.

The JSC`s website[37] is a convenient dashboard from which one may assess the JSC and judiciary`s modernisation drive. It carries information from corporate details to structure, organisation, officers, departments and most importantly, court services. There are notice boards displaying court rolls, judicial decisions, court judgments as well as a library of institutional literature. The Chief Justice has a decent catalogue of papers and speeches addressing a diversity of subject matter as noted above.

Perhaps most insightful are the annual reports and strategic plans generated over the years. Apart from portraying how far the JSC has travelled from its Ministry of Justice days, the portal allows an objective evaluation of the JSC and judiciary. The JSC`s strategic plans reflect earnest industry and commitment to the

37 https://www.jsc.org.zw/.

organisational capabilities recognised by the learned author Tsabora. I quote from the 2026-2030 JSC Strategic Plan: -

> The 2021-2025 Strategic Plan laid a strong foundation for institutional modernisation. Accountability and the digital transformation of our courts. Significant accomplishments-including the rolling out of the Integrated Electronic Case Management System (IECMS), expansion of court infrastructure, establishment of the Judicial Training Institute of Zimbabwe (JTIZ), and meaningful advances in judicial independence and professionalism- have repositioned the judiciary for the next phase of growth. Despite this progress, the previous cycle also revealed critical challenges, noticeably the increasing pressure on judicial capacity, human capital constraints, and the rising demands of a rapidly evolving justice environment.
>
> The 2026-2030 Strategic Plan responds decisively to these realities. Developed through extensive consultations, situational analysis, and reflective engagement across the justice ecosystem, the Plan introduces a renewed strategic focus anchored on nine interlinked priorities; strengthening judicial independence and integrity; enhancing transparency and accountability, expanding access to justice; capacitating customary and local courts; improving judicial efficiency and quality; building a high performing Judicial Service; deepening public trust; accelerating digital transformation; and safeguarding the safety and welfare of our personnel.
>
> At the heart of this Plan lies a resolute commitment to the rule of law, constitutionalism, and the delivery of justice that is fair, accessible and efficient. The judiciary must remain fearless, impartial, and uncompromising in upholding the Constitution. To achieve this, the Plan prioritises the entrenchment of financial and operational autonomy, the strengthening of institutional safeguards, and the enhancement of ethical standards through robust accountability mechanisms.

The above excerpt distils into greater detail, Tsabora`s broad parameters on the purpose and function of a judicial service commission. The bold commitments in the JSC Strategic Plan are backed up by a solid implementation, evaluation, and test-check-and-challenge framework. The plan vindicates the Chief Justice`s previous declarations on transparency and accountability.

The public and in particular, the JSC`s (many) critics have an opportunity to evaluate the JSC`s activities. The JSC is after all, a statutory entity with a constitutional mandate.[38] Unsurprisingly its activities continue to attract close scrutiny. This includes litigation over the Chief Justice`s term of office,[39] the

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38 See also section 191 of the Constitution, sections 3 and 2(1) (d) of the Administrative Justice Act [Chapter 10:28] and section 3 of the Public Finance Management Act [Chapter 22:19].

39 *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 7-21.

removal of judges from office in terms of section 187 of the Constitution,[40] as well as a swathe of social media criticisms.[41] The JSC Strategic Plan is a credible concretion of the implementation or intent to implement the diverse commentaries and judicial wish-lists shared over the years by the Chief Justice. At the plan`s centre is the recognition that the JSC is about the judiciary, and that the judiciary is about its constitutional and transformational mandate. The ultimate measure of the JSC Strategic Plan will be the lived reality of quality justice on time.

7.3. Automation and Enhancement of Institutional Processes

How will the overhaul and modernisation of institutional processes, principally at the JSC, aid the judicial officers, one may inquire. Or put differently, how exactly will such processes demonstrate the Chief Justice`s famed confluence of administration and juridical? Firstly, again as noted by Tsabora, [42] the JSC exists to serve the judiciary in every respect except to adjudicate matters. The infrastructural and support services required to lighten or quicken the judicial officer`s work and indeed life-from court rooms to support staff, all fall into such category. The Chief Justice articulated the function of JSC staff as follows[43]: -

> For members of the Judicial Service to play such important and critical roles, there is need that they understand and appreciate their functions in this critical justice delivery matrix. When legal practitioners and other players in the justice sector come to courts, they interface and interact in the first instance with you as members of the Judicial Service. You are the officers of court who ensure that court papers are filed properly, court decorum is properly observed, courts are able to sit on time. You are the people who set down matters for hearing and ensure that court orders are enforced. You are there to ensure that deceased estates are properly administered in terms of the law. You ensure that children and other vulnerable persons such as widows and the disabled are not taken advantage of. You are there, ladies and gentlemen, to ensure that there are adequate funds and other resources for the court operations. You work tirelessly to provide logistics for the courts to function efficiently and for judicial officers to travel to circuit courts all over the country. You procure goods and services including human resources that enable cases to be heard. You ensure that courts are up to date with technology. It is you who communicate with the public on what is happening in the courts. The justice delivery system would not function without your

40 *Bere v JSC & 6 Ors* CCZ 10-22; *Ndewere v JSC* SC 113-22; *Paradza* v *Chirwa & Ors* 2005 (2) ZLR 94.

41 https://www.heraldonline.co.zw/kasukuwere-lawyer-rues-misguided-utterances/.

42 Tsabora (n 30) above.

43 At page 3 of the Chief Justice`s keynote address during the JSC Leadership Convention on 30 October 2021 https://jsc.org.zw:8222/media/uploads/FINAL_SPEECH_final.pdf accessed 4 April 2026.

> efforts. In a nutshell, you are the cog and the engine that powers the administration of justice in this country." [underlined for emphasis]

Secondly and more pointedly, one may focus on adjectival law. If substantive law is the heartbeat in justice delivery, then procedural law becomes its sinews or tendons. Procedural law offers the elaborate compendium of compliance guidelines, links and nodes which help process litigation in the courts. The Constitutional Court discusses that point held in *Liziwe Museredza & 385 Ors v Minister of Agriculture, Lands, Water and Rural Resettlement & 10 Ors* CCZ 11-21.[44] Adjectival law runs on administrative rails. Arguably the most transformative intervention in modernising such rails has been introduction of the IECMS system. The Chief Justice described the IECMS system as "*The flagship activity that the Judiciary has taken to enhance efficiency and the rule of law".*[45] It delivered telling improvements to the organisation and processing of judicial work. Across all spectra. The filing and service of documents or pleadings, consolidation and compilation of court records as well as conduct of court proceedings, among other processes have been insulated against human error and omission.

It replaced the antiquated registry and musty dungeons with the convenience of the desktop. At the click of a button, judicial officers could access case documents and court records giving *Mhungu v Mtindi* 1986 (2) ZLR 171 (S) renewed meaning.[46] Judicial officers, registrars and staff could monitor performance, pull reports and MI.s, issue or receive instructions and generate or read notifications in real time. The benefits and functionalities of IECMS are not only impressive but ongoing. They have exposed past failings including those reposed in the rules of court. Automation will also enhance the JSC`s Standard Operating Procedures (SOPS) which define and regulate workflow.

7.4. Decentralisation of the Court System

The Chief Justice made the following observation on the occasion of the official opening of the High Court Mutare Building: -

> The figures coming out of all Courts indicate that litigation continues to rise, making it impossible for the three existing High Court stations to effectively serve the whole country. The High Court stations, particularly at Harare, are choking with case backlogs. Cases are taking long to be completed, despite the best efforts by Judges. To the ordinary person, the issues of delay,

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44 *Liziwe Museredza & 385 Ors v Minister of Agriculture, Lands, Water and Rural Resettlement & 10 Ors* CCZ 11-21 at 9.

45 On 10 January 2022 during the Legal Year Opening Speech https://jsc.org.zw:8222/media/uploads/CJ_SPEECH_2022_LEGAL_YEAR_1.pdf.

46 Held that a court has the authority to refer to its own records.

> expense and corruption in the Courts are the most worrying. This made the need to increase High Court stations a priority. ……It in all respects accords with the notion that justice must be dispensed from clean halls of justice.

Happily, the event marked a turning point in addressing the pains constituting the Chief Justice`s lamentations. He thus turned the positive page, brimming with positive platitudes such as "magnificent structure"; "a beautiful complex"; "unique ambiance"; "the best courthouse in the country" and "a source of pride". He could have spoken about the facility`s prototype JSC décor of burnished mahogany and plywood panelling, both adorned with upholstery in shades of green and golden brown!

The Chief Justice had every cause to be elated. He sustained the dream and initiative of his predecessor, the late Chidyausiku CJ who had, two years previously, been the first Chief Justice in a period of one-hundred and twenty-two years to open a new seat of the High Court. The last time such event had taken place had been in 1898 when the colonial administration opened the Bulawayo High Court.

Today, the number of High Court seats number an impressive five-being Harare (including the Commercial Division), Bulawayo, Mutare, Masvingo, Chinhoyi with Kwekwe slated to join the list shortly. The Chief Justice`s decentralisation drive has also targeted the Magistrates Court. Feltoe described as follows in his manual, '*The Magistrates Handbook*'[47] "*Magistrates play a vital role in the administration of criminal justice in Zimbabwe. Magistrates Courts are situated throughout the country and thus reach are the dispensers of justice at a local level*."[48]

During the past 10 years of the Chief Justice`s tenure, the JSC set up a number of courts across the land to improve access to justice by the marginalised.[49]

7.5. *Specialisation of the courts*

Madhuku described the High Court`s role in the following terms; -

> (b) <u>The special place of the High Court</u>
> It is entrenched in our legal tradition that there is always one court of unlimited original jurisdiction. For that court not to exercise jurisdiction, there must be a specific provision ousting jurisdiction. The court is the High Court. In the old constitution, the jurisdiction of the High Court was left to an Act of Parliament. It was then the High Court Act which gave the High Court original jurisdiction over "all civil and criminal matters". The new Constitution has

47 Revised Edition, August 2021, Zimlii.
48 Feltoe.
49 See Items 3.1 and 3.2 at page 44 of the JSC`s 2026-2030 Strategic Plan.

> elevated our legal tradition to a constitutional position. The High Court has "original jurisdiction over all civil and criminal matters throughout Zimbabwe". In the absence of provisions on "exclusive jurisdiction", the High Court has original jurisdiction over all matters including those over which other courts have jurisdiction [concurrent jurisdiction]. This is why the new Constitution only excludes the High Court from matters "that only the Constitutional Court may decide.[50]

The Constitution provides for the enhancement of the High Court`s effectiveness through 2 provisions which I set put below: -

> **171(3) Jurisdiction of High Court**
> (3) An Act of Parliament may provide for the High Court to be divided into specialised divisions, **but every such division must be able to exercise the general jurisdiction of the High Court in any matter that is brought before it**.
> 176 Inherent powers of Constitutional Court, Supreme Court and High Court
> 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**. [for emphasis]

It cannot be seriously contested that these 2 provisions represent the very confluence of administrative efficacy and judicial excellence which the Chief Justice has consistently argued are material in delivering transformative justice. In the same vein, section 46A of the High Court Act [*Chapter 7:06*] empowers the Chief Justice, in consultation with the Judge President of the High Court, to compartmentalise the High Court into specialised divisions.

Parliament, in 2017, enacted the Judicial Laws Amendment (Ease of Settling Commercial and Other Disputes) Act Number 7 of 2017 ("JLA").[51] The title of this piece of legislation is instructive. The spectrum of activities meant to spur economic development as a transformational objective. By its section 5, the JLA regularised existing "divisions" of the High Court being; -

> (a) the Electoral Court
> (b) the Fiscal Appeal Court
> (c) the Special Court for Income Tax Appeals
> (d) the Intellectual Property
> (e) the criminal, civil and family law divisions of the High Court established before the commencement of this Act.

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50 Madhuku.

51 Gazetted on 23 June 2017 thus preceding the promulgation of the Commercial Division of the High Court by notice dated 17 October 2017.

On 17 October 2017, about 4 months after the formal constitution of the High Court Divisions, the Chief Justice issued Proclamation in the Gazette setting up the Commercial Division of the High Court or Commercial Court.

This pronouncement was preceded by extensive work, research, benchmarking and consultations by senior judges Mr Justice Mafusire and Mrs Dr Justice Tsanga-Banda. The blueprints and rules of court were drawn up, with the latter being gazetted on 31 May 2020, as High Court (Commercial Division) Rules Statutory Instrument 123 of 2020. These came into effect on 1 May 2022 through an amendment; High Court (Commercial Division) (Amendment) Rules, Statutory Instrument 79 of 2022 published on 22 April 2022. The establishment of the Commercial Court was a key judicial achievement in Zimbabwe. His Excellency, the President of the Republic of Zimbabwe, Dr E.D. Mnangwagwa, guest of honour on the day, delivered the following remarks in his keynote address: -

> I am advised that the Commercial Court is a specialized court that will be charged with handling complex and high value national and international business disputes. The complexity will demand a higher level of personal accountability on the part of the presiding Judges. Zimbabwe is not alone in this endeavour of setting up a stand-alone commercial court as it will be joining a community of various States that have specialized Commercial Courts in one form or another. Some were established by dedicating a stand-alone court, others as a specialized commercial section within an existing court or specialized judges within a general civil court. Having a commercial court as specialized courts or division therefore is not a new feature on the international plane, that is, within the different domestic legal systems. They are borne out of a desire and a need to offer bespoke processes, procedures and solutions for business related disputes. It will undoubtedly be one of the leading fora for commercial dispute resolution and thus be an asset contributing to a good business climate in Zimbabwe.[52]

The Commercial Court opened its doors on 1 May 2022. I was privileged to be one of the pioneering judges appointed to this Division. The other judges were Judge President, Honourable Mrs Maria Dube, Hon Mafusire as Head of Court, Hon Chirawu-Mugomba J, Hon Manzunzu J and Hon B. Ndlovu J. The new Division underwent a myriad of experiences as the jurisdiction settled down to a new concept whose fresh approach was reflected in the rules of court. These rules were markedly different from those applicable in the Main Court or Civil Division. They were much shorter, simpler and designed to deliver justice

[52] https://jsc.org.zw:8222/media/uploads/Key_Note_Address_by_the_President-_Opening_of_Commercial_Court.pdf.

expeditiously by minimising the adjectival nightmares generated by the old rules. Rule 4 (3) and its resultant Schedule 2 reiterated this new approach:

> Rule 4 (3)
> The court shall in administering these rules, have due regard to the set of values set out in the Second Schedule to these rules and the need to achieve substantial justice inter parties in any particular case without derogating from the principles of natural justice or established law and resolving the dispute timeously.
> Schedule 2
> (3) The core attributes of the Commercial Court are:
> (a) reduction and simplification of processes;
> (b) curtailment and minimisation of costs and time;
> (c) full integration of electronic case management systems;
> (d) complete digitalisation of records;
> (e) across the board training;
> (f) enhanced professionalism and increased efficiency;
> (g) new rules of procedure;
> (h) adaptability.

The judge was granted greater latitude to resolve disputes under the case management options in rules 16 to 24. Also worthy of mention are the arguments around rule 3 (2). This provision obliges the Commercial Division to deal exclusively with "commercial disputes" meeting the criteria set out therein. It was argued that the Constitution permitted "Divisionalisation" subject to the exercise of concurrent jurisdiction. These arguments were not successful, and a number of decisions dealt with the matter.[53]

The nation must recognise that the Commercial Court is but an enhancement of the present judicial structure`s capacity to deliver on justice. It complements sister Divisions. By no means should anyone regard it as elitist. Neither is the oft-specious practice of forum shopping necessary. The following guidance is apt: -

> Prevention, resolution and adjudication. Three ways in which our courts promote the rule of law. Where commercial disputes are concerned, it is crucially important that we always bear these three functions in mind. Not just commercial disputes though. As with courts, commercial disputes do not stand in isolation. They too are part of the wider whole. Commercial disputes can have an impact on families. They can give rise to and be affected by criminal liability, not least where fraud is concerned.
> In developing our approach to commercial disputes, we must not just bear in mind the court's three functions as identified, but equally we must consider

[53] See also *Rosenfeldt v Brackenhills Trust & 4 Ors* HH 348-23; *Savechem (Pvt) Ltd & Anor v Masimba Industries & Anor* HH 61-25.

> the interrelationship between different types of dispute. The more commercial courts can help guide lawful behaviour and help to minimise the prospect that disputes arise through the clarity of their judgments amongst other things, the more effective they will be in helping to promote the rule of law, business confidence, and economic growth to the benefit of society, locally, nationally and globally.[54]

7.6. *En passant: Artificial Intelligence and Alternative Dispute Resolution*

The 2026 End of First Term Judges` Symposium in Victoria Falls carried the theme "The Application of Artificial Intelligence Technology In the Processes and Proceedings Of the Judicial Service." Similarly, the Chief Justice championed the Court-Assisted Alternative Dispute Resolution initiative. A team led by Hon Chitapi J, (also Head of the Civil Division) was tasked to prepare for the roll out of the programme to introduce court-assisted ADR in Zimbabwean courts.

8. Conclusion

This account focussed on the jurisprudential basis of the Chief Justice`s administrative initiatives. Whatever the consensus[55], telling changes were felt in the judiciary and beyond during Chief Justice Malaba`s tenure. Important too, was the seamlessness in the transition from Chidyausiku CJ to Malaba CJ. Including the distinct but collaborative relationship between the Executive and the Judiciary as components of the State, to a discernible style in judgment writing. From the volume of judgments issued by the Superior Courts to the increase in judicial officers at Superior Court and subordinate tribunal level.

By championing judicial proficiency and operational effectiveness, the Chief Justice triggered far-reaching reflections. He lectured, led, engaged and opined on a diversity of subject matter. This created opportunities and platforms for introspection, change, debate, concurrence and divergence. From the initial trepidation over IECMS, to the to universal acceptance by judges, ("digital aliens") of technology and automation. Judge collegiality took root as did the pride in case completion statistics reflecting not at all the mendacious bean counter, but the judicial officer`s honest toil to improve the lot of his or her people.

Given their stature and import, the Chief Justice, judiciary and JSC faced some turbulence. Litigation over the Chief Justice`s tenure briefly threatened the judiciary with dysfunctionality. It also revealed the true character of the nation and

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54 Address by Lady Chief Justice Sue Carr, Chief Justice of England and Wales at the Standing International Forum of Commercial Courts SIFOCC in Doha, April 2024 at https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/25/2025/01/20.266_JO_SIFoCC-Fifth-Meeting-Report_FINAL_Jan2025_WEB.pdf.

55 This discourse focussed more on the conceptual ahead of the empirical.

its judiciary. It testified to the freedom of expression, conscience, right to dissent and above all-resolution of disputes by application of the law. The matter was indeed lawfully resolved by the judiciary and judiciary alone. In similar vein, the removal of judges from office, never a pleasant nor welcome process, was progressed in terms of s 187 of the Constitution. Rightfully so, the nation continues to engage and reflect over these and other issues around the judiciary-especially the jurisprudence.

Lastly, the Chief Justice`s cherished subject: judgment writing. Concision and precision characterised by short, sharp, quick sentences now rule the roost. But the Chief Justice`s advice on simplicity in writing was not prescriptive. Thus, the wordsmith jurists still adorn their rulings with a surfeit of big words, colourful descriptors, and bombastic hyperbole. So too will the lone nostalgic judge indulge in the elegant asperity and dry wit of the likes of *Doelcam v Pitchanik & Ors* 1999 1 ZLR 390 (H).

COMPARATIVE EXPERIENCES: MAPPING PROGRESS AND CHALLENGES IN JUDICIAL AUTONOMY

HON. MR. JUSTICE JOEL MAMBARA[1]

Abstract

This article explores the development of judicial autonomy in Africa through a comparative perspective. It suggests that the Zimbabwean experience, when properly understood, offers an important and replicable model for strengthening judicial independence in modern constitutional democracies. It clarifies the difference between judicial independence, as the decision -making freedom of individual judges, and judicial autonomy, as the institutional ability of the judiciary to manage its own affairs without external interference. The article places current debates within the broader context of colonial legal legacies, parliamentary supremacy, executive dominance, and the politicisation of the judiciary. Building on this background, it examines appointment procedures, public trust, court management, judicial training, the ethical duties of legal professionals, and the practical importance of financial stability. The key point is not that Zimbabwe is free from threats to judicial independence; rather, the Zimbabwean experience clearly shows how readily political pressure, constitutional changes, or resource limitations can challenge forma l protections. The main argument is that Zimbabwe's requirement for public interviews for judicial appointments, combined with the judicial -led rollout of the Integrated Electronic Case Management System (IECMS), represents one of the most promising efforts s on the continent to turn formal independence into effective operational autonomy. These reforms enhance transparency, streamline court management, increase accountability, and foster the public trust essential for the courts' long-term legitimacy. Therefore, Zimbabwe's recent reforms should be viewed not as a final achievement but as a valuable model for jurisdictions aiming to embed constitutionalism and the rule of law.

Keywords: *Judicial autonomy; judicial independence; executive interference; constitutionalism in Africa; judicial appointments; Integrated Electronic Case Management System (IECMS); public confidence in the judiciary; Zimbabwean judicial reform.*

[1] MA Law (Voronezh State University). Judge of the High Court of Zimbabwe.

1. Introduction

The classical injunction *Justitia fiat, ruat caelum let (*justice be done though the heavens) fall captures, with elegant severity, the duty of a court that is not beholden to power. In the African setting, that duty is sharpened by history. The constitutional transitions that accompanied the continent's third wave of democratisation raised justified hopes that judiciaries would move from being instruments of executive preservation to becoming guardians of the constitutional order. Yet the same transitions also widened the judicial role. Courts are now called upon not only to resolve ordinary disputes, but to review legislation, to discipline executive action, to adjudicate electoral controversies, to uphold socio -economic rights, and to resolve questions that lie at the heart of the political community. The result is that judicial power has grown at precisely the moment when attacks on judicial independence have taken more subtle, strategic and institutionally corrosive forms.[2]

A clear threshold is therefore essential. Judicial independence and judicial autonomy are related but different concepts. Judicial independence refers to the judge's personal freedom to decide cases impartially, based on facts and law, without fear, favour, or prejudice. It relates to the individual judge 's impartiality, integrity, and adherence to the judicial oath. Judicial autonomy is broader; it concerns the judiciary's institutional ability to control the conditions that make independence effective rather than superficial. This includes appointments, internal administration, financial security, case management, education, discipline, and the everyday mechanisms through which courts carry out their constitutional duties. A judiciary might have formal independence in the constitutional text, but still depend institutionally on the executive for budgets, staffing, transport, files, buildings, promotions, or digital infrastructure. In such cases, independence remains fragile because the institutional environment necessary to support it exists outside the judiciary's control.[3]

The comparative literature is clear on two points. First, there can be no lasting rule of law without an independent judiciary. A court that relies on the goodwill of the political branches to function are vulnerable, even if no explicit threat is made. Second, judicial independence is not an end in itself. It exists to ensure principled decision-making, equal justice, public confidence, and constitutional government. As Justice Edwin Cameron has noted, judicial independence "is not a perk of

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2 T Masengu 'The Vulnerability of Judges in Contemporary Africa: Alarming Trends' (2017) 63 Africa Today 3; EO Ogada Judicial Independence under Threat: Balancing Law and Political Control (paper presented at Speke Munyonyo Resort, Kampala, 2024); T Milej & E Ogada Upholding Judicial Independence in Kenya: Challenges, Context and Solutions (2024).

3 J Ferejohn (note 1 above); O Fiss (note 1 above); TA McKenzie (note 1 above); T Masipa (note 1 above); L Siyo & JC Mubangizi (note 1 above).

office for judges; it is a political principle designed for the benefit of decent government." Similarly, as Mogoeng CJ has emphasised, "the judiciary's goal is to deliver quality justice swiftly to all, which requires both decisional independence and efficient administrative competence."[4]

The practical justification for insisting on independence has been clearly outlined in comparative and South African literature. Mikva noted that the more a constitution grants courts the power to review actions by political branches, the more essential it becomes to shield judges from those same branches. McKenzie draws a similar conclusion from an institutional design perspective, showing that autonomy is inherently linked to a court's position within the constitutional system. The contemporary South African debate adds another layer, namely, public confidence. Gordon and Bruce, drawing on both international standards and local experience, clarify that courts' authority stems not just from formal jurisdiction but also from the perception that they are independent, impartial, and publicly accountable. Malaba's recent assertion that judicial authority "derives from the people" is therefore not merely a rhetorical flourish; it accurately reflects the constitutional environment in which modern courts function. An autonomous judiciary relies on public trust, which in turn depends on visible institutional arrangements that convince litigants and citizens that courts are not mere instruments of partisan power.[5]

The thesis of this article is that Zimbabwe, despite its well -documented challenges, has developed two crucial models for judicial independence in Africa. The first is constitutional and procedural, involving public interviews and a constitutionally based appointments process that ensures transparent judicial selection. The second is administrative and technological, exemplified by the implementation of the Integrated Electronic Case Management System (IECMS), which has enabled the judiciary to effectively control case flow, filing, and tracking, as well as internal efficiency. Both reforms are important because independence is built not only through doctrine but also, through institutions, procedures, and public legitimacy. A transparent and rational appointment process helps prevent patronage. An administrative system managed by the judiciary safeguards against bureaucratic capture, and both measures strengthen public confidence in the judiciary.[6]

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4 E Cameron 'The need for the independence of the judiciary and of the legal profession' (2008) Advocate 34; M Mogoeng 'SAJEI: A vehicle for the speedy delivery of quality justice to all our people' (2018) 1 *South African Judicial Education Journal* 1.

5 AJ Mikva (note 1 above); TA McKenzie (note 1 above); A Gordon & D Bruce (note 1 above); P Andrews (note 9 above); L Malaba.

6 C M Fombad 'A comparative overview of recent trends in judicial appointments: selected cases from Africa' (2021) 55 *Canadian Journal of African Studies* 161;

That proposition requires qualification but not retreat. Zimbabwe's constitutional history over the past decade confirms that intimidation, constitutional amendments, and informal political pressure can undermine autonomy. The argument presented here is therefore not triumphalist. It is that the Zimbabwean experience is instructive precisely because it exposes both sides of the African dilemma: the persistence of old threats and the emergence of tangible reforms capable of resisting them. The comparative question is not whether Zimbabwe is free of difficulties. It is whether, in relation to the continent's broader experience, Zimbabwe's system of transparent appointments and judicially driven administrative modernisation offers lessons worth emulating. The answer, it is argued, is yes.[7]

2. Historical vestiges and enduring struggles

The modern African debate on judicial autonomy cannot be fully understood without considering its colonial and post -colonial heritage. The main legal traditions inherited across the continent, such as common law in Anglophone Africa and civil law in Francophone Africa, created distinct institutional structures. Yet, both left the judiciary vulnerable to executive influence. In the Anglophone tradition, the ideal of judicial independence was rooted in the metropolitan centre but was weakened during colonial times. Colonial governors and administrators-controlled appointments and treated the courts as part of a broader machinery of governance. In the Francophone tradition, mistrust of a government of judges was embedded in the constitutional systems, with the President acting as the guarantor and the effective master of judicial careers. Post -independence constitutions often maintained these arrangements, leaving the judiciary with only a superficial constitutional independence but lacking the practical means to enforce its autonomy.[8]

The effects of these inheritances have been significant. Fombad's comparative research demonstrates that many African judiciaries entered the constitutional era already lacking public confidence because judges had been appointed,

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L Malaba Address on the Occasion of the Official Opening of the 2025 Legal Year (Bulawayo, 13 January 2025).

7 S Tembo & A Singh 'Mutilation of the Independence of the Judiciary: Threats, Intimidation and Constitutional Amendments in Zimbabwe' (2023) 44 *Obiter* 546.

8 CM Fombad (note 5 above); TA Aguda 'The Judiciary in Africa ' (1985) 9 The Fletcher Forum 13; JB Diescho 'The paradigm of an independent judiciary: Its history, implications and limitations in Africa ' in N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* (2008); M Hansungule 'Independence of the judiciary and human rights protection in Southern Africa ' (paper, University of Pretoria, undated); Sègnonna Horace Adjolohoun 'Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa ' (2023) 67 *Journal of African Law* 169.

transferred, and dismissed at the whim of presidents. Aguda, writing earlier but just as insightfully, warned that African judges could not fulfil the hopes placed in law unless they were protected from executive pressure and could operate under the rule of law rather than under the rule of will. Diescho, studying the Namibian context, similarly connected judicial independence to the separation of powers and the rejection of absolutist traditions, while Horn and Bösl caution that legal frameworks, although essential, are insufficient without complementing them with political culture, professional ethics, and
a long -term commitment to vigilance.[9]

South Africa offers a significant cautionary example, showing how formal legalism can exist alongside deep institutional reliance. During apartheid, the judiciary displayed many outward signs of independence, security of tenure, salary protection, and formal separation. However, the judiciary functioned under parliamentary supremacy within a political system designed to exclude the majority of the population. Judges, mostly white and male, were often oriented towards the executive, and the way appointments, court administration, and promotions were organised reinforced that mindset. Gordon and Bruce, Ellmann, Andrews, and Devenish each, in different ways, demonstrate that the courts' complicity was not just in enforcing unjust laws but in legitimising a system of rule by law rather than rule of law. The distinction is important. A state can be saturated with law and still fail to uphold the rule of law if legal norms are used to enable domination rather than to limit power.[10]

This historical lesson is not confined to South Africa; the Namibian experience illustrates that even within dependent colonial and pre -independence institutional frameworks, courts could develop limited yet meaningful forms of judicial autonomy. Plasket 's reconstruction of late -apartheid administrative law demonstrates that even under constrained conditions, doctrinal shifts may lay the groundwork for later constitutional developments. Froneman's historical reflections on judges, governments, and the rule of law reinforce this point from another angle: judicial review survives only where institutional conditions and

9 CM Fombad (note 5 above); TA Aguda; JB Diescho; N Horn & A Bösl 'Introduction' in *The Independence of the Judiciary in Namibia* (2008).

10 S Ellmann 'The Struggle for the Rule of Law in South Africa ' (2016) 60 *New York Law School Law Review* 57; A Gordon & D Bruce Transformation and the Independence of the Judiciary in South Africa (2007); P Andrews 'Without Fear, Favor or Prejudice: Judicial Independence and the Transformation of the Judiciary in South Africa ' (2010) *SSRN Electronic Journal*; GE Devenish 'The Independence and Effectiveness of Constitutional Courts in Sub -Saharan Africa: The South Africa Experience ' (2007) *University of Botswana Law Journal* 3; AJ Mikva 'The Need for an Independent Judiciary: Implications for South African Reform ' (1993) 8 *American University International Law Review* 621.

political culture permit judges to remain faithful to the law even in moments of executive strain.[11]

The point warrants emphasis because contemporary African constitutionalism still operates in the shadow of these earlier arrangements. The African Commission's jurisprudence, as discussed by Malila, repeatedly highlighted the damaging effects of ouster clauses, special tribunals, and the executive nullification of ordinary courts. In that jurisprudence, the problem was not just that rights were violated in individual cases, but that the very institutions responsible for determining rights were being deprived of their authority. The South African discussion document on transformation echoes this idea in a different tone: a post -authoritarian judiciary cannot merely adopt the forms of a previous legal order but mu st be transformed in function, composition, and administrative capacity to align with a constitutional order based on the rule of law. Restoring history without redesigning institutions is therefore ineffective.[12]

It follows that the central African challenge today is not just to declare independence in constitutional words but to turn that promise into lasting autonomy. Masengu 's significant contribution is that modern threats to judges are subtle yet equally perilous: political assaults, blocked appointments, internal manipulation, public defamation, arbitrary transfers, financial pressure, and the rising demands on courts caused by the judicialisation of politics. Milej and Ogada illustrate how these patterns manifest in present -day Kenya through public attacks on judges, disregard for court orders, financial intimidation, blocked appointments, and widespread accusations of corruption. Tembo and Singh offer a stark Zimbabwean example, arguing that judicial independence can be systematically eroded through a mix of intimidation, patronage, and constitutional amendments even after a progressive constitutional settlement has been adopted.[13]

The broader point is that judicial autonomy is always negotiated in history, never received as a gift. It must be secured against inherited habits of deference, against structures of executive dominance, and against the continuing temptation of governments to see courts as useful only when compliant. That is why the present article approaches Zimbabwe not as an exception to Africa's difficulties, but as an important site of contestation in which some of the most promising

11 JB Diescho (note 7 above); N Horn & A Bösl; C Plasket 'The Understated Revolution: The Development of Administrative Law in the Appellate Division of the Supreme Court of South Africa N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* (2008).

12 M Malila; Department of Justice and Constitutional Development.

13 T Masengu (note 2 above); T Milej & E Ogada (note 2 above); S Tembo & A Singh (note 6 above).

reforms have been undertaken precisely because the dangers are so well understood.[14]

3. The crucible of appointment

If autonomy has an institutional origin, it is the appointment process. An appointment marks the moment when a constitutional order reveals whether it is genuinely committed to an independent judiciary or merely to the language of independence. The comparative literature on Africa largely agrees on this point. Fombad describes the mode of judicial appointment as one of the most decisive factors influencing judicial values such as independence, impartiality, transparency, inclusivity, and efficiency. Adjolohoun, examining regional mechanisms, similarly warns that judges often become guardians of each other only after flawed national appointment processes have exposed the judiciary to capture. The jurisprudence of the African Commission, as explained by Mumba Malila, reinforces this lesson: an independent tribunal requires not only a formal court but competent, properly appointed adjudicators, free from political influence or direction manipulation.[15]

The two main African appointment models highlight the issues at hand. The High Judicial Council model, common in many Francophone countries, tends to reinforce executive influence because the President often remains central to appointments, promotions, and transfers, with the council playing a mainly advisory role. The lack of transparency in the process worsens the problem. Conversely, the Judicial Service Commission (JSC) model, more typical of Anglophone Africa, allows for wider participation of judges, lawyers, and other stakeholders. However, as Malan, Andrews, Gordon, and Bruce demonstrate in the South African context, a JSC is not a universal solution. It can itself become politicised; efforts at transformation can be exploited unethically; and an appointments body dominated by political nominees may reproduce executive preferences within a mor e reputable institutional framework
form.[16]

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14 TA Aguda (note 7 above); M Hansungule (note 7 above); J Froneman (note 10 above).

15 C M Fombad (note 5 above); SH Adjolohoun (note 7 above); M Malila 'The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples' Rights' (paper presented at the Judges' Symposium on Judicial Independence, Impartiality and Accountability, Maseru, 2010).

16 K Malan 'Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa' (2014) 17 *Potchefstroom Electronic Law Journal* 1965; P Andrews (note 9 above); A Gordon & D Bruce (note 9 above).

The South African debates are instructive because they show that appointment is not only about formal independence but also about legitimacy. Andrews convincingly argues that judicial transformation and judicial independence are not mutually exclusive. A judiciary emerging from racial dominance cannot earn public trust if it remains demographically or ideologically like the old order. Siyo, Mubangizi, and, earlier, Siyo in his thesis, also emphasise that appointment, security of tenure, and remuneration is interconnected in maintaining both institutional and individual independence. A judiciary that is formally protected but socially illegitimate will struggle to fulfil its constitutional role; on the other hand, a representative judiciary that is not shielded from interference will stay vulnerable. The point is not to choose between transformation and independence but to recognise that each depends on the other.[17]

The Zimbabwean appointments framework deserves special attention in this regard. Section 180 of the Constitution of Zimbabwe, 2013, institutionalises one of the most transparent appointment processes on the continent. The process consists of public advertisement of vacancies, public nominations, public interviews and the submission of a shortlist by the JSC to the President. Public interviews matter not merely because they make patronage harder. They force candidates to demonstrate competence, integrity, temperament and constitutional vision in the full view of the legal profession and the public. They also build confidence in the process itself by replacing whispered executive preference with visible institutional reasoning. Compared with other achievements, this is a serious one. Even critics of Zimbabwe's broader political environment have had to acknowledge that the architecture of the appointments process, at least on paper, marks a decisive departure from opaque executive selection.[18]

The strength of this architecture becomes clearer when considered alongside the South African debate on transformation. Malan demonstrates how an appointment process can become distorted when its criteria are poorly defined or when political actors treat representativity as a substitute for competence. Conversely, Andrews, Gordon, and Bruce emphasise that a transformed judiciary cannot command public respect if it reproduces past exclusions. The Zimbabwean model is normatively appealing because it openly acknowledges the tension: the process is transparent, the questioning is public, and the relationship

17 P Andrews (note 9 above); L Siyo & JC Mubangizi (note 1 above); LK Siyo (note 1 above); Department of Justice and Constitutional Development Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State (2012).

18 Constitution of Zimbabwe Amendment (No 20) Act, 2013 s 180; V Ocheme 'Separation of Powers and Judicial Autonomy: A Cornerstone of Democracy' (paper, undated); S Tembo & A Singh (note 6 above).

between merit and legitimacy is thus addressed publicly. When this process is respected, the resulting appointment holds a democratic legitimacy that secretive executive selection practices cannot easily replicate. This also explains why regional and comparative scholarship has increasingly centred on institutional harbours for independence; transparent, multi -actor appointments may not guarantee virtue, but they make capture more difficult and legitimacy easier to sustain.[19]

That architecture must, however, be assessed honestly. Tembo and Singh demonstrate how constitutional amendments and informal political pressure have strained judicial independence in Zimbabwe in the decade after the 2013 Constitution. The importance of that critique lies not in invalidating the appointments framework, but in exposing the fragility of gains if the institutional logic of transparency is not defended. Similarly, Milej and Ogada 's analysis of Kenya shows that even where the Constitution establishes a powerful JSC, political branches may still frustrate appointments, publicly attack judges, and use budgetary pressure to discipline the judiciary. Appointment processes thus require not only transparency but also a surrounding culture of constitutional respect, integrity, and fidelity.[20]

For current purposes, the importance of the Zimbabwean model lies in its identification of the correct constitutional answer. Appointment to judicial office should be transparent, rational, merit-based, and institutionally mediated. That is the blueprint. It is supported by comparative scholarship and African experience alike. Ocheme's discussion of separation of powers, Mikva 's explanation of why judicial power requires judicial independence, and Posner's pragmatic acknowledgement that courts operate within a political environment all converge on one point: if those who review power are appointed through a process dominated by the very power they are meant to restrain, then independence will remain fundamentally compromised. Zimbabwe's Constitution, through public interviews and a constitutionally entrenched JSC process, addresses that challenge more convincingly than many of its counterparts on the continent.[21]

The judicialization of politics amplifies the urgency of getting appointments right. Masengu describes this as one of the defining features of contemporary governance: courts now determine electoral disputes, rights claims, constitutional amendments, public appointments and other questions of mega politics. Kenya

19 K Malan (note 14 above); P Andrews (note 9 above); A Gordon & D Bruce (note 9 above); SH Adjolohoun (note 7 above).

20 S Tembo & A Singh (note 6 above); T Milej & E Ogada (note 2 above).

21 V Ocheme (note 16 above); AJ Mikva (note 9 above); RA Posner 'Judicial Autonomy in a Political Environment' (2006) 38 *Arizona State Law Journal* 1.

supplies a vivid modern example. Milej and Ogada recount repeated public attacks on judges after decisions on electoral disputes, taxation, public finance and police deployment. The same pattern appears elsewhere in the region: public confidence in courts rises when they hold power to account, but so too does the intensity of executive and partisan retaliation. Once again, this strengthens rather than weakens the case for transparent appointments. Judges entrusted with deciding these fraught disputes must come to office through a process that can withstand scrutiny from both the victorious and the defeated.[22]

4. The transformative power of the Integrated Electronic Case Management System (IECMS)

Appointments alone do not establish autonomy. A judiciary may appoint excellent judges and remain institutionally dependent if its administration is manual, opaque, bureaucratically fragile, or externally controlled. This is where Zimbabwe's Integrated Electronic Case Management System gains significance beyond mere technological modernisation. When properly understood, the IECMS is a constitutional instrument. It shifts the judiciary from reliance on paper -based, delay -prone, and manually manipulable systems to a digital platform that streamlines filing, service, fee payment, tracking, and scheduling within a unified, auditable judicial process framework.[23] Comparative scholarship on judicial administration emphasises why this is significant. Contini and Mohr contend that the outdated opposition between judicial independence and accountability is flawed, in which accountability is understood not as executive control but as the set of methods by which public institutions make themselves transparent, efficient, and answerable to the values they aim to serve. Langbroek, conversely, demonstrates that performance, independence, and accountability are not mutually exclusive if the institutional design is carefully planned. Administrative data, case flow information, and transparent systems of case allocation and monitoring can bolster rather than weaken independence, provided they remain under judicial rather than executive control. This is the administrative logic underpinning the Zimbabwean IECMS project.[24]

Chief Justice Hon. Malaba 's 2025 address is particularly significant because it frames the matter not in technocratic but constitutional terms. He explicitly links the judiciary 's authority to the people of Zimbabwe and places public confidence at the centre of judicial legitimacy. He notes that the IECMS is now firmly

22 T Masengu (note 2 above); T Milej & E Ogada (note 2 above).

23 L Malaba (note 5 above).

24 F Contini & R Mohr 'Reconciling independence and accountability in judicial systems' (2007) 3 *Utrecht Law Review* 26; P Langbroek 'Measuring Judicial Performance, Independence and Accountability' (2018) 8 *International Journal for Court Administration* 1. L Malaba (note 5 above).

embedded in all superior courts and has "revolutionised the manner in which courts are run," while also observing that public confidence in the system has been "gradually but effectively gained. That assessment is important. A judicial technology programme succeeds not merely when computers are purchased or forms digitised, but when litigants and stakeholders begin to trust the system and adjust their behaviour accordingly. The study visits from Mozambique, Zambia, Malawi, and Namibia to observe Zimbabwe 's use of IECMS further confirm that the reform is already being viewed as a significant
institutional development.[25]

The deeper value of the IECMS lies in its impact on court administration. A paper system conceals responsibility. Files can go missing; dates become uncertain; litigants rely on intermediaries; and performance is hard to assess without anecdotal evidence. Conversely, a digital system enables the judiciary to understand itself. It produces data on filing trends, case progress, bottlenecks, clearance rates, and delays. It facilitates internal management based on evidence rather than guesswork. Additionally, it diminishes opportunities for petty corruption associated with missing records, physical file transfers, or opaque payment practices. In this way, the IECMS enhances not only efficiency but also institutional transparency.[26]

The reform also has an educational aspect. Judicial autonomy is maintained not just by technology but also by judges, magistrates, registrars, clerks, and practitioners who understand the importance of systems. Klug 's work on judicial training in a constitutional democracy highlight that the modern judicial role requires competence in both legal doctrine and managing complex institutional settings. Davis 's approach to judicial education in a transformative context reaches the same conclusion from a different perspective: courts cannot fulfil their constitutional duties with narrow formalism and limited administrative capacity. Rogers, discussing advocacy training, notes that the judiciary has a direct interest in the quality of professional performance before it. What emerges from these writings is that Zimbabwe 's IECMS should be seen as part of a broader culture of autonomy, in which education, ethics, case management, and professional standards are central together.[27]

That conclusion is reinforced by South African literature on judicial education and court performance. Mogoeng CJ argued that case management systems benchmarked against the best -performing jurisdictions are essential for the swift delivery of quality justice. Klug similarly links judicial competence to the

25 L Malaba (note 5 above).
26 F Contini & R Mohr (note 20 above); P Langbroek (note 20 above).
27 H Klug (note 23 above); DM Davis (note 23 above); OL Rogers (note 23 above).

institutional environment in which judges operate, noting that independence, competence, and impartiality in a constitutional democracy require systems that enable rather than hinder adjudication. Davis, writing on judicial education in a transformative context, goes further: judges cannot fulfil constitutional obligations through narrow doctrinal knowledge alone; they need institutions that equip them to understand policy, administration, and the real -world impact of judicial orders. Rogers' account of advocacy training and Sutherland's analysis of the ethical duties of legal practitioners serves as reminders that autonomy is ecological; it depends on the court system, the bench, and the profession functioning within a shared culture of competence, candour, and institutional integrity.[28]

The argument for IECMS as part of autonomy does not imply naivety. Like all meaningful reforms, it has revealed infrastructural weaknesses: uneven internet connectivity, the digital divide, the need for training, and ongoing budgetary demands. These are genuine challenges. However, they do not lessen the constitutional importance of the reform. Instead, they illustrate why techno logical autonomy must be connected to sustained resource commitments and judicial education. A court system can only govern itself through digital infrastructure if judges, magistrates, lawyers, registrars, and litigants are all capable of using it. Therefore, the point is not that IECMS solves all issues. Rather, it shifts the focus to managing its processes with greater transparency, accessibility, and institutional professionalism.[29]

For that reason, the Zimbabwean experience deserves unequivocal support. In a region where courts are often pressured to do more with fewer resources, and where underfunding itself is a form of pressure, Zimbabwe's commitment to implementing digitally integrated case management under judicial oversight represents a significant institutional milestone. It is not merely a peripheral administrative innovation. It is one of the most evident modern examples of the shift from formal judicial independence to substantive judicial autonomy, and the credit must be given to the leadership of Chief Justice Hon. Malaba.[30]

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28 M Mogoeng (note 4 above); H Klug 'Judicial training and the role of judges in a constitutional democracy ' (2018) 1 *South African Judicial Education Journal* 11; DM Davis 'Judicial education in a transformative context ' (2018) 1 *South African Judicial Education Journal* 25; OL Rogers 'To give and to gain: Judicial involvement in advocacy training ' (2018) 1 *South African Judicial Education Journal* 31; R Sutherland 'The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non -Disclosure ' (2021) 4 *South African Judicial Education Journal* 47.

29 M Mogoeng (note 4 above); H Klug (note 23 above); DM Davis (note 23 above); F Contini & R Mohr (note 20 above); P Langbroek (note 20 above).

30 L Malaba (note 5 above).

5. The unspoken condition

No discussion of autonomy can end with appointments and administration. There remains an unspoken condition without which all constitutional design risks futility: material security. Judicial independence is impossible to sustain in conditions of acute financial vulnerability, underfunding, disregard of court orders, and the persistent spectre of corruption. The literature from Southern and Eastern Africa is particularly emphatic on this point. Ramjathan Keogh identifies appointment, tenure, promotion, transfer, suspension and practical non -interference as the essential conditions of judicial independence. Masengu shows how contemporary threats operate through personal attacks, patronage, blocked appointments, violence, and subtle methods of pressure. Milej and Ogada 's Kenyan study demonstrates the same point through budget cuts, fiscal intimidation and public defiance of court orders. Where courts are financially starved or their orders openly ignored, autonomy becomes performative rather than real.[31]

The power of the purse is particularly dangerous because it allows political actors to deny responsibility. Budgets may be reduced under the guise of fiscal discipline rather than as a form of institutional punishment; however, the impact remains the same. Courts lacking resources cannot recruit staff, maintain facilities, implement new technology, offer competitive salaries, secure judicial officers, or reduce case backlogs. The same applies to remuneration and working conditions. Judges and magistrates are not corrupt simply because they are paid modestly. Still, a system that tolerates poor conditions, high staff turnover, weak security, and institutional neglect creates fertile ground for corruption and damages public perception of judicial integrity. As the Kenyan and regional literature demonstrate, perception is nearly as important as evidence, because public confidence in the courts can be eroded by repeated allegations even when individual cases are difficult to prove.[32]

The regional examples are disturbing. Masengu describes the vulnerability of judges in Zambia, The Gambia, Burundi, Swaziland, and Botswana, showing how institutional attacks can come not only from presidents and ministers but sometimes from chief justice's themselves. Milej and Ogada add a current Kenyan perspective of financial intimidation, blocked appointments, political abuse, violence against magistrates, and ignoring court orders. These examples show that independence is not maintained by laws alone. It needs a constitutional culture in which the executive follows court rulings, the legislature provides sufficient funding for the courts, and the public understands that criticism of the

31 30 K Ramjathan -Keogh 'The Importance of Promoting Judicial Independence in the Southern African Region' (2016) Goal 16 of the Sustainable Development Goals 10; T Masengu (note 2 above); T Milej & E Ogada (note 2 above).

32 K Ramjathan -Keogh (note 26 above); T Masengu (note 2 above); T Milej & E Ogada (note 2 above); M Malila (note 13 above).

courts can be robust without aiming to undermine their legitimacy. Ogada 's paper on authoritarianism is a serious reminder that when these conditions are not met, courts can become tools of political control instead of checks on it.[33]

Zimbabwe's own experience affirms this point. The Chief Justice's 2025 address, while celebrating institutional progress, openly acknowledges the importance of government support, logistical resources, staffing, and working conditions in enabling the judiciary to function effectively. The growth of resident magistrates' courts, the provision of vehicles, support staff, infrastructure, and the effort to extend the IECMS into the magistracy all rely on sustained funding. Financial autonomy, therefore, is not just about accounting arrangements; it concerns whether constitutional commitments can be realised in everyday practice. Powel l's study of the Office of the Chief Justice in South Africa emphasises a similar idea: without administrative and financial authority, the formal headship of the judiciary remains incomplete.[34]

At the same time, financial autonomy must be linked to ethics. The judiciary does not function in isolation when administering justice. Cameron 's emphasis on the independence of both the judiciary and the legal profession is relevant here. A court system cannot sustain credibility if advocates, lawyers, court officials, or intermediaries abuse litigants, baselessly scandalise courts, or undermine the administration of justice through dishonesty. Rogers demonstrates that the quality of advocacy influences the quality of adjudication, while Sutherland highlights that judicial reliance on the ethical conduct of legal practitioners is often underestimated. Therefore, judicial autonomy depends not only on government actions or inactions but also on the standards upheld by the profession appearing before the court bench.[35]

The implications are twofold. First, the defence of judicial autonomy must include a commitment to judicial education, professional ethics, and institutional self - discipline. This is where the 2018 and 2021 contributions to the South African Judicial Education Journals are useful. They clarify that judicial independence is sustained through training, awareness of social context, sound advocacy, case management, and principled reflection on the role of judges in a constitutional democracy. Second, autonomy must be defended publicly. Masipa 's speech on judicial independence in the new South Africa is particularly valuable because it

33 T Masengu (note 2 above); T Milej & E Ogada (note 2 above); EO Ogada (note 2 above).

34 L Malaba (note 5 above); CH Powell 'Judicial Independence and the Office of the Chief Justice' (2019) 9 *Constitutional Court Review* 497.

35 E Cameron (note 4 above); OL Rogers (note 23 above); R Sutherland (note 23 above).

highlights the multiple sources of improper influence —government, litigants, media, private power, and even senior colleagues. Judge s themselves must remain vigilant, but the wider legal community must also oppose attempts to normalise political abuse, fiscal intimidation, or professional misconduct.[36]

In this regard, the Zimbabwean thesis presented in this paper is even stronger, not weaker. A judiciary that conducts public interviews during appointments, adopts a judicially driven digital case management system, and connects both to public trust and multi -stakeholder participation is not engaging in superficial reform. It is addressing the real conditions under which autonomy either endures or collapses. This does not imply that the work is finished. It means that the blueprint is identifiable and normatively sound.[37]

A further implication extends from this point. Judicial autonomy should not be regarded as an elite institutional preference of judges for judges. Comparative evidence consistently indicates that courts are strongest when broader society develops a sense of ownership in the administration of justice. The Kenyan recommendations gathered by Milej and Ogada, therefore, warrant broader attention: enhance social ownership of the judiciary, strengthen accountability mechanisms, reform the JSC, and seriously uphold the separation of powers in fiscal practices. These recommendations are not exclusively Kenyan; they address a common African challenge. Malila 's interpretation of the African Commission 's jurisprudence affirms that rights protection requires not only courts but also institutional arrangements that enable the authority of t hose courts to be exercised effectively. In Zimbabwe 's context, multi -stakeholder participation is not merely optional; it is a practical way to transform judicial authority from a constitutional ideal into a tangible public trust. When citizens, lawyers, court users, professional bodies, and other branches of government view the judiciary as a shared constitutional inheritance, efforts to isolate or intimidate the courts become more politically challenging and costly.[38]

6. Conclusion

The African debate on judicial autonomy is often presented as if the choices are merely abstract: independence or accountability, autonomy or transformation, courts or democracy. The literature discussed in this article suggests a different perspective. The real quest ion is how to establish an institution capable of deciding cases impartially while also gaining the legitimacy needed to restrict

36 T Masipa (note 1 above); H Klug (note 23 above); DM Davis (note 23 above).

37 36 CM Fombad (note 5 above); L Malaba (note 5 above); M Mogoeng (note 4 above).

38 T Milej & E Ogada (note 2 above); M Malila (note 13 above); F Contini & R Mohr (note 20 above); M Mogoeng (note 4 above).

public and private power within a constitutional democracy. This involves far more than just formal guarantees. It requires transparent appointments, judicial administration, financial security, professional ethics, principled legal development, and public trust. Dennis Davis' 2021 restatement of transformative constitutionalism is pertinent here. A constitutional order does not change society through rhetoric alone. It demands institutions capable of translating constitutional commitments into everyday legal practice. Courts are vital to this process, not because they replace politics, but because they ensure that public and private power are exercised within normative limits. Judicial autonomy is therefore not a competing value alongside transformation; it is one of the institutional conditions that prevent transformation from being threatened by expedience, patronage, and coercion.

Viewed against that standard, the Zimbabwean experience deserves strong support. It does so not because Zimbabwe is free from threats to judicial independence, but because its recent reforms target the right constitutional issues. Public interviews for judicial positions enhance transparency, merit, and legitimacy at the entry point. The IECMS improves internal case management, accessibility, accountability, and administrative self -governance. The public framing of these reforms around confidence in the judiciary and multi -stakeholder participation rightly recognises that the authority of courts within a constitutional order relies as much on public trust as on legal foundations.

The comparative experience equally shows what remains essential. Appointments must continue to resist patronage; technology must be funded and expanded; court orders must be obeyed; the legal profession must uphold its own ethical responsibilities; and the political branches must accept in practice what constitutions declare in theory that the judiciary is not a subordinate department of the executive, but a coequal branch entrusted with guarding the law. Africa 's history provides many examples of what happens when that lesson is ignored. The Zimbabwean reforms discussed in this article offer a credible pathway away from that history. For that reason, they should be regarded as a serious and replicable blueprint for strengthening judicial autonomy across the continent.

HUMAN DIGNITY AS THE FOUNDATION OF RIGHTS: HON. MR JUSTICE LUKE MALABA'S JURISPRUDENTIAL LEGACY IN *S* V *C (A JUVENILE)* 2019 (2) ZLR 12 (CC)

PANASHE GARAINESU RONALD GOMBIRO[1]

Abstract

This article examines the contribution of Malaba CJ to the advancement of human rights in Zimbabwe by focusing on his reasoning in S v C (A juvenile) 2019 (2) ZLR 12 (CC). The article argues that the judgment is not only a decision on judicial corporal punishment – it serves as a constitutional affirmation of the central role of human dignity within the legal order. His Lordship's reasoning treated human dignity as a foundational value, the source of fundamental rights, an interpretative command and a limit on the penal power of the State. By striking down section 353 of the Criminal Procedure and Evidence Act [Chapter 9:07], the Constitutional Court affirmed that a child in conflict with the law remains a human being whose dignity, bodily integrity and psychological integrity, must be respected and protected. The article situates the judgment within sections 3, 44, 46, 51, 52, 53, 81 and 86 of the Constitution of Zimbabwe, 2013. It also examines the judgment's use of international human rights law, comparative constitutional law and South African jurisprudence. The article contends that S v C demonstrates a distinctive feature of Malaba CJ's legacy: the disciplined movement from constitutional text to value, from value to legal principle and from legal principle to institutional consequence. The judgment advanced human rights in Zimbabwe by insisting that punishment must remain humane, that legality must serve personhood and that constitutional interpretation must protect the human being even where the human being stands before the law as an offender.

Keywords: *human dignity; human rights; corporal punishment; juvenile justice; constitutional interpretation; Zimbabwe*.

1. Introduction

The retirement of Mr Justice Malaba invites a form of reflection that goes beyond biography. It invites consideration of the ideas that animated a judicial career of more than four decades and of the manner in which those ideas shaped the development of Zimbabwean law. This article responds to that call by focusing on

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human dignity as one of the most important themes in his constitutional jurisprudence.

The theme of human dignity is examined through the case of *S* v *C*.[2] The judgment concerned the constitutionality of section 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which authorised a sentence of moderate corporal punishment against a male person under the age of eighteen years who had been convicted of an offence. The High Court had declared the provision constitutionally invalid on the basis that it contravened section 53 of the Constitution of Zimbabwe, 2013 which provides that; "no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment." The Constitutional Court, in a judgment delivered by Malaba DCJ (as he then was), confirmed the order of invalidity, holding that judicial corporal punishment is, by its nature, intent and effect, an inhuman and degrading punishment within the meaning of section 53 of the Constitution of Zimbabwe, 2013.[3]

The immediate consequence of the judgment was the removal of judicial corporal punishment from the penal system. The deeper consequence was jurisprudential. The judgment transformed human dignity from a constitutional value of general application into a standard of legality for punishment. It gave content to the proposition that the State may punish an offender but may not use punishment to turn the offender into an object of State violence. In this respect, *S* v *C* serves as a judgment regarding the child, the offender and the limits of penal authority. It is also a judgment about the constitutional culture mandated by the Constitution of Zimbabwe, 2013.

The core question addressed herein is whether *S* v *C* may properly be understood as part of Chief Justice Malaba's legacy in the advancement of human rights. The article posits that it can, as the judgment illustrates rights adjudication that commences with the constitutional text, identifies the underlying value, applies that value to a concrete practice and ends by requiring institutional reform. This method reflects the role of the judiciary under a supreme Constitution: to ensure that the exercise of public power remains faithful to the human being for whose benefit the legal order exists.

The article is structured in ten parts. The first part sets out the constitutional question in *S* v *C*. The second part discusses the constitutional question in S v C while the third part examines the place of human dignity in the 2013 Constitution. The fourth part discusses the meaning of inhuman and degrading punishment.

2 *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC).
3 *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 19B.

The fifth part examines the child offender and the transformation of juvenile justice. The sixth part places the judgment within comparative and international human rights law, with particular attention to South African jurisprudence. The seventh part focuses on dignity, punishment and the limits of State Power. The eight part discusses His Lordship's reasoning on inhuman and degrading punishment, paying particular attention to the interpretive approach used in S v C. The ninth part considers the significance of *S* v *C* for the legacy of Chief Justice Malaba and for the future of human rights adjudication in Zimbabwe, and the final part is the conclusion.

2. The constitutional question in *S* v *C*

The facts of *S* v *C* were direct but constitutionally significant. A fifteen-year-old male juvenile had been convicted of rape by the magistrates' court and sentenced to receive three strokes with a rattan cane. The sentence was imposed under section 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The provision authorised a sentencing court to order moderate corporal punishment for a male person under the age of eighteen years. It also contained procedural safeguards, including the requirement of a medical examination and the involvement of designated officers in the administration of the punishment.[4]

The constitutional issue was whether the provision was inconsistent with section 53 of the Constitution of Zimbabwe, 2013. Section 53 protects every person from physical or psychological torture and from cruel, inhuman or degrading treatment or punishment. His Lordship treated the right as absolute and non-derogable. He also located the right in a broader constitutional structure made up of section 51, which protects inherent dignity, section 52(a), which protects bodily and psychological integrity and section 86(3), which prohibits limitation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.[5]

The structure of the judgment is important. The Court did not simply ask whether corporal punishment was undesirable or outdated. It asked whether the punishment, by its nature and effect, was compatible with the Constitution. That approach avoided a moral debate in the abstract. It placed the inquiry within the discipline of constitutional adjudication. The question was not whether a judge, parent or community might approve of corporal punishment. The question was whether a law that authorised a court to impose corporal punishment on a child could stand in a legal order founded on human dignity, freedom, equality, justice and the rule of law.

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4 *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 49B-D.

5 See ss 51, 52(a), 53 and 86(3) of the Constitution of Zimbabwe, 2013.

The judgment also emphasised the special character of confirmation proceedings. Section 175(1) of the Constitution provides that where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order lacks legal force unless enforced by the Constitutional Court. The Court therefore had to satisfy itself that the impugned legislation was inconsistent with the Constitution. His Lordship's insistence on a thorough investigation of constitutionality is part of the legacy of the judgment. It affirmed that constitutional invalidity is not produced by concession, sympathy or agreement among litigants. It is produced by an objective finding of inconsistency between a law and the Constitution.[6] The constitutional question was therefore framed with precision. The Court had to decide whether judicial corporal punishment imposed on a male juvenile in execution of a criminal sentence was inhuman or degrading punishment. The answer was framed not as an isolated conclusion but as the result of a value-based interpretation of the Constitution.

3. Human dignity in the architecture of the Constitution

The central contribution of *S* v *C* lies in its treatment of human dignity. His Lordship held that section 53 occupies a central place in the scheme of protection of fundamental human rights and freedoms in Chapter 4 of the Constitution. The reason is that the protection against inhuman or degrading punishment is connected to human dignity and to physical and mental integrity. These are not peripheral values. They are among the most fundamental values of the constitutional order.[7]

Section 3 of the Constitution of Zimbabwe, 2013 recognises human dignity as one of the values and principles on which Zimbabwe is founded. Section 51 provides that every person has inherent dignity in private and public life and the right to have that dignity respected and protected. Section 52(a) of the Constitution of Zimbabwe, 2013 provides that every person has the right to bodily and psychological integrity, including freedom from all forms of violence from public or private sources. Section 46 of the Constitution of Zimbabwe, 2013 requires courts, when interpreting Chapter 4, to give full effect to rights and freedoms and to promote the values of a democratic society based on openness, justice, human dignity, equality and freedom. In *S* v *C*, these provisions were not treated as separate fragments. They were treated as parts of a constitutional whole.

His Lordship's reasoning is notable for the proposition that human dignity gives rise to all fundamental rights and forms the essence of each of them. That proposition is consistent with a prominent line of comparative human rights

6 *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 52C.
7 *S* v *C* (*A Juvenile*) 2019 (2) ZLR 12 (CC).

scholarship. McCrudden has shown that dignity performs a central role in human rights adjudication, although its content may differ across jurisdictions.[8] Carozza responds by emphasising that human dignity and human rights are not lived as abstract concepts but acquire meaning in concrete human experience.[9] The importance of *S* v *C* is that it gives Zimbabwean content to that insight. Dignity was not used as a decorative word. It was used to decide whether the State could lawfully order the beating of a child.

The judgment also avoided a weakness often identified in dignity adjudication, namely the danger that dignity may become too general to guide legal analysis. O'Mahony has argued that there is difficulty in treating dignity as both the foundation of rights and a right in itself.[10] White's response is that dignity may still guide rights adjudication when properly understood.[11] The reasoning in *S* v *C* shows how that guidance can be achieved. The Court did not rely on dignity alone. It read dignity together with bodily integrity, psychological integrity, the prohibition of inhuman or degrading punishment and the non-derogability of the right. The value was therefore connected to text, context and institutional consequence.

The judgment further shows that dignity has both personal and institutional dimensions. At the personal level, it protects the offender against humiliation, objectification and violence. At the institutional level, it restrains the State from using public power in a manner that contradicts the values of the Constitution. Waldron has argued that law protects dignity not only by recognising rights but also by treating persons as bearers of status within a legal order.[12] In *S* v *C*, the child offender was treated as a rights-bearing person whose status as a human being survived conviction. This is a powerful statement in a criminal justice system that may be tempted to define a person entirely by the offence committed.

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8 C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) Vol 19 *European Journal of International Law* 655 at 655, https://academic.oup.com/ejil/article/19/4/655/349356 (Accessed 30 April 2026).

9 PG Carozza 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) Vol 19 *European Journal of International Law* 931 at 931, https://academic.oup.com/ejil/article/19/5/931/505548 (Accessed 28 April 2026).

10 C O'Mahony 'There is No Such Thing as a Right to Dignity' (2012) Vol 10 *International Journal of Constitutional Law* 551 at 551, https://academic.oup.com/icon/article/10/2/551/666082 (Accessed 30 April 2026).

11 EK White 'There is No Such Thing as a Right to Human Dignity: A Reply to Conor O'Mahony' (2012) Vol 10 *International Journal of Constitutional Law* 575 at 576 and 581, https://academic.oup.com/icon/article/10/2/575/666085 (Accessed 29 April 2026).

12 J Waldron 'How Law Protects Dignity' (2012) Vol 71 *Cambridge Law Journal* 200 at 201 and 210, https://doi.org/10.1017/S0008197312000256 (Accessed 29 April 2026).

The Court's treatment of dignity also reflects a communitarian understanding. His Lordship observed that a human being is a social person and that dignity has reciprocal implications. A person must respect himself or herself and must accord others equal respect. Others must in turn respect that person's inherent dignity. The point is not merely philosophical. It explains why the State cannot teach respect for law by authorising a practice that humiliates the body and personhood of a child. The State becomes, by its own example, a teacher of constitutional values. If the State uses violence as moral correction, it weakens the culture of non-violence which the Constitution seeks to establish.

This aspect of the judgment resonates with Henry's typology of dignity as personal integrity, equality, liberty, institutional status and collective virtue.[13] It also resonates with Glensy's observation that courts often invoke dignity without clearly identifying its content.[14] *S* v *C* is different. It identifies the relevant content of dignity: the person must not be treated as an object, the body must not be used as an instrument of State punishment and punishment must not humiliate the offender in a manner that destroys self-respect.

4. The meaning of inhuman and degrading punishment

The next step in His Lordship's reasoning was the definition of inhuman and degrading punishment. The judgment drew from earlier authority in Zimbabwe, especially *S* v *Ncube & Ors* and *S* v *A Juvenile*.[15] It held that punishment is inhuman when it involves brutality, cruelty or a want of humane feeling. It is degrading when it lowers the person in self-esteem, exposes the person to disrespect or produces fear, anguish or inferiority.[16]

The reasoning is important because it focuses on the nature and effect of punishment. A penalty may violate section 53 because of what it is, because of how it is administered or because of what it does to the person subjected to it. Judicial corporal punishment failed on all three levels. It involved the deliberate use of physical and mental violence. It required the body of the child to be placed under the control of another person. It created fear and humiliation before the stroke was even administered. It reduced the child to an object of official force.

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13 LM Henry 'The Jurisprudence of Dignity' (2011) Vol 160 *University of Pennsylvania Law Review* 169 at 172 and 202, https://ssrn.com/abstract=1928768 (Accessed 28 April 2026).

14 RD Glensy 'The Right to Dignity' (2011) Vol 43 *Columbia Human Rights Law Review* 65 at 93, https://ssrn.com/abstract=1775144 (Accessed 28 April 2026).

15 See *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 28D–29H.

16 *S* v *Ncube & Ors* 1987 (2) ZLR 246 (S) at 267B-G; *S* v *A Juvenile* 1989 (2) ZLR 61 (S) at 73F-G.

His Lordship's reasoning on the anticipation of pain is particularly important. Corporal punishment was not treated as the single moment of physical contact between cane and body. It was treated as a process, including certification, waiting, restraint, helplessness, anticipation and pain.[17] The Constitution protects bodily integrity and psychological integrity. It therefore protects the person from both the physical stroke and the mental suffering produced by the knowledge that the stroke is coming.

This reasoning is consistent with international human rights law. The Human Rights Committee has stated in General Comment No 20[18] that the prohibition of cruel, inhuman or degrading treatment or punishment extends not only to acts that cause physical pain but also to acts that cause mental suffering. The Committee also made clear that the prohibition extends to corporal punishment as a punishment for crime.[19] The Committee on the Rights of the Child similarly defines corporal punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.[20]

The judgment's insistence that the precautionary measures attached to corporal punishment do not save the punishment is another significant aspect of the reasoning.[21] Section 353 attempted to regulate corporal punishment by requiring medical certification and prescribed procedures. His Lordship held that these safeguards did not change the nature of the punishment. The point is central. A constitutionally impermissible punishment does not become permissible because the State administers it carefully. The evil lies in the authorised use of violence to inflict pain and humiliation as punishment.

This approach accords with the South African Constitutional Court's reasoning in *S* v *Williams and Ors*. Langa J held that punishment must be assessed in the light of the values underlying the Constitution and that judicial whipping, by deliberate infliction of physical pain, is a direct invasion of human dignity.[22] *S* v *C* accepted

17 See *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 31B–C.

18 UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, https://www.refworld.org/legal/general/cescr/2009/68520 [accessed 04 May 2026].

19 UN Human Rights Committee General Comment No 20, Article 7: Prohibition of Torture, or Other Cruel Inhuman or Degrading Treatment or Punishment, para 5.

20 Committee on the Rights of the Child General Comment No 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel and Other Cruel Degrading Forms of Punishment, para 11.

21 See *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 32A.

22 *S* v *Williams and Ors* 1995 (3) SA 632 (CC) at 644C-645C.

the same essential proposition but developed it within Zimbabwe's constitutional text, especially sections 51, 52 and 53. The judgment, therefore, forms part of a regional constitutional movement away from penal practices that normalise the physical humiliation of children.

The Court also rejected the argument that corporal punishment could be justified because it kept children out of prison.[23] His Lordship held that an unauthorised means cannot be justified by a legitimate objective. This was a decisive statement of constitutional principle. The State may pursue legitimate penal objectives, including deterrence, rehabilitation and accountability. It may not pursue those objectives through punishment that violates dignity and physical integrity. The child offender may not be beaten in order to avoid imprisonment. Constitutional morality does not permit the exchange of one form of rights violation for another.

5. The child offender and the transformation of juvenile justice

The judgment's concern with the child offender is one of its most important contributions to human rights law. The child in *S* v *C* had been convicted of a serious offence. The seriousness of the offence did not remove the protection of the Constitution. His Lordship made the point clear that a person does not lose human dignity because of the gravity of an offence. Even the offender remains a human being entitled to equal respect and protection.

The importance of this point cannot be overstated. Criminal law often invites a narrowing of the person into the offence. The offender becomes rape accused, thief, murderer or delinquent. *S* v *C* resists that reduction. It recognises the wrongfulness of the offence while refusing to erase the humanity of the offender. This is not leniency. It is constitutional discipline. The State may punish wrongdoing but must punish in a manner consistent with the continuing dignity of the person punished. The same principle was affirmed in *S v Makwanyane* 1995 (3) SA 391 (CC), where the Court emphasised that human dignity is a foundational constitutional value and that even persons convicted of the most serious crimes cannot be deprived of their inherent dignity by the State. Punishment, therefore, must remain consistent with respect for the humanity of the offender.

The judgment is also significant in the manner in which it draws on child rights norms to reshape sentencing philosophy. Section 81(2) of the Constitution elevates the best interests of the child to a paramount consideration in all matters concerning the child. This constitutional injunction finds further expression in both international and regional human rights instruments. Article 3(1) of the

23 See *S* v *C (A Juvenile)* 2019 (2) ZLR 12 (CC).

Convention on the Rights of the Child requires that the best interests of the child be a primary consideration in all actions concerning children, while Article 37(b) emphasises that detention must be employed only as a measure of last resort and for the shortest appropriate period. In addition, Article 40 of the Convention situates juvenile justice within a rehabilitative framework, requiring that the treatment of child offenders promotes dignity, worth and reintegration into society. A similar normative architecture is reflected in the African Charter on the Rights and Welfare of the Child, particularly Article 4(1), which entrenches the best interest's principle and Article 17, which underscores rehabilitation and reintegration as central objectives of the juvenile justice system and insists on deprivation of liberty only as a measure of last resort. Read together, these instruments provide a coherent normative foundation upon which the court builds a sentencing philosophy oriented towards rehabilitation, reintegration and proportionality rather than retribution. His Lordship did not use these instruments as external ornaments. He used them to develop a sentencing philosophy that gives priority to rehabilitation, reintegration and proportionality.

This approach is supported by scholarly work on the dignity and best interests of children. Freeman argues that the corporal punishment of children must be understood through dignity and the best interest's principle and concludes that dignity is central to the international law of child protection.[24] Thus, he made the following comment:

> To emphasize 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 recognize this in all sorts of areas, including American constitutional law. We must now recognize dignity's significance for children and for the corporal-punishment debate.[25]

Dixon and Nussbaum, writing from the capabilities approach, argue that children may require special priority because of development, vulnerability and future functioning.[26] These insights support the direction of *S* v *C*. The punishment of children cannot be evaluated only by reference to retribution. It must also be assessed against the child's capacity for rehabilitation, the child's developmental stage and the obligation of the State to protect the child from violence.

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24 MDA Freeman 'Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children' (2010) Vol 73 *Law and Contemporary Problems* 211 at 251, https://scholarship.law.duke.edu/lcp/vol73/iss2/8. (Accessed 30 April 2026).

25 Freeman (n 24 above) 251.

26 R Dixon & MC Nussbaum 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) Vol 97 *Cornell Law Review* 549 at 587, https://scholarship.law.cornell.edu/clr/vol97/iss3/4 (Accessed 30 April 2026).

The judgment also engaged with sentencing alternatives. It examined imprisonment, fines, community service, postponement of sentence, suspension of sentence and options under the juvenile justice system. This part of the judgment is sometimes overlooked, yet it is central to the legacy of the decision. The Court did not merely strike down corporal punishment and leave magistrates without guidance. It identified lawful alternatives and urged the development of rehabilitative infrastructure. It therefore converted a rights decision into an institutional programme for juvenile justice.

The discussion of community service is especially important. The judgment recognised community service as a sentence that can combine accountability, rehabilitation and social reintegration.[27] It allows the offender to remain within the community while performing work for the benefit of society. It avoids the harm of imprisonment and the violence of corporal punishment. It also speaks to the constitutional obligation to develop humane forms of accountability. In this respect, *S* v *C* is not an abolitionist judgment in the weak sense of removing a punishment. It is a constructive judgment. It requires the State to build a more humane penal order.

Research on physical punishment reinforces the importance of this shift. Durrant and Ensom, reviewing two decades of research, record an international shift in perspectives on physical punishment and note the consistent association between physical punishment and negative child outcomes.[28] Gershoff and Grogan-Kaylor, in a meta-analysis of spanking and child outcomes, found that spanking was associated with increased risk of detrimental outcomes.[29] Such empirical literature does not decide the constitutional question by itself. It does, however, support the judgment's conclusion that the State should not preserve physical punishment as a tool of correction where lawful, humane and rehabilitative alternatives exist. The judgment further locates juvenile justice within a broader constitutional culture. The child offender is not simply a subject of punishment. He or she is a developing person. The law must therefore respond to wrongdoing in a way that preserves the possibility of future citizenship. His

27 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at p 47A-G.

28 J Durrant & R Ensom 'Physical Punishment of Children: Lessons from 20 Years of Research' (2012) Vol 184 *Canadian Medical Association Journal* 1373 at 1373-1374, https://www.cmaj.ca/content/184/12/1373 (Accessed on 28 April 2026).

29 ET Gershoff & A Grogan-Kaylor 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) Vol 30 *Journal of Family Psychology* 453 at 453 and 463, https://pubmed.ncbi.nlm.nih.gov/27055181 (Accessed 30 April 2026).

Lordship's reasoning treats rehabilitation not as mercy but as an implication of human dignity.

6. Comparative and international law in the reasoning of the court

A notable feature of *S* v *C* is its use of comparative and international law. Section 46 of the Constitution of Zimbabwe, 2013 requires a court interpreting Chapter 4 to take into account international law and all treaties and conventions to which Zimbabwe is a party. It also permits consideration of foreign law. His Lordship applied this provision with care. The judgment drew from international instruments, treaty bodies, foreign courts and regional constitutional jurisprudence. The comparative material was not used to replace Zimbabwean law. It was used to illuminate the meaning of Zimbabwe's Constitution.

The judgment referred to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. These instruments reinforce the link between human dignity, physical integrity and the prohibition of cruel, inhuman or degrading punishment. Their use in the judgment reflects the understanding that the 2013 Constitution belongs to a wider human rights tradition while remaining rooted in the text and values of Zimbabwean constitutional law.

The South African cases are particularly instructive. In *S v Makwanyane & Anor supra*, the Constitutional Court of South Africa held the death penalty unconstitutional. O'Regan J stated that the right to dignity acknowledges the intrinsic worth of human beings and that human beings are entitled to be treated as worthy of respect and concern.[30] That reasoning is echoed in *S v C*. The offender does not cease to be worthy of respect and concern because of conviction. Punishment must therefore preserve, not annihilate, the human standing of the offender.

In *S* v *Williams and Ors S v Williams & Ors* 1995 (3) SA 632 (CC) at 644C-645C., the South African Constitutional Court considered the constitutionality of juvenile whipping. The Court held that corporal punishment was inconsistent with the values underlying the Constitution. Langa J emphasised that judicial whipping involved deliberate infliction of physical pain and offended human dignity.[31] Similarly, *S* v *C* draws strength from that reasoning but develops the point further through the structure of the 2013 Constitution. The Zimbabwean Constitution expressly protects inherent dignity, bodily and psychological integrity and the non-

30 *S v Makwanyane & Anor* 1995 (3) SA 391 (CC) at para 328.
31 *S v Williams & Ors* 1995 (3) SA 632 (CC) at 644C-645C.

derogable right not to be subjected to cruel, inhuman or degrading punishment. The textual foundation is therefore strong.

The judgment also drew from *Tyrer* v *United Kingdom*, (1979-80) 2 EHRR 1 where the European Court of Human Rights held that judicial corporal punishment of a juvenile offender amounted to degrading punishment. The Court in *S v C* treated *Tyrer* case as part of an international convergence against judicial corporal punishment. It also relied on Namibian authority, especially *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*, where the Supreme Court of Namibia held that corporal punishment by organs of State violated human dignity. These authorities supported the view that corporal punishment is not merely a local sentencing practice but a practice with constitutional significance across rights-based legal systems.

This comparative method is consistent with Carozza's view that dignity can serve as a common currency of transnational judicial dialogue while still allowing local constitutional specificity.[32] It is also consistent with Horák's functional account of dignity in legal argumentation, which treats dignity as capable of operating as a value, a right and a source of rights when used carefully.[33] His Lordship's reasoning reflects this careful use. The judgment did not import a foreign rule. It used comparative jurisprudence to confirm a conclusion reached from Zimbabwe's constitutional text.

The role of comparative law in the judgment also reflects judicial confidence. The Court did not treat foreign law as controlling. It treated it as a source of illumination. This is the correct posture under section 46. Foreign authority may assist, but the decision must remain one of Zimbabwean constitutional law. The court in *S* v *C* therefore offers a model of comparative reasoning that is open without being dependent and principled without being insular.

7. Dignity, punishment and the limits of state power

The deepest issue in *S* v *C* is the relationship between dignity and State power. The State has power to create crimes and prescribe punishments. That power is necessary for social order. It is also dangerous if not restrained by constitutional values. His Lordship's reasoning insists that the Constitution places limits on how the State may punish.

32 Carozza (n 8 above) 933-934.

33 F Horák 'Human Dignity in Legal Argumentation: A Functional Perspective' (2022) Vol 18 *European Constitutional Law* Review 237 at 241, https://doi.org/10.1017/S1574019622000185 (Accessed 30 April 2026).

The judgment is grounded in the proposition that the State exists for the benefit of the human being and not the human being for the benefit of the State.[34] The proposition is a rule of constitutional ordering. It means that public power must be justified by reference to the protection of the person, not the humiliation of the person. Penal power is therefore subject to constitutional discipline.

This is where the judgment speaks most clearly to the advancement of human rights. Human rights are not advanced only when courts protect popular claimants or sympathetic victims. They are also advanced when courts protect those who stand at the margins of public sympathy. The child offender in *S* v *C* had committed a serious offence. The Court nevertheless insisted that his dignity was inviolable. That insistence strengthens the entire constitutional order, because a legal system that protects dignity only when the claimant is popular does not protect dignity as a principle.

The judgment also rejects a purely utilitarian view of punishment. Corporal punishment was defended partly on the basis that it might deter wrongdoing, avoid imprisonment or provide swift correction. His Lordship held that even legitimate goals cannot justify means that violate dignity.[35] This is an essential element of constitutional governance. A rights-based legal order does not permit the State to achieve public objectives by constitutionally prohibited methods.

Rao has warned that dignity can be used and abused in constitutional law when it becomes a free-standing justification for judicial preference.[36] *S* v *C* avoids that danger. It grounds dignity in the constitutional text and in the concrete effect of corporal punishment. The Court did not say merely that corporal punishment feels undignified. It explained why the practice violates dignity for several reasons, including that it uses institutionalised violence, inflicts physical and mental pain, humiliates the person, reduces the person to an object and contradicts the constitutional prohibition of violence.

The judgment also answers Macklin's critique that dignity may add little beyond autonomy or respect for persons.[37] In *S* v *C*, dignity adds something specific. A child may not be able to assert autonomy in the same way as an adult. A child offender may also be under the lawful authority of the court. Dignity nevertheless

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34 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 26A–B.

35 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 40A–C.

36 N Rao 'On the Use and Abuse of Dignity in Constitutional Law' (2008) Vol 14 *Columbia Journal of European Law* 201 at 208 and 213, https://ssrn.com/abstract=1144856 (Accessed on 28 April 2026).

37 R Macklin 'Dignity is a Useless Concept' (2003) Vol 327 *British Medical Journal* 1419 at 1419, https://pubmed.ncbi.nlm.nih.gov/14684633 (Accessed on 29 April 2026).

provides protection. It operates as a status-based principle, grounded in the fact of being human, which prevents the State from treating the child as an object of punishment. The protection does not depend on the child's autonomy or consent. It depends on the child's humanity.

The judgment, therefore, demonstrates the practical force of dignity in contexts where autonomy is limited. Children, prisoners, accused persons and convicted offenders are precisely the persons who need dignity as a constitutional guarantee. They may be subject to lawful control, but they may not be dehumanised. The law may restrain them. It may not degrade them.

8. Malaba CJ's interpretative approach in *S* v *C*

The importance of *S* v *C* to the legacy of Mr Justice Malaba lies not only in the outcome but in the method of interpretation. His Lordship's reasoning reflects a disciplined constitutional method of interpretation. It begins with the text of the Constitution. It identifies the foundational values that inform the text. It interprets the right purposively. It considers international and comparative law where constitutionally permitted.[38] It applies the right to the practice under review. It then draws the institutional consequences of invalidity.

The method is visible in the movement from section 53 to sections 51, 52, 46, 81 and 86. His Lordship did not interpret section 53 in isolation.[39] He treated the Constitution as a coherent instrument. The prohibition of inhuman or degrading punishment was therefore understood in relation to dignity, bodily and psychological integrity, child protection, non-derogability and the interpretative duty of courts.[40] This is a central feature of strong constitutional adjudication. It prevents narrow literalism and ensures that provisions that give human rights are read in the light of the values they are designed to protect.

His Lordship's reasoning also demonstrates the importance of legal certainty. The discussion of confirmation proceedings made clear that a declaration of constitutional invalidity must be precise, justified and confirmed through the proper constitutional process.[41] This protects the authority of the Court and the separation between the Judiciary, the Legislature and the Executive. In this

38 See s 46(1) of the Constitution of Zimbabwe, 2013, which requires a court interpreting Chapter 4 to give full effect to the rights and freedoms in the Declaration of Rights, promote the values of a democratic society, take into account international law and all relevant constitutional provisions and consider relevant foreign law where appropriate.

39 See S v C (A Juvenile) 2019 (2) ZLR 12 (CC) at 24E–28C and 42H–43C.

40 Ibid.

41 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 19C –20H.

sense, *S* v *C* is not only a human rights judgment. It is also a judgment about institutional responsibility.

The judgment further shows an approach to comparative law that is consistent with Zimbabwe's constitutional framework. His Lordship drew from South African, Namibian, European and international materials.[42] The use of those materials was careful and targeted. They were used to confirm the meaning of dignity, to show convergence against judicial corporal punishment and to assist in the assessment of punishment under section 53 of the Constitution of Zimbabwe, 2013. The result was not imitation. It was constitutional reasoning enriched by comparative insight.

The judgment also reflects a judicial style associated with Mr Justice Malaba, namely, the insistence on the legal consequence of constitutional principles. It does not remain at the level of moral statement. It applies the remedial powers of the Constitutional Court in a manner consistent with constitutional supremacy and the responsibility of courts to give effect to the Constitution.[43] Once the Court found that section 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was inconsistent with section 53 of the Constitution, the consequence was not left abstract. The Court confirmed the order of constitutional invalidity, fixed the date from which the declaration would take effect, struck down the impugned provision, prohibited the future imposition of moderate corporal punishment on male juveniles and extended that prohibition to sentences already imposed but not yet executed.[44] The judgment also directed attention to alternative sentencing mechanisms available within the criminal justice and juvenile justice systems.[45] It therefore moved from principle to remedy and from remedy to institutional adjustment.

The legacy reflected in *S* v *C* is, therefore, both jurisprudential and institutional. It is jurisprudential because it developed the meaning of dignity, inhuman punishment and child-sensitive sentencing. It is institutional because it required courts, prosecutors, magistrates, correctional authorities and the State to abandon an old penal practice and to rely on constitutionally acceptable alternatives. The judgment advanced human rights by changing both legal doctrine and legal practice.

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42 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 26B, 26D–G and 32B – 35H.
43 See s 2(1) and s 175(6) of the Constitution of Zimbabwe, 2013.
44 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 53A-C.
45 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 44F.

9. The contribution of *S* v *C* to Human Rights law in Zimbabwe

The contribution of *S* v *C* to human rights law in Zimbabwe may be stated in four propositions. First, the judgment affirms that human dignity is not an ornamental value. It is a legal standard with operative constitutional force. A law or practice that invades human dignity is not merely objectionable as a matter of morality. It may be declared unconstitutional where it is inconsistent with the rights and values protected by the Constitution. In this respect, the judgment gives practical content to s 3 of the Constitution, which recognises human dignity as a founding value, and to s 51, which protects the right of every person to have their dignity respected and protected.[46]

Second, the judgment affirms the indivisibility of dignity, bodily integrity and psychological integrity. The Court understood punishment as an experience of the whole person.[47] It therefore protected the body and mind of the child offender. This is important for future cases involving detention, prison conditions, police conduct, sentencing, school discipline and all other contexts in which authority is exercised over vulnerable persons.

Third, the judgment affirms that the rights of children in conflict with the law are part of human rights law. The fact of criminal offending does not remove the child from the protection of section 81 of the Constitution of Zimbabwe, 2013. The child remains a developing person entitled to special protection, rehabilitation and reintegration.[48] This principle should shape the future of juvenile justice in Zimbabwe. Lastly, the judgment affirms that international and comparative law may be used in a manner that strengthens domestic constitutional interpretation. The use of South African case law, Namibian case law, European authority and treaty body materials shows the value of legal dialogue.[49] It also shows that Zimbabwean constitutional law can participate in global human rights reasoning while retaining its own textual foundation. These contributions explain why *S* v *C* is a fitting case through which to reflect on the legacy of Mr Justice Malaba. The judgment does not merely record the invalidity of a statutory provision. It states a constitutional ethic, that is, the dignity of the person must survive punishment, public condemnation and institutional convenience.

10. Conclusion

S v *C* stands as a significant human rights judgment in the constitutional law of Zimbabwe. It confirms that the 2013 Constitution requires punishment to be

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46 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 24C – F.
47 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 24E.
48 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 42H – 43F.
49 See *S v C (A Juvenile)* 2019 (2) ZLR 12 (CC) at 26B and the pages that follow and 32D–39F.

humane, rights to be interpreted purposively and children in conflict with the law to be treated as persons with inherent dignity. It rejects the idea that pain and humiliation may be used as instruments of lawful correction. It insists that the State must punish within the limits of civilised standards and constitutional values.

The judgment also reveals an important aspect of Mr Justice Malaba's judicial legacy. His Lordship's reasoning shows that constitutional adjudication must be anchored in text but animated by value. It must be open to international and comparative law but faithful to domestic constitutional structure. It must protect the individual while respecting institutional roles. Above all, it must place the human being at the centre of legal analysis.

In *S* v *C*, the human being before the Court was not an ideal claimant. He was a child offender convicted of a serious crime. The decision to protect his dignity was therefore a strong test of constitutional commitment. The Court passed that test by holding that even the offender remains a person whose dignity, body and mind may not be degraded by the State. That is the enduring contribution of the judgment.

The advancement of human rights often depends on such moments. A court is called upon to decide whether the Constitution protects only those who attract sympathy or whether it protects every person because every person is human. *S* v *C* chose the latter path. In doing so, it gave lasting effect to the promise of human dignity in the Constitution and secured a place for Malaba CJ's reasoning in the development of rights-based constitutionalism in Zimbabwe.

CONSTITUTIONAL COURT DECISIONS AND THE PROTECTION OF VULNERABLE POPULATIONS: EMPHASIZING CHILDREN'S RIGHTS IN ZIMBABWE

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Abstract

This paper examines the evolution of human rights protections under the leadership of Chief Justice Malaba in Zimbabwe, with a particular focus on the safeguarding of children's fundamental rights. Throughout his tenure, Chief Justice Malaba has played a pivotal role in shaping jurisprudence that enhances the protection of vulnerable populations, especially children. The analysis centres on two landmark Constitutional Court judgments authored by him: the Mudzuru and Chokuramba cases. In the Mudzuru case, the Court declared the practice of child marriage unconstitutional, emphasizing the importance of protecting children's rights to education, health and development. Similarly, in the Chokuramba case, the Court outlawed corporal punishment in schools, reinforcing the obligation to uphold children's dignity and bodily integrity. These rulings conform with international obligations provided for in international human rights instruments to which Zimbabwe is a signatory. They marked significant milestones in Zimbabwe's human rights landscape, signalling a progressive shift toward stronger legal safeguards for children and a rejection of traditional practices that violate their rights. The paper explores how Chief Justice Malaba's jurisprudence has contributed to the entrenchment of fundamental rights, aligning Zimbabwe's legal framework with international human rights standards. It also discusses the broader implications of these judgments for the protection of children's rights within the constitutional and societal context of Zimbabwe. Furthermore, the study assesses the impact of these decisions on legislative reforms and societal attitudes toward children's rights. Overall, this analysis highlights Chief Justice Malaba's influential role in advancing human rights

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jurisprudence, especially in outlawing practices that undermine the well-being and dignity of children, thereby fostering a more just and rights-respecting society in Zimbabwe.

Key words: *Children's Rights, Constitutional Jurisprudence, Transformative Constitutionalism, Child Marriage, Corporal Punishment*

1. Introduction

The relationship between constitutional adjudication and the protection of human rights is nowhere more consequential than in societies navigating the tension between deeply entrenched cultural traditions and the imperatives of a progressive constitutional order. In Zimbabwe, this tension has found its most illuminating expression in the jurisprudence of the Constitutional Court, particularly in cases concerning the rights and welfare of children. As one of the most vulnerable segments of any society, children depend disproportionately on the state and its institutions – including its courts – to give practical meaning to the rights enshrined in law. The extent to which a constitutional court is willing to confront practices that violate children's rights, even when those practices are deeply rooted in custom and tradition, is therefore a meaningful indicator of a legal system's commitment to transformative constitutionalism.

The Constitution of Zimbabwe, 2013 (the Constitution) represented a foundational moment in the country's human rights journey. The Constitution introduced a comprehensive Declaration of Rights, one of the most elaborate in the African region, which explicitly recognises children's rights as a distinct and enforceable category of fundamental rights. Section 81 of the Constitution of Zimbabwe, 2013 sets out with considerable specificity the rights of every child – including the right to be protected from economic and sexual exploitation, child labour, and maltreatment, neglect, and abuse. Critically, it guarantees children the right to education and health, parental care and family life, and to be protected against practices that are injurious to their well-being. These constitutional guarantees did not emerge in a vacuum. They were shaped by, and must be read alongside, Zimbabwe's international human rights obligations, including those arising from the United Nations Convention on the Rights of the Child (CRC),[4] the African Charter on the Rights and Welfare of the Child (ACRWC),[5] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[6] all of which Zimbabwe has ratified.

4 United Nations Convention on the Rights of the Child 1989 (CRC).
5 African Charter on the Rights and Welfare of the Child 1990 (ACRWC).
6 United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).

Yet, the existence of rights on paper, however comprehensively drafted, does not by itself produce a rights-respecting society. The task of translating constitutional text into lived reality falls in large measure to the judiciary. It is in this context that the role of Chief Justice Luke Malaba assumes historical significance. During his tenure as Chief Justice of Zimbabwe and as a judge of the Constitutional Court, Chief Justice Malaba authored a series of landmark judgments that departed from passive judicial restraint and instead embraced an active, purposive approach to constitutional interpretation. Guided by the principle that the Constitution must be read generously and in a manner that gives full effect to the rights it guarantees, his judgments have confronted some of the most entrenched and harmful practices affecting children in Zimbabwe.

This paper examines two such landmark judgments: *Loveness Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Others*[7] and *The State v Willard Chokuramba and Others.*[8] These cases, taken together, represent a watershed moment in Zimbabwe's constitutional jurisprudence. In *Mudzuru*, the Constitutional Court declared the practice of child marriage to be unconstitutional, holding that permitting girls below the age of eighteen to marry violated their constitutional rights to equality, dignity, education, health, and freedom from discrimination. The judgment struck down legislative provisions in the Marriage Act and the Customary Marriages Act that had previously allowed girls to enter into marriages before attaining the age of majority, and in doing so, brought Zimbabwe into alignment with international standards that categorically prohibit child marriage. In *Chokuramba*, the Court confronted the longstanding and culturally normalised practice of corporal punishment in schools, holding that it constituted a violation of children's rights to dignity, equality, and freedom from cruel, inhuman, and degrading treatment. The Court declared statutory provisions that had authorised corporal punishment in educational institutions unconstitutional, signalling an unambiguous commitment to upholding the bodily integrity of children in all institutional settings.

The significance of these decisions extends well beyond their immediate legal effects. Both judgments engaged directly with the challenge of reconciling constitutional rights with cultural and traditional practices that have historically been justified based on community norms, parental authority, or disciplinary necessity. In navigating these tensions, Chief Justice Malaba's approach reflects a broader jurisprudential philosophy – one that is unwilling to permit cultural relativism to dilute the universality of children's rights, and one that treats children not as objects of adult discretion but as rights-bearing subjects deserving the full protection of the law. This approach is consistent with the transformative

7 CCZ 12/15.
8 CCZ 10/19.

aspirations of Zimbabwe's 2013 Constitution, which was adopted precisely to break from a past characterised by systemic violations of fundamental rights.

Methodologically, this paper adopts a doctrinal approach. It analyses the constitutional provisions, statutory frameworks, and judicial reasoning underpinning both decisions, and situates them within the broader landscape of international human rights law. It further examines the legislative responses to these decisions and considers the extent to which they have contributed to shifting societal attitudes toward children's rights in Zimbabwe. In doing so, the paper draws on the judgments themselves, the relevant constitutional provisions, international treaty obligations and academic commentary.

The paper proceeds as follows: section two provides an overview of the constitutional and international human rights framework that governs children's rights in Zimbabwe, establishing the normative foundation against which both decisions are assessed. Section three examines the *Mudzuru* case in depth, tracing its factual background, the legal issues it raised, the Court's reasoning, and its implications. Section four provides a corresponding analysis of the *Chokuramba* case. Section five considers the broader legacy of Chief Justice Malaba's jurisprudence, including its implications for legislative reform, the relationship between law and culture, and the evolving landscape of children's rights in Zimbabwe. Section six offers concluding reflections on the role of constitutional courts in advancing the rights of vulnerable populations, with reference to the lessons that Zimbabwe's experience offers for the broader African human rights project. Ultimately, this paper argues that the *Mudzuru* and *Chokuramba* decisions stand as enduring contributions to Zimbabwe's constitutional order and to the global cause of children's rights. They demonstrate that constitutional courts, when animated by a purposive and rights-centred interpretive philosophy, can play a decisive role in dismantling practices that perpetuate harm and inequality – and building a more just and rights-respecting society case by case.

2. The International and Constitutional Human Rights Framework Governing Children's Rights in Zimbabwe

The concept of children’s rights has, in the past three decades, received a greater amount of attention in the legal spheres. This has led to the development of initiative at international, regional and national levels to address children’s rights violations. This paradigm shift in international law in favour of dedicated protection for independent children’s rights has played out at the level of national constitutional law. It has become increasingly common for national constitutions to include dedicated provisions of children’s rights in their constitutions. Such

constitutionalisation of children's rights legitimizes and elevates children's rights and makes them enforceable, as any other rights in the Constitution.

2.1 International Human Rights Framework Governing Children's Rights

The Geneva Declaration of Human Rights of 1924 (the Declaration) was the first instrument to provide for the rights of the child. It established five basic principles that created obligations for children. This Declaration was followed by the UN Declaration on the Rights of the Child of 1959 (the UN Declaration) which later informed the development of the rights of the child.[9] The UN Convention on the Rights of the Child (CRC) was adopted in 1989 as the first binding instrument on children's rights. It is the main and widely ratified international instrument which makes a global historical commitment to the protection of children worldwide.[10] It covers a wide range of rights, including civil, political, economic, social and cultural rights. The CRC provides for obligations on State parties fulfilment of children's rights. It obliges State Parties to, "undertake all appropriate legislative, administrative and all other measures for the implementation of the rights" in the CRC.[11]

At regional level, the African Charter on the Rights and Welfare of the Child (1990) ACRWC was adopted for the protection of children's rights in Africa.[12] Like the CRC, it covers civil, political, economic, social and cultural rights. It obliges State Parties to "undertake necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt legislative and other measures as may be necessary to give effect to the Charter."[13] Both the CRC and the ACRWC lay down major principles that have to be observed in the interpretation of children's rights. These are the best interests of the child, the rights to life, survival and development, non-discrimination and the participation of the child in matters that concern him or her.

2.1.1. The Place of International Human Rights in Domestic Spheres

To have impact in individual states, international treaties signed by states should be given effect within the national jurisdictions of the state parties so that they are justiciable within the country's jurisdiction.[14] Giving effect to international treaties

9 The UN Declaration contains 10 principles which mankind owes to children including the right to equality, name and nationality, adequate nutrition, housing and medical services, protection against all forms of neglect, cruelty and exploitation etc.

10 Zimbabwe ratified the CRC on 11 September 1990.

11 Article 4 of the CRC.

12 Zimbabwe ratified the CRC on 19 January 1995.

13 Article 1 (1) of the ACRWC.

14 CM Fombad 'Internationalization of Constitutional Law and Constitutionalism in Africa (2012) Vol 60 *American Journal of Comparative Law* 439-473 at 447.

in individual states depends on whether monism or dualism applies.[15] Within the monist approach, international law and national or domestic law, "comprise one single legal order within the nation's legal system."[16] In countries where monism is applied, international law is superior to national law and overrides any contrary domestic laws and takes precedence in the event of a conflict between the two.[17] As such, among monist states, international law is directly applicable in the national legal system with no need to enact national laws to give effect to international laws.[18]

On the other hand, countries which apply dualism in their approach to international law, perceive "international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character."[19] Under the dualist approach, for international law to be applicable in a country's legal system,

> it must be received through domestic legislative measures, the effect of which is to transform the international rule into a national one. It is only after such a transformation that individuals within the State may benefit from or rely on the international (now national) law.[20]

As such, international law must be incorporated into domestic law before creating justiciable rights which are enforceable in the domestic courts.[21] Zimbabwe follows both a monist and a dualist approach to international law. It provides that customary international law is part of domestic law unless it is inconsistent with the Constitution.[22] However, international conventions, treaties and agreements only have domestic application once transformed into national law, approved and incorporated into law by Parliament.[23] This implies that the children's rights regime in Zimbabwe incorporates relevant international customary law while adopting legal obligations into domestic instruments.

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15 JM M'baku, 'International Law and Limits on the Sovereignty of African States,' (2018) Vol 30(2) *Florida Journal of International Law* 43-110 at 69.
16 Ibid.
17 Ibid.
18 R. F. Oppong 'Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems on Africa' (2006) Vol 30(2) *International Law Journal* 296-345 at 297.
19 O Duru 'International Law Versus Municipal Law: A Case Study of Six African Countries; Three of Which Are Monist, and Three of Which Are Dualist' (2011) Vol 45 *SSRN Electronic Journal.*
20 Oppong (note 11 above) at 298.
21 M'baku (note 15 above) 83.
22 Section 326 of the Constitution of the Constitution of Zimbabwe, 2013.
23 Section 327(2) (a) and (b) of the Constitution of Zimbabwe, 2013.

2.2. The Constitution of Zimbabwe and Children's Rights

Historically, the Lancaster House Constitution (LHC) did not have separate provisions dedicated to the rights of children in Zimbabwe. Children were largely viewed as objects of parental care and state protection. This perspective was changed by the 2013 Constitution which constitutes specific provisions on children's rights in Zimbabwe. This Constitutionalisation of children's rights is a direct response to legal developments at international level. Children's rights are specifically provided for in section 81 of the Constitution.[24] In addition to these rights, children in Zimbabwe are also entitled to all other human rights applicable to all people. The obligation of the State with regards children's rights is provided for in section 19 wherein the state is required to adopt policies and measures to ensure that children's rights are upheld and the best interests of the child promoted. The Constitution lays fertile ground for litigation and judicial elaboration of children's rights. The Constitutional Court has a duty to interpret and decide on the constitutionality of actions against children *vis-à-vis* these constitutional provisions. As will be discussed below, *Mudzuru* and *Chokuramba* the Constitutional Court outlawed child marriages and judicial corporal punishment as being in contravention of the Constitution.

3. Overview of the Mudzuru and Chokuramba cases

3.1. *Mudzuru and Another v Minister of Justice Legal and Parliamentary Affairs and Others*

3.1.1. Background and facts

Applicants, two young women, Loveness Mudzuru (aged 19 years) and Rudo Tsopodzi (aged 18 years) petitioned the Constitutional Court in terms of Section

[24] Section 81(1) of the Constitution of Zimbabwe, 2013, Every child, that is to say every boy and girl under the age of eighteen years, has the right— (a) to equal treatment before the law, including the right to be heard; (b) to be given a name and family name; (c) in the case of a child who is— (i) born in Zimbabwe; or (ii) born outside Zimbabwe and is a Zimbabwean citizen by descent; to the prompt provision of a birth certificate; (d) to family or parental care, or to appropriate care when removed from the family environment; (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse; (f) to education, health care services, nutrition and shelter; (g) not to be recruited into a militia force or take part in armed conflict or hostilities; (h) not to be compelled to take part in any political activity; and (i) not to be detained except as a measure of last resort and, if detained— (i) to be detained for the shortest appropriate period; (ii) to be kept separately from detained persons over the age of eighteen years; and (iii) to be treated in a manner, and kept in conditions, that take account of the child's age. (2) A child's best interests are paramount in every matter concerning the child. (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

85(1) of the Constitution of Zimbabwe, 2013. They complained about the infringement of the fundamental rights of the girl child subjected to early marriage. Therefore, they sought an interpretation of section 78(1)[25] as read with section 81(1)[26] of the Constitution and a declaratory order that:

> "1. The effect of s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 is to set 18 years as the minimum age of marriage in Zimbabwe.
> 2. 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).
> 3. Section 22(1) of the Marriage Act [*Chapter 5:11*] is unconstitutional.
> 4. The Customary Marriages Act [*Chapter 5:07*] is unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under the same.
> 5. The respondents pay costs of suit."[27]

When sections 78 and 81(1) came to force the Marriages Act (Chapter 5:11) in section 22 provided that a girl who had attained the age of sixteen years was capable of contracting a valid marriage a valid marriage with the written consent of her guardian(s). Section 22 also provided that a boy aged sixteen or eighteen years could not contract a valid marriage except with the written consent of the Minister of Justice. During that era, a child was defined as a person under the age of sixteen years.[28]

3.1.2. Arguments by the parties

The applicants submitted that they were approaching the court in public interest in terms of sections 85(1)(a) and (d) of the Constitution.[29] The applicants, argued

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25 Section 7(1) provides that "Every person who has attained the age of eighteen years has the right to found a family."

26 Section 81 of the Constitution of Zimbabwe, 2013 generally enumerates all children's rights including the right to (a) equal treatment before the law, including the right to be heard, (e) be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse, (f) to education, health care services, nutrition and shelter. Section 81(2)- A child's best interests are paramount in every matter concerning the child; Section 81(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

27 *Mudzuru* at 1-2.

28 Section 2 of the Child Abduction Act [Chapter 5:06], Section 2 of the Child Protection and Adoption Act [Chapter 5:06].

29 Any of the following persons, namely— (a) any person acting in their own interests; …(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

that "on a broad, generous and purposive interpretation of section 78(1) as read with section 81(1) of the Constitution, the age of eighteen years had become the minimum age of marriage in Zimbabwe."[30] They further argued that the strict and narrow literal interpretation cannot be used to interpret section 78 if regard is had to similar international human rights instruments from which it derived inspiration.[31] The applicants further argued that since section 81(1) of the Constitution now defined a child to mean "every boy and girl under the age of eighteen,"[32] a child did not have the capacity to enter into a valid marriage since the coming into force of sections 78 and 81(1) of the Constitution on 22 May 2013.[33] In effect, section 22 of the Marriages Act (Chapter 5:11) or any other law which gave authority to a girl below the age of eighteen to marry infringed the fundamental rights of the girl child to equal treatment before the law as provided for in section 81(1)(a) of the Constitution.[34] Applicants further argued that child marriage "exposes the girl child to the horrific consequences of early marriage which are the very injuries against which the fundamental rights are intended to protect every child."[35]

The respondents opposed the application and raised a *point in limine* citing that the applicants had no right to approach the court claiming the relief sought because they had not alleged that any of their own interests were adversely affected by the alleged infringement of the fundamental rights of the child. They further argued that the applicants had not given any names of the children, on whose behalf they purported to act, whose fundamental rights had been infringed through the alleged child marriages.[36] The respondents argued that "the applicants had not produced facts to support their claims to *locus standi* under section 85(1)(a) and (d) of the Constitution."[37] On the merits, the respondents disputed that section 78(1) had the effect of setting the minimum age of marriage at eighteen years. They further denied the allegation that section 22(1) of the Marriages Act or any other law authorizing a girl aged sixteen years to marry contravened section 78(1) of the Constitution.[38] They argued that girls mature physiologically and psychologically earlier than boys and alleged that such different rates of maturity justifies the differences on the minimum age of marriage

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or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

30 *Mudzuru* at 3.
31 Ibid.
32 Section 81(1) of the Constitution of Zimbabwe, 2013.
33 *Mudzuru* at 4.
34 Ibid.
35 Ibid.
36 Ibid at 4-5.
37 Ibid at 5.
38 Ibid at 6.

for girls and boys. They concluded that there was nothing unconstitutional about legislation authorizing child marriage.[39]

The legal questions for determination at the Constitutional Court were as follows:[40]

- Whether or not the applicants had, on the facts, *locus standi* under s 85(1)(a) or 85(1)(d) of the Constitution to institute the proceedings claiming relief they sought.[41]
- If they were found to have standing before the court, did s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in in Zimbabwe.[42]
- If the answer to issue No.2 was in the affirmative, did the coming into force of ss 78(1) of the Constitution on 22 May 2013 render invalid s 22 (1) of the Marriage Act [Chapter 5:05] and any other law authorising a girl who has attained the age of sixteen to marry.[43]
- If the answer to No.3 was in the affirmative; what was the appropriate relief to be granted by the court in the wide discretion conferred on it under s 85(1) of the Constitution.[44]

In writing for the Constitutional Court, Malaba DCJ (as he then was, will be referred to as CJ) began an analysis of the case by invoking and interpreting section 44 of the Constitution. He stated that, "[t]he protection of the fundamental rights of the child is guaranteed under section 44 of the Constitution."[45] Section 44 imposes an obligation upon the State, every person, institution and agent of government to "respect, protect, promote and fulfil the rights and freedom in Chapter 4".[46]

With regards *locus standi,* Malaba CJ emphasized that it is imperative for one acting under section 85(1)(d) to be acting in public interest. He further emphasized that "the meaning or content of public interest will vary from case to case depending on the facts and circumstances. After considering precedents from constitutional cases within Zimbabwe, from other jurisdictions, international law and other legal instruments, the court concluded that the applicants had no *locus standi* to institute proceedings in terms of section 85(1)(a) but had

39 Ibid.
40 *Mudzuru* at 7.
41 Ibid.
42 Ibid.
43 Ibid
44 Ibid at 8.
45 *Mudzuru* at 2.
46 Section 44 of the Constitution of Zimbabwe, 2013.

successfully managed to prove *locus standi* in terms of section 85(1)(d) of the Constitution of the Constitution of Zimbabwe, 2013.

On the second and third issue, the Constitutional Court was put to task to interpret section 78 (1) as read with section 81(1) of the Constitution of Zimbabwe, 2013. It was also required to interpret section 22(1) of the Marriages Act and the effect of the application of section 78(1) on its meaning.[47] Malaba made reference to section 46(1)(c) of the Constitution of Zimbabwe, 2013 which requires that when interpreting Chapter 4 of the Constitution, "a court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party."[48] Malaba CJ discussed applicable international conventions and other legal instruments, as will be highlighted below, in deciding on these two issues before the court. After a thorough analysis of applicable international law, the court concluded that "the applicants succeeded in showing that section 78(1) of the Constitution of the Constitution of Zimbabwe, 2013 sets 18 years as the minimum age of marriage in Zimbabwe and that section 22(1) of the Marriages Act, and any law, custom and practice which authorizes child marriage is unconstitutional.

3.1.3. The judgment of the Constitutional Court

The Constitutional Court granted the application in favour of the applicants. It declared that section 78(1) of the Constitution set eighteen years as the minimum age of marriage in Zimbabwe. The judgment further declared that section 22(1) of the Marriage Act or any law, practice or custom authorizing a person under eighteen years to marry or to be married was inconsistent with the provisions of section 78(1) of the Constitution and therefore invalid to the extent of the inconsistency and struck down the law. The Constitutional Court ordered that with effect from 20 January 2016, no person, male or female, could enter into any marriage, including unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen years.

3.2. The State v Willard Chokuramba and Others

3.2.1. Background and facts

The High Court had made an order for constitutional invalidity of section 353 of the of the Criminal Procedure and Evidence Act [Chapter 9:03] (CPEA) in the following circumstances: - On 26 September 2014, the respondent, who was fifteen years old, was sentenced by a Regional Magistrates Court to receive moderate corporal punishment of three strokes with a rattan cane after being

47 Ibid at 25.

48 Section 46(1)(c) of the Constitution of Zimbabwe, 2013.

convicted of the offence of rape committed on a fourteen year old girl.[49] The matter came before the High Court for review where Muremba J argued that section 353 of the Criminal Procedure and Evidence Act (Chapter 9:03) (CPEA) was inhuman and degrading and inconsistent with the Constitution. The matter was referred to the Constitutional Court to confirm whether section 353 was unconstitutional. The matter for determination before the Constitutional Court was whether section 353 of the CPEA contravened section 53 of the Constitution.[50] To determine this issue the Court had to determine the meaning of phrases "inhuman punishment" and "degrading punishment" and determine whether judicial corporal punishment amounted to "inhuman", "degrading" punishment or both.[51]

3.2.2. Arguments by the parties

In its submissions, the state argued that punishment as prescribed under section 353 of the CPEA did not amount to inhuman or degrading punishment. It contented that there were prescribed precautionary measures which had to be taken before and during the administration of moderate corporal punishment which took it out of the ambit of the punishment prohibited by section 53 of the Constitution.[52] Respondents through their representatives, argued that notwithstanding the precautionary measures prescribed before and during the administration of the punishment, judicial corporal punishment was inherently an inhuman and degrading punishment.[53] They averred that it was inhuman and degrading because it involved, in its infliction, the use of physical and mental violence to consciously cause acute pain and suffering thereby impacting on the human dignity and physical integrity of the person being punished.[54]

3.2.3. The judgment of the Constitutional Court

After considering the submissions by the parties and reference to legal authority, the court remarked that, "the elimination of judicial corporal punishment from the penal system is an immediate and unqualified obligation on the State. Judicial

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49 *Chokuramba* at 7.

50 Section 353 of the CPEA amongst other things, provided that "Where a male person under the age of eighteen years is convicted of any offence the court which imposes a sentence upon him may, in lieu of any other punishment, or in addition to a wholly suspended sentence of a fine or imprisonment… sentence him to receive moderate corporal punishment, not exceeding six strokes." The section further explains in detail the conditions which have to be met before corporal punishment may be inflicted; Section 53 of the Constitution of Zimbabwe, 2013 provides that "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

51 *Chokuramba* at 3.

52 Ibid at 24.

53 Ibid.

54 Ibid.

corporal punishment constitutes a serious violation of the inherent dignity of a male juvenile offender subjected to its administration."[55] The Constitutional Court confirmed the order of the High Court, declaring section 353 of the CPEA to be invalid for the reason that it was in contravention of section 53 of the Constitution with effect from 3 April 2019.[56] Consequently, section 353 was with effect from 3 April 2019 struck down and the court ordered that no male juvenile convicted of any offence shall be sentenced to receive moderate corporal punishment.[57]

4. Significance and Critical Analysis of the Mudzuru and Chokuramba Judgments

4.1. Generous and purposive interpretation of the constitutional provisions

The interpretation of the fundamental rights and freedoms enshrined in the Constitution is an important duty of the Constitutional Court. The interpretative clause is part of the Declaration of Rights in the Constitution. Specifically, section 46 of the Constitution of Zimbabwe, 2013 provides a guide as to how the rights and freedoms in Chapter 4 of the Constitution of Zimbabwe, 2013 should be interpreted. Section 46 provides that:

> "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."[58]

According to Moyo, "an approach that gives full effect to the rights and freedoms entrenched in the Constitution of Zimbabwe echoes the elements of a generous interpretation of the constitutional provisions."[59] Each judgment acknowledges

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55 Ibid at 69.
56 Ibid at 70.
57 Ibid.
58 Section 46 (1) of the Constitution of Zimbabwe, 2013.
59 A Moyo 'Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights' Final papers of the 2016 *National Symposium on the Promise of the Declaration of Rights Under the Constitution of Zimbabwe* (2019).

the importance of section 46 of the Constitution of Zimbabwe, 2013 in dealing with the issues before it. In the *Mudzuru* case, Malaba CJ averred that:

> Section 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 the provisions of the Constitution, in particular, the principles and objectives set out in Chapter 2.[60]

In the *Chokuramba* case, Malaba CJ remarked that, "Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value in interpreting any of the provisions of the Constitution."[61]

The LHC had no interpretation clause that comprehensively stipulated how the courts had to interpret the provision in the Declaration of Rights.[62] In legal matters heard under the LHC, *locus standi* was interpreted in the narrow traditional manner, which was restrictive such that no one could ordinarily seek redress for injury suffered by another person.[63] Under the LHC, only persons who were directly affected or about to be directly affected by the infringements of their rights where entitled to approach the court for relief.[64] This position has been changed by section 85(1) of the Constitution, which leans towards liberalization of *locus standi* in Zimbabwe by broadening the number of persons who are entitled to claims to the Constitutional Court.[65] This means that in exercising its jurisdiction under section 85(1), the court can adopt a broad and general approach to locus

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60 *Mudzuru* at 43.

61 *Chokuramba* at 15.

62 Moyo (note 52 above).

63 J Sloth-Nielsen & K Hove 'Mudzuru & Anor v Minister of Justice, legal and parliamentary Affairs 7 2 others: A Review' (2015) 15 *African Human rights Law Journal* 554-568 at 557.

64 A Moyo 'Standing, Access to Justice and Human Rights in Zimbabwe' (2018) *African Human Rights Law Journal* 266-292.

65 Section 85 of the Constitution of Zimbabwe, 2013 provides that, "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."

standi.[66] In *Mudzuru*, Malaba CJ chose a broader and more generous interpretation of *locus standi* which gives anyone with a sufficient direct or indirect interest, in a matter the right to be heard before a court of law. He argued that section 85(1) in its entirety must be given a liberal, broad and general application not the narrow traditional conception of *locus standi*.[67] According to Sloth-Nielsen & Hove, "the broad interpretation given to *locus standi* in the *Mudzuru* case bodes particularly well for future actions brought to further the interests of vulnerable groups based on alleged constitutional infringements."[68] They further postulate that this interpretation introduces legal certainty in the role played by public interest litigation in Zimbabwe in that anyone with direct or indirect interest in a matter can move to have the rights protected. The generous interpretative approach adopted by Malaba CJ shows that the court should not put unjust emphasis on technical issues of strict interpretation and other procedural aspects in interpreting issues of infringements of rights in the Constitution.[69]

In interpreting section 53 of the Constitution in the *Chokuramba* case, Malaba CJ also argued for the adoption of a broader approach of interpretation. He remarked that:

> the appropriate approach to be adopted in the interpretation of a provision of the Constitution guaranteeing a fundamental right or freedom is the purposive, broad, progressive and value-based approach. The court must adopt an interpretation of s53 of the Constitution that promotes the respect for the inherent dignity of the male juvenile when he is subjected to punishment for an offence of which he has been convicted.[70]

Malaba CJ also noted that the "Constitution is a dynamic document which must by its very nature be interpreted and applied to absorb the changes in society's attitudes towards what is right and wrong at any given period."[71]

4.2. Reliance on International Conventions and Foreign Law

66 Sloth-Nielsen & Hove (note 56 above) at 557.
67 *Mudzuru* at 15.
68 Sloth-Nielsen & Hove (note 56 above) at 560.
69 B Mushohwe 'A positive step towards ending child marriages: A review of the Loveness Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O & Others' (2017) Vol 3 *Midlands State University Law Review* at 20. See also N Maphosa 'Putting the old head over a child's shoulder: A critical appraisal of child marriages in Zimbabwe through the lens of Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O and Others' *PROLAW Student Journal of Rule of Law for Development* at 12.
70 *Chokuramba* at 17.
71 Ibid at 42.

Another celebrated positive of the *Mudzuru* and *Chokuramba* cases is the expansive reference by Malaba CJ to international law and foreign law. In the two judgments, Malaba presents a commendable example of how the courts can make use of international and foreign law and comments from regional and international human rights bodies in their reasoning.

4.2.1. International Conventions and Treaties

Section 46(1)(c) of the Constitution of Zimbabwe, 2013 implores the courts to take international law into account when interpreting constitutional rights. The courts are also urged to interpret legislation in a manner consistent with any treaty or convention that is binding on Zimbabwe.[72] In this regard, Malaba CJ in the *Mudzuru* judgment began by acknowledging the obligations of Zimbabwe in the international community by virtue of its ratification of international conventions and treaties. He remarked that, "By signing these documents, Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined on the relevant conventions to ensure that they are enjoyed in practice."[73] With this, Malaba CJ held that the meaning of section 78(1) of the Constitution could not be ascertained and interpreted without having regard to the context of the obligations undertaken by Zimbabwe under international conventions and treaties on matters of marriage and family relations at the time of the enactment of the Constitution of Zimbabwe, 2013.[74] In interpreting whether section 22 of the Marriages Act infringed sections 78(1) and 81(1) of the Constitution of Zimbabwe, 2013, Malaba remarked that, "Regard must also be had to the emerging consensus of values in the international community which Zimbabwe is party…"[75] After noting this, Malaba CJ then discussed international treaties on the subject matter, including the Universal Declaration of Human Rights (1948), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (1962), the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). Malaba also made references to general comments or recommendations made by the committees of these international conventions in interpreting the issue of child marriages, like General Recommendation 21 of the CEDAW Committee.

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72 Section 327(6) of the Constitution of Zimbabwe, 2013 provides that, "When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."

73 *Mudzuru* at 29.

74 Ibid at 28.

75 Ibid at 29.

In the *Chokuramba* case, Malaba CJ referred to international treaties and conventions in deciding whether judicial corporal punishment was unconstitutional. In explaining human dignity as a foundational value when interpreting any rights and freedoms in the Constitution, Malaba CJ made reference to the preambles of the International Covenant on Economic, Social and Political Rights (1966) and the International Covenant on Civil and Political Rights (1966), which both state that human rights "derive from the inherent dignity of the human person."[76] In his judgment, Malaba CJ also made reference to article 1 of the UDHR, article 4 of the African Charter on Human and Peoples Rights and article 37 of the CRC all which emphasize right to respect of the dignity inherent in a human being.[77] Reference was also made to General Comment 8 of the CRC Committee in emphasizing that dignity is of every person is the fundamental guiding principle of international human rights law.

In deciding whether judicial corporal punishment amounts to inhuman and degrading treatment, Malaba CJ also referred to General Comment No 20 of the UN Human Rights Committee and General Comment No 13 of the UN Committee on Economic, Social and Cultural Rights. Reference was also made to the UN Standards Minimum Rules for the Administration of Juvenile Justice, 1986 (Beijing Rules) in explaining the purposes of punishment and the fundamental principles of sentencing.

4.2.2. Foreign Law

When interpreting fundamental rights and freedoms in the Constitution, the courts are urged to consider relevant foreign law.[78] The two Constitutional Court judgments are commendable for their wide use of foreign law in support of various assertions and reasoning. The use of foreign law is commendable and shows that the Constitutional Court is willing to seek support in foreign law in advancing principles of constitutional application in line with international best practices. In *Chokuramba* and *Mudzuru*, reference was made to foreign jurisprudence for guidance. In *Mudzuru*, Malaba CJ used cited legal authorities from South Africa, Canada, Australia, United Kingdom and India. The *Mudzuru* judgment cited section 38(d) of the Constitution of South Africa. Reference was also made to foreign case law like *R v Big M Drug Mart* (Canada), *Ferreira v Levin NO and others* (South Africa) *Federal Court in Mckinnon v Secretary Department of Treasury* (Australia) *Lawyers for Human Rights & Another v Minister of Home Affairs and Another* (South Africa) and *SP Gupta v President of India and Others* (India).

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76 *Chokuramba* at 15.
77 *Ibid* at 17-19.
78 Section 46(1)(e) of the Constitution of Zimbabwe, 2013.

In *Chokuramba*, Malaba CJ referred to constitutions of other countries on issues which the court was discussing. Reference was made to section 17(1) the Constitution of Jamaica on defining human and degrading treatment.[79] Malaba CJ also referred to Article 8 of the Constitution of Namibia and section 11(2) of the Constitution of South Africa in deciding whether judicial corporal punishment amounted to inhuman or degrading punishment.[80] Further, Malaba CJ cited the following foreign cases, *S v Makwanyane* (South Africa), *Ex parte Attorney General, Namibian Re Corporal Punishments by Organs of State* (Namibia), *S v Williams* (South Africa), *Tyrer v United Kingdom*, *Winston Ceaser v Trinidad and Tobago*, *Prince Pinder v Bahamas* and *Trop v Dulles* among others to understand how foreign courts have dealt with the issue of corporal punishment within their jurisdictions.

5. Chief Justice Malaba's Jurisprudential Legacy: Implications for Legislative Reform, Societal Attitudes and Children's Rights in Zimbabwe

The jurisprudence of Malaba CJ has significantly shaped Zimbabwe's constitutional and human rights landscape in the protection and promotion of children's rights. His tenure as Chief Justice and his role in the Constitutional Court have been marked by a transformative approach to constitutional interpretation, one rooted in purposive, expansive, and rights-centered jurisprudence. His landmark decisions, notably in the *Mudzuru* and *Chokuramba* cases, not only advanced children's rights but also catalyzed legislative reforms and influenced societal perceptions.

Malaba CJ's jurisprudence is distinguished by a deliberate shift from narrow, formalistic legal interpretation proposed by the LHC towards a generous, purposive approach aligned with the transformative ideals of Zimbabwe's 2013 Constitution. He advocates for an interpretation that gives full effect to constitutional rights, emphasizing human dignity, equality, and social justice. This approach is evident in the *Mudzuru* and *Chokuramba* judgments, where the Court prioritized the rights and well-being of children over traditional or cultural practices that undermine those rights.

A hallmark of Malaba CJ's approach is his extensive reliance on international treaties, regional instruments, and foreign jurisprudence. This not only aligns Zimbabwe's legal interpretation with global human rights standards but also signals a judiciary committed to progressive legal development. Malaba CJ's judgments have been instrumental in prompting legislative reforms that align national laws with constitutional and international standards. The *Mudzuru* and

79 *Chokuramba* at 21.
80 Ibid at 32-35.

Chokuramba judgment have led to law reform in Zimbabwe. In *Mudzuru*, Malaba CJ ordered that section 22 of the Marriages Act was unconstitutional. This led to this provision being struck off. A new Marriages Act (Chapter 5:17) was enacted which not only conform with the Constitution but also harmonizes all marriage laws in Zimbabwe. The Marriages Act sets the minimum age of marriage for both boys and girls at eighteen years without any exceptions.[81] *Chokuramba* judgment confirmed the unconstitutionality of judicial corporal punishment and ordered that section 353 of the CPEA be struck down. With effect from the date of judgment of *Chokuramba* case, corporal punishment is no longer a form of punishment in Zimbabwe.

The *Mudzuru* and *Chokuramba* judgment provide points of educational reference on the forms and principles of sentencing and *locus standi*, respectively, in Zimbabwe. In the two judgments, Malaba CJ should also be commended for his departure from a purely legalistic reasoning and acknowledging the interdisciplinary nature of child marriages and juvenile justice. The *Mudzuru* case has had a regional impact in dealing with the problem of child marriage in Africa. After the *Mudzuru* judgment, a petition challenging child marriage was also done in Tanzania in the case of *Rebecca Gyumi v Attorney General*[82] the presiding judge was invited by the petitioner's counsel to seek guidance form the *Mudzuru* judgment. After discussing the reasoning in the *Mudzuru* judgment, the Tanzanian Court was persuaded to grant its ruling in favour of the petitioner, ruling that the provisions which differentiated the ages of marriage for boys and girls were discriminatory. The Court of Appeal of Tanzania conformed the High Court ruling on appeal.

Another profound implication of Malaba CJ's jurisprudence is its challenge to cultural relativism that often justifies harmful practices like child marriage and corporal punishment. His approach emphasizes that constitutional rights and international standards are superior to cultural or customary norms. By declaring child marriage and corporal punishment unconstitutional, the Court positions itself against practices justified on cultural grounds, asserting that rights-based jurisprudence must prevail over traditional practices that violate fundamental rights. This stance encourages societal reflection, prompting communities to reconsider practices that undermine children's dignity, health, and development. Malaba CJ's jurisprudence exemplifies the transformative role of the judiciary in advancing social justice demonstrating that courts can be proactive agents of social change, particularly in areas where legislation and societal attitudes lag.

81 Section 3 (1) of the Marriages Act (Chapter 5:17).

82 *Rebeca Gyumi v Attorney General Miscellaneous* Civil Case No 6 of 2016 Tanzania High Court.

The *Mudzuru* and *Chokuramba* rulings provide legal backing for civil society organizations and activists working to eradicate harmful practices.

6. Conclusion

Malaba CJ's jurisprudence has evidently played a transformative role in advancing the protection of human rights, particularly children's rights within Zimbabwe's constitutionally oriented legal landscape. Through landmark decisions such as the *Mudzuru* and *Chokuramba* cases, the Constitutional Court has demonstrated a commitment to interpreting constitutional provisions in a broad, purposive, and rights-centred manner that aligns with international human rights standards. These judgments have not only abolished harmful cultural practices like child marriage and corporal punishment but have also led to significant legislative reforms and shifted societal attitudes toward recognizing children as rights-bearing subjects deserving of dignity and protection. Malaba CJ's decisions serve as a precedent and a call to action for legislators, civil society, and communities to uphold and reinforce children's rights, fostering a more just, equitable, and rights-respecting society in Zimbabwe. His legacy affirms the transformative potential of constitutional courts to shape societal values and advance the global human rights agenda, particularly for society's most vulnerable populations

THE LEGACY OF THE CHIEF JUSTICE HON. LUKE MALABA IN INNOVATING REGISTRY ADMINISTRATION AND CASEFLOW MANAGEMENT IN ZIMBABWE'S SUPERIOR COURTS

ANITAH TSHUMA[1]

Abstract

This article analyses Chief Justice Hon. Luke Malaba's significant influence on registry administration and caseflow management in Zimbabwe's superior courts, arguing that his most enduring institutional legacy lies in redefining the registry as a central catalyst for judicial efficiency. It contends that he deliberately prioritised modernisation of the judiciary's administrative framework, particularly the registry, as a constitutional tool for delivering justice, rather than treating administrative reform as ancillary to adjudication. Drawing on Practice Direction 1 of 2017 on the management of civil and labour appeals, Practice Direction 1 of 2025 on dormant matters, Practice Direction 1 of 2026 on consolidation of labour reviews and appeals, the Integrated Electronic Case Management System (IECMS) framework he championed, and the statistical governance mechanisms he introduced, the article demonstrates how he transformed the Registrar from a passive record-keeper into an active caseflow manager. It shows how this transformation enabled registries to enforce compliance, monitor case progression, and enhance efficiency through data-driven supervision, while preserving judicial independence. The discussion also examines his hands-on approach to mentoring registrars and legal practitioners, his structural innovations in registry specialisation, and his inclusive leadership style that fostered cooperation between judges and administrative staff. The article further acknowledges the implementation challenges, including infrastructural constraints, resistance to change, and the need for sustained capacity-building that accompanied these reforms, offering a balanced assessment of both achievements and ongoing tensions. Overall, the article situates Chief Justice Malaba not only as a leading jurist but as an architect of modern judicial administration whose reforms have reconfigured how justice is processed and experienced in Zimbabwe's superior courts.

Key words: *Integrated Electronic Case Management System (IECMS), Caseflow Management, Registry Modernisation, Judicial, Practice Directions*

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1. Introduction

The administration of justice in the 21st century is more interconnected with digital technologies than it ever was. Courts globally are utilising information and communication technologies to address systemic issues of delay, expense, and lack of transparency.[2] The ability of a legal system to adapt to this change is a major task in the administration of justice.[3] This international trend emerged at a time that Zimbabwe under the astute leadership of the Honourable Chief Justice Luke Malaba, acknowledged that judicial reform necessitated not only legal proficiency, but also a fundamental restructuring of the administrative framework supporting the courts.

The global literature on digital transformation in courts underscores that technology is never merely a technical tool; it reshapes institutional roles, organisational culture and the distribution of power within court systems. In many jurisdictions, electronic filing, online case tracking and remote hearings have altered what court administrators and registrars do on a daily basis and how they interact with judges and court users.[4] By situating Zimbabwe's reforms within this wider context, it becomes apparent that the Honourable Chief Justice Malaba's approach did not simply import foreign ideas but adapted the international movement towards online courts to local constitutional imperatives and resource constraints, particularly by using the registry as the fulcrum of change in line with best practices.

The mode of registry modernisation in Zimbabwe mirrors wider global trends in the digitisation of court administration. A comparative examination highlights both shared characteristics and unique aspects, thereby contextualising the IECMS within the framework of international practices. Singapore's eLitigation system, launched in 2000 and regularly refined since,[5] serves as a model for integrated electronic case management. It revolutionised the way legal professionals handle filings, service, and overall case management. This was achieved by requiring electronic processes for all practitioners, supported by a complex workflow that seamlessly connects with the internal systems of the judiciary.[6] Like Zimbabwe's

2 R Susskind *Online Courts and the Future of Justice* (2019) Chapters 1-2.

3 D Reiling 'Courts and Technology: The Next Frontier' (2020) 11(1) *International Journal for Court Administration* 1.

4 Virginia Upegui Caro. "Five Ways Digital Technologies Are Transforming Courts and Access to Justice." *Governance for Development (World Bank Blogs)* https://blogs.worldbank.org/en/governance/five-ways-digital-technologies-are-transforming-courts-and-acces (Accessed 28 March 2026).

5 Henderson, H 'The Singapore eLitigation System: A Model for Digital Courts?' (2019) 18(2) *Journal of Court Innovation* 78.

6 H Henderson 'The Singapore eLitigation System: A Model for Digital Courts?' (2019) 18(2) *Journal of Court Innovation* 78.

IECMS, the Singapore model empowers court administrators to perform compliance checks digitally and provides real-time case visibility to litigants. However, its fully mandatory nature and extensive infrastructure were developed over decades, illustrating the long-term horizon of such reforms.

In contrast to jurisdictions that adopted technology-first approaches, Zimbabwe's reforms under Chief Justice Malaba have been characterised by a registry-centric strategy that simultaneously pursues technological infrastructure, legal rule amendments, and cultural change through training and motivational tools. This holistic approach, while still evolving, aligns with findings from comparative studies that sustainable digital transformation in courts requires alignment of legal frameworks, organisational capacity, and user readiness.[7]

The registry, frequently referred to as the 'engine of any Superior Court', has been the principal locus of this transition. The Constitution of Zimbabwe (2013) creates the positions of Registrar for the Supreme Court (s 171(4)) and the High Court (s 169(4)), with their responsibilities detailed in corresponding legislation such as the Constitutional Court Act [*Chapter 7:22*], Supreme Court Act [*Chapter 7:13*] and the High Court Act [*Chapter 7:06*]. Historically, the functions of issuing court processes, maintaining records, and managing case flow were performed manually through paper-based procedures. In his 2020 legal year opening address, the Chief Justice articulated that the transition from a *'physically manned registry to an automated system' became a fundamental element of the Judicial Service Commission's strategic vision, aimed at 'expediting court procedures and eradicating opportunities for delay'*.[8] This article therefore evaluates how Chief Justice Malaba's strategic vision, implemented through the Integrated Electronic Case Management System (IECMS) and a series of practice directions, has fundamentally restructured these essential functions, revolutionising registry operations and improving access to justice. It further analyses Chief Justice Malaba's crucial role in leading this transformation, particularly emphasising how his leadership restructured registry operations and case flow management in Zimbabwe's superior courts.

2. The Chief Justice's vision: recognising administration as a constitutional imperative

Chief Justice Malaba's approach to judicial leadership diverged from conventional notions that restrict judicial roles to adjudicative responsibilities. His tenure demonstrates a nuanced comprehension of the constitutional need for the

7 A Zuckerman 'Digital Courts and the Future of Civil Justice' in D Reiling and others (2021) (11) *Technology and the Future of Courts* 55.

8 Malaba, L *'Speech by the Chief Justice, The Honourable Luke Malaba on the Occasion of the Official Opening of the 2020 Legal Year'*.

'efficient, effective and transparent administration of justice',[9] which cannot be achieved without addressing the institutional mechanisms involved in the processing and delivery of justice. The Chief Justice's address for the 2020 legal year defined this aim with precision:

> The modernisation of our judicial systems is not solely a question of convenience but a constitutional need. A justice system that is sluggish, unclear, or inaccessible undermines its intended beneficiaries. Consequently, we must reconceptualise both our adjudication processes and our administrative practices.[10]

By framing modernisation as a constitutional imperative rather than a managerial preference, the Chief Justice effectively elevated administrative reform to the level of constitutional compliance. This framing is significant because it justified prioritising registry reform in resource allocation, staffing decisions and strategic planning within the Judicial Service Commission. It also provided a principled basis for insisting that all court actors, from judges to registry clerks, bear responsibility for giving practical effect to the rights and values articulated in the 2013 Constitution, including the rights of access to courts and the right to administrative justice.

This acknowledgement that administration is integral rather than ancillary to justice, formed the basis for the subsequent transformative program. The Chief Justice recognised that the registry, being the public face of the judiciary, serving as the initial interface between litigants and the court and facilitating the progression of cases from filing to resolution, necessitated comprehensive re-engineering. His vision encompassed not only automation but also a thorough redefinition of the registrar's duties, the dynamics between judicial officers and administrative personnel, and the fundamental culture of court administration that encourages professionalism and courtesy in dealing with litigants and lawyers.

3. The legal and operational framework: Operationalising the vision through rules and the IECMS

The Chief Justice's vision was implemented through a series of statutory instruments and practice directions that integrated electronic processes into court procedures. Statutory Instruments 78, 79, and 80 of 2022, along with Statutory Instrument 153 of 2023, specifically sections 2 and 3, not only introduced a technical alternative but also fundamentally revised the regulations of the superior courts to facilitate and require electronic case administration. These amendments authorised court personnel to oversee matters in the digital realm. Rule 16 of the

9 Section 190 of the Constitution of Zimbabwe, 2013.
10 Malaba (n 7above).

Constitutional Court Rules, 2025, clearly empowers the registrar to 'refuse to accept any document which, in his or her opinion, does not comply with these rules.' Comparable provisions exist under Rule 19 of the Supreme Court Rules, 2025 and Rule 15B (2) of the High Court (Amendment) Rules, 2023. The High Court (Amendment) Rules, 2024 likewise empower the Chief Registrar, in exceptional circumstances, to direct a registrar to accept a document outside ordinary office hours. This legal framework redefined the registrar's position at the filing stage from a passive recipient to an active gatekeeper, a function crucial for averting the 'congestion of the registry with non-compliant matter.'

Collectively, these provisions codify an important conceptual shift: the registrar is no longer simply a neutral conduit through which parties' documents pass, but an officer mandated to protect the integrity of court processes. In practice, this means that registry staff must scrutinise pleadings and applications for compliance at the point of entry, reject defective documents, and guide parties towards corrective action. The possibility of after-hours filing under the High Court (Amendments) Rules, 2024 further underscores that access-to-justice concerns are balanced with the need to maintain orderly, rule-bound processes rather than allowing informal, unrecorded dealings with court officials.

Richard Susskind's well-known classification of digital courts can help us understand how Zimbabwe's registry management has changed.[11] Susskind identifies three phases of technological advancement in judicial systems: the paper-based court, characterized by the predominance of physical documents and in-person interactions; the digitised court, which employs electronic copies of paper processes alongside traditional methods while maintaining the core procedures; and the online court, where the entire process from filing to decision is conducted digitally, necessitating a fundamental redesign of procedures to leverage technological capabilities.[12] Susskind contends that merely digitising current paper-based processes (the second stage) is inadequate and advocates for genuine transformation that requires reconfiguring the service model to enhance accessibility, proportionality, and efficiency in the pursuit of justice.

The IECMS, which Chief Justice Malaba set up, represents a planned step toward the third stage. The IECMS is different from a system that only makes electronic copies of paper files. It changes the way work is done. For example, mandatory compliance checks happen at digital gateways, case allocation is handled by registrars through system dashboards, judges and registry staff can communicate

11 Susskind (n 1 above).

12 Susskind (n 1 above) 45–78, developing the distinction between paper-based, digitised and online courts, and arguing for fundamental service redesign rather than mere digitisation.

with each other through traceable comments and tasks, and litigants get automated notifications and can access court documents from anywhere. These qualities are in accordance with Susskind's idea of a system that "replaces traditional physical processes with a seamless, integrated online service."

Practice Direction 1 of 2025 on case management epitomises this methodology, instituting a proactive judicial and registry-driven case flow management system that enables registrars to oversee compliance, monitor case advancement, and guarantee strict adherence to timelines.[13] The same applies to Practice Direction 1 of 2026, which places an obligation on the registrar to notify parties of any duplication in reviews and appeals filed separately but arising from the same matter. These Practice Directions implement the Chief Justice's vision of a registry that proactively controls its caseload instead of only responding to litigant-initiated processes. Notably, Practice Direction 1 of 2025 does not merely exhort judges and registrars to "manage" cases; it embeds concrete timelines, default consequences for non-compliance and an obligation on registry officers to trigger judicial directions where parties have been inactive. This design transforms case management into a shared responsibility, with the registry monitoring deadlines and bringing dormant matters to the attention of the court rather than waiting passively for practitioners to act. Practice Direction 1 of 2026 builds on this philosophy in the Labour Court by leveraging the registrar's vantage point over filings to prevent duplication and fragmentation at the earliest possible stage.

The Netherlands' KEI, launched in 2013, adopted a different philosophy; it focused on re-engineering civil procedure around the needs of litigants rather than simply digitising existing processes.[14] KEI introduced a central digital portal for case initiation, proactive case management by a designated judge, and a shift from written to oral hearings in many stages.[15] Zimbabwe's Practice Direction 1 of 2025 on case management shares with KEI an emphasis on judicial-led, registry-supported oversight of case progression, demonstrating convergence in reform philosophies despite differing contexts.

4. Hands-on Leadership: Training as the foundation of Registry transformation

Chief Justice Malaba's dedication to registry transformation was not only theoretical but profoundly pragmatic. It is characterised by close involvement with

13 Chief Justice's Practice Direction 1 of 2025.

14 Celis, E and Schaap, L 'The KEI Programme: Innovating Civil Procedure in the Netherlands' (2015) 7(1) *International Journal for Court Administration* 42.

15 Di Natale, LJ and Cordella, A 'Digitising the Judicial Sector: A Case Study of the Dutch KEI Programme' in R Krimmer et al (eds), *Electronic Participation: 14th IFIP WG 8.5 International Conference, ePart 2022, Proceedings* (Springer 2022) 139–153.

registry staff and a comprehensive grasp of operational intricacies. Judicial education is the key to ensuring high standards of judicial performance, and it is a lifelong project.[16] At the commencement of his term, he saw a substantial procedural impediment that was compromising the appellate process, as a considerable number of appeals were being struck off the roll due to flawed notices of appeal. The defects spanning from non-compliance with the Supreme Court Rules to substantive omissions, led to wasted judicial time, delayed justice for litigants, and fading faith in the appellate system. The Chief Justice issued Practice Direction 1 of 2017 which regulated the filing of compliant notices of appeal and chamber applications.

Instead of solely relying on remote policy directions, the Chief Justice personally trained registry members on executing thorough compliance checks on notices of appeal and chamber applications. He facilitated rigorous training sessions with registrars and researchers, clarifying procedural requirements, demonstrating the identification of nuanced faults, and enabling them to reject non-compliant notices at the time of filing. This proactive gatekeeping ensured that only notices of appeal which complied with the Rules reached the court system thus limiting the build-ups of defective processes that would ultimately be struck off the roll after wasting significant judicial resources. The training was not limited to court staff. The Chief Justice, affirming his dedication to uniform standards in all superior courts, expanded the program to include legal practitioners and registry personnel as far as Bulawayo, ensuring that the entire legal community comprehended the significance of compliant notices and the registry's augmented role in enforcing procedural regulations. The effect was instant and quantifiable: the quantity of appeals struck off the roll due to flawed notifications significantly reduced, alleviating the appellate backlog and reinstating trust in the appeal procedure. This practical action illustrated the Chief Justice's conviction that judicial leadership involves both foresight and active involvement in the justice system.

From a professionalisation perspective, these initiatives signalled that compliance with rules is not a peripheral technicality but an ethical and professional obligation. By investing time in explaining the rationale behind each requirement, the Chief Justice reinforced the idea that properly framed processes are integral to the right of appeal itself. The registry's enhanced gatekeeping function thus became a mechanism for upholding, rather than obstructing, litigants' rights: once notices met prescribed standards, appeals could be heard on their merits without avoidable procedural derailments.

16 Malaba L, The Judicial Orientation Programme for the Recently Appointed High Court Judges (2021).

The training initiative established a fundamental paradigm to guide all future reforms where the registry is not a passive administrative entity but an active participant in guaranteeing procedural integrity and judicial efficiency. Registrars, formerly perceiving themselves as just record-keepers, began to recognise their function as custodians of procedural compliance, empowered to intervene early to avert flawed processes from obstructing the court system.

5. Operational overhaul of the IECMS-driven registry

5.1. The Transformation of the Registrar's Role: From Custodian to Digital Gatekeeper

The traditional definition of the registrar's role, as described by Dendy and Loots [17], identifies the official as responsible for the 'efficient operation of the court,' tasked with 'various responsibilities that encompass, but are not confined to, the issuance of process, documentation, preservation, and management of all documents.'[18] Chief Justice Malaba's reforms have digitised and enhanced these responsibilities. Through the IECMS, the Registrar has evolved into a digital custodian. The Standard Operating Procedures for Registrars and Assistant Registrars (JSC, 2024), established on the Chief Justice's directive, require a stringent 'compliance check' upon the electronic receipt of any process. The system's integrated checklists offer a standardised framework for this review, assuring uniformity and compliance with regulations.[19] This proactive management at the entry point signifies a substantial shift from the previous passive strategy which was largely perfunctory.

A simple illustration from day-to-day registry work shows the qualitative change. Under the paper-based system, an assistant registrar might accept a poorly drafted summons or an unsigned notice of appeal and place it in a physical file, with defects only discovered weeks later when the matter reached a judge's chambers. Under the IECMS-based Standard Operating Procedures, by contrast, the system prompts the registrar to confirm that every mandatory field is completed, that the correct case type has been selected, and that prescribed documents are attached before the file can progress any further. Defects are flagged immediately, parties are notified electronically, and the risk of dormant defective files clogging the registry shelves is significantly reduced. An impact assessment conducted by the Ministry of Justice indicated that the prompt rejection of non-compliant documents by the registry has diminished procedural

17 Dendy, M and Loots, C *Herbstein and Van Winsen's The Civil Practice of Superior Courts of South Africa* 3rd ed (1954) Chapter 1.

18 Dendy (n 14 above) 45.

19 Judicial Service Commission of Zimbabwe *Standard Operating Procedures for Registrars and Assistant Registrars* (2024) 7.

delays by approximately 30% in pilot courts, enabling judicial officers to concentrate on substantive cases.[20] This enhancement in efficiency directly aligns with the Chief Justice's strategic emphasis on mitigating delays at the earliest stage of litigation.

5.2. Augmented Supervision and Administrative Authority through IECMS Tools

The IECMS design provides a previously impossible level of supervisory capability. Functions such as the notification bell and the 'Pending My Action' portfolio furnish the Registrar with an instantaneous overview of registry activities. The SOPs specify that a Registrar can oversee whether 'drafts and court requests are addressed promptly,' 'pleadings are stamped and issued without delay,' and if 'orders issued by Judges are stamped in a timely manner.'[21] This data-centric supervision is essential for accountability. A 2023 report on the IECMS emphasised that 'the digital audit trail enables the identification of bottlenecks in case progression, attributing specific delays to particular officers.'[22] This has fostered a more disciplined and performance-driven registry environment, directly furthering the Chief Justice's dedication to judicial accountability.

The existence of a reliable digital audit trail has also altered internal accountability dynamics within registries. Supervisors no longer rely solely on anecdotal reports or sporadic spot-checks; they can interrogate system logs to see how long particular tasks took, how many matters are awaiting action at each stage, and whether specific instructions from judges were implemented on time. This has enabled more informed performance appraisals, targeted coaching for underperforming staff and, where necessary, disciplinary measures grounded in objective data rather than perceptions or personal conflicts.

5.3. Optimised Internal Communication and Workflow

The IECMS now provides for optimised internal communication and workflow. For instance, the implementation of comments and tasks functionalities has transformed internal court interactions. These systems enable efficient, traceable communication between Judges and the registry, supplanting informal and

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20 Dr WT Chikwana, 'Presentation on Operational Readiness and Impact of the Integrated Electronic Case Management System' (Judicial Service Commission of Zimbabwe, internal presentation, 2023). The presentation was delivered to JSC leadership and development partners; a summary of findings is referenced in Justice Sector Reform Trust, *Bridging the Gap: An Independent Review of Digital Justice Reforms in Zimbabwe* (2023) 18. The 30% figure reflects comparative data from the Commercial Division pilot over a six-month period.

21 SOPs (n 7 above) 12.

22 Justice Sector Reform *Trust Bridging the Gap: An Independent Review of Digital Justice Reforms in Zimbabwe* (2023) 23.

frequently misplaced physical memoranda. A judge may pose an inquiry regarding a case file through a comment, while the registrar might delegate a job to an assistant registrar, such as 'request heads of arguments' or 'deliver a confirmed review to the Magistrates Court.' This establishes a written audit trail and guarantees the effective execution of instructions, directly reinforcing the SOPs' focus on 'communicating with internal users.'[23] The Zimbabwe Law Review indicated that the average duration for a case to progress from filing to the initial hearing diminished by 40% during the inaugural year of IECMS implementation in the Commercial Division, primarily due to these optimised communication channels.[24]

6. Harmonising jurisprudence through Practice Direction 1 of 2026 in the Labour Court

The IECMS improved procedural efficiency, while the Chief Justice's acute awareness of rising substantive issues in the superior courts prompted a significant intervention in the Labour Court with the implementation of Practice Direction 1 of 2026. This directive emerged from a particular and urgent issue that had started to erode the coherence in the Labour Court. Prior, litigants would initiate several proceedings with similar causes of action or disputes, across various case categories some as ordinary or review applications, and others as appeals. Upon allocation, these cases would be assigned to several judges, who, without a coordinated strategy, would deliver inconsistent rulings on fundamentally identical legal and factual concerns. These inconsistent outcomes not only generated uncertainty for litigants but also jeopardised the institutional integrity of the justice system.

Practice Direction 1 of 2026 constituted the Chief Justice's deliberate response to the said challenge. The Practice Direction mandates the registrar to identify and enable consolidation of reviews and appeals with a common cause of action or dispute, ensuring they are addressed by a single judge and resolved timeously and completely in a single proceeding. This technique averts dispute fragmentation, removes the risk of conflicting rulings, and enhances judicial efficiency by enabling a single judge to gain comprehensive insight into the case and adjudicate all pertinent issues in a unified judgment.

From a doctrinal perspective, the consolidation requirement in Practice Direction 1 of 2026 promotes horizontal coherence in Labour Court jurisprudence. When factually and legally related matters are heard together, judges are better placed

23 Judicial Service Commission of Zimbabwe *Standard Operating Procedures for Registrars and Assistant Registrars* (2024).

24 T Ndlovu 'Digitalising the Bench: The IECMS and the Future of Litigation in Zimbabwe' (2023) Vol 45(2) *Zimbabwe Law Review* 112 at 118.

to develop consistent principles and to distinguish cases transparently where necessary. The registrar's power to flag and channel related matters is therefore not a mere administrative convenience; it is a structural safeguard for the rule-of-law ideal that like cases should, as far as possible, be treated alike. The directive demonstrates the Chief Justice's nuanced comprehension that case management transcends administrative duties and constitutes a fundamental aspect of judicial quality. Practice Direction 1 of 2026 safeguards the integrity of the judicial process by mandating the consolidation and simultaneous determination of related situations, offering clarity to litigants and upholding the idea that analogous cases should be similarly adjudicated which is a fundamental tenet of the rule of law. The registry is crucial in implementing this directive. Registrars, utilising the IECMS's case tracking functionalities, can now discern linked cases at the filing stage and designate them for consolidation prior to assignment to various judges. This anticipatory identification averts the issue before its emergence, rather than seeking to rectify conflicting assessments post hoc.

7. Data-driven governance: embedding accountability through statistical monitoring and oversight

Chief Justice Malaba's leadership substantially transformed the judiciary's comprehension and administration of its performance. Understanding that unmeasurable elements cannot be enhanced, he established a stringent framework for statistical reporting and analysis that converted court administration from an intuitive practice into an evidence-based discipline. Under his leadership, the registry commenced the generation of detailed monthly, quarterly, and annual statistics reports that included precise data on case submissions, dispositions, backlog trends, and registry throughput. The Chief Justice not only required regular reporting but also conducted a thorough analysis, finding trends, highlighting deficiencies, and executing targeted actions to guarantee both efficiency and the quality of justice. Upon identifying ongoing delays in specific divisions or courts, he interrogated the same in order to rectify the root causes. He ensured that the court system adapted to developing areas of litigation identified by statistical trends that required specialised attention. The Chief Justice's decision to reorganise the forums for performance discussions was arguably the most notable innovation in this context. Meetings previously exclusive to Heads of Courts have been broadened to incorporate the Chief Registrar, thereby integrating registry perspectives and insights into the highest echelons of judicial decision-making. The Chief Registrar, equipped with comprehensive statistical analyses, was afforded an opportunity to offer direct insights into operational difficulties and suggest evidence-based remedies for enhancing registry performance.

Over time, the regular review of statistics also changed how performance was discussed within the judiciary. Instead of focusing only on anecdotal complaints or isolated high-profile cases, discussions began to incorporate trends in clearance rates, average age of pending matters and distribution of work across stations. This allowed the Chief Justice, Heads of Courts and the Chief Registrar to distinguish between structural resource constraints, training needs and individual performance issues, and to design responses that matched the nature of each problem. An exemplary illustration of this data-driven methodology was the Chief Justice's direct focus on the matter of reserved judgments.

Through a comprehensive evaluation of the inventory of judgments that had been delayed beyond reasonable durations, the Chief Justice guaranteed that all judgments were rendered within the legally and procedurally mandated six-month limit. Where delays were detected, he implemented follow-up measures that progressively fostered a culture of adherence among judicial officers. This ongoing, data-driven supervision conveyed a definitive message that accountability for the prompt administration of justice was not optional but essential to the judicial role. The statistical data allowed the Chief Justice to discern training requirements, resource deficiencies, and systemic impediments that may have otherwise gone unnoticed. Data on case processing durations identified the types of problems facing the most significant delays, facilitating focused solutions in those areas. Registry throughput data revealed divisions that were underperforming and requiring further assistance or process reengineering.

8. Empowering registrars: judicial delegation and the case allocation policy

Chief Justice Malaba implemented a policy that radically altered the relationship between the bench and the registry by delegating case allocation to registrars.[25] This reform fulfilled several interconnected objectives that collectively improved the efficiency and concentration of the superior courts. First, the policy unified and formalised the quasi-judicial functions of the registrar's office. The explicit delegation of case allocation enhanced the role of registrars, acknowledging their significance as essential participants in the justice delivery system, despite their historical exercise of judicial or administrative authorities. This empowerment aligned with the Chief Justice's overarching vision of a proactive, professionally empowered registry capable of exercising independent judgment within its domain of expertise. Second, and of equal significance, the policy guaranteed that judges could concentrate on their primary mandate and vocation of adjudication and resolution of cases. By alleviating the administrative responsibility of case distribution from judicial officers, the Chief Justice enabled them to focus their knowledge and time on their primary function of adjudicating

25 SOPs (n 7 above) 12.

matters. The specialisation of roles, that is, registrars overseeing administrative processes and judges concentrating on adjudication, embodied contemporary ideas of judicial administration, directly enhancing case throughput and minimising delays.

The policy further improved transparency and objectivity in case distribution. The involvement of registrars in controlling the process according to predetermined criteria minimised the likelihood of suspicions of prejudice or favouritism in judicial allocation. Litigants are assured that their cases were assigned through an impartial administrative process rather than through discretionary judicial selection. Moreover, the delegation of case allocation facilitated more advanced task management. Registrars, armed with real-time information on judicial workloads and specialisations, might guarantee equitable distribution of cases and the assignment of matters to judges possessing relevant competence. This not only augmented efficiency but also elevated the quality of adjudication by guaranteeing that intricate cases were presided over by judges possessing pertinent expertise.

9. Structural innovations: organising High Court registries into specialised divisions

In addition to formal policies and technology systems, Chief Justice Malaba's leadership was marked by a readiness to restructure the courts' organisational framework to more effectively address the interests of litigants and enhance efficiency. During his tenure, a notable institutional innovation was the consolidation of registries in the High Court into specialised divisions criminal, civil, and family divisions, within the superior courts. This reorganisation, resulting from discussions with the Judicial Service Commission Secretary, the Chief Registrar and judicial officials, significantly enhanced workflow efficiency by enabling registry personnel to cultivate specialised competence in certain areas of law and procedure. Instead of requiring each registrar to manage all types of matters with uniform expertise, the specialised divisions facilitated the cultivation of in-depth knowledge and more effective processing within each area. The proposal to appoint additional substantive registrars for the various divisions of the High Court was a welcome development given the work pressure at the Harare High Court station. The station had generally faced a lot of challenges due to its sizeable workload which predates the advent of the IECMS.[26] It had become apparent that the workload was too much to be effectively managed by a single High Court Registrar.

[26] Judicial Service Commission 2023 Annual Report.

The creation of specialised registries in the High Court reflected a broader trend towards functional differentiation in judicial administration. By aligning registry structures with substantive divisions of the court, the reform acknowledged that criminal, civil and family matters present distinct case-flow patterns, evidentiary demands and user needs. Specialisation at the registry level thus complements judicial specialisation, enabling more accurate scheduling, tailored communication with litigants and more informed support to judges working in each division. Part of the benefits associated with the restructuring of the registries include increased efficiency by reducing the workload for one Registrar. Each Registrar is now accountable for the work in their division and distributes responsibilities amongst assistant registrars assigned to that particular division. Further, it resulted in faster case processing. With registrars assigned to divisions and concentrating on their areas of focus, the Court can process cases more quickly. A Registrar is now able to assist in managing the flow of cases, ensuring that hearings are scheduled promptly and that documents are filed efficiently. This helps reduce backlogs and delays in the justice system, leading to expeditious dispute resolution.

Additional Registrars now contribute to improved service delivery at the court. There had been instances in which letters were not responded to timeously or cases are not progressing. Such challenges were reduced with the distribution of work amongst registrars, thereby contributing to a more effective and professional Court environment. Registrars who were allocated to divisions brought a deeper understanding of the relevant legal principles, procedures and precedents, enhancing the accuracy and efficiency of court proceedings in their respective areas.

10. Fostering collaboration: integrating bench and registry performance

One of Chief Justice Malaba's most nuanced yet significant developments was his intentional endeavour to promote authentic partnership between the judicial officers and the registry. He recognised that the efficacy of justice administration relies not solely on the proficiency of individual participants but also on the calibre of the interaction between judges and registrars, two entities whose functions are profoundly interconnected yet have traditionally functioned in relative seclusion from each other. He realised that the disconnection between the bench and the registry slows processes. The Chief Justice urged Heads of Courts to assume an active supervisory role in registry operations. This was not an instruction for judicial intervention in administrative affairs but rather a promotion of cooperative engagement. Judges were urged to comprehend the difficulties confronting the registry, to recognise the limitations under which registrars functioned, and to collaborate with registry administration to resolve bottlenecks and inefficiencies.

The most notable expression of this collaborative mindset was the reorganisation of court performance assessment. The Chief Justice required a unified evaluation methodology that linked the assessment of registry performance with court performance, replacing the previous method of separate evaluations. This ostensibly straightforward modification yielded significant consequences. It fostered a perception among judges and registry personnel of themselves as collaborators in a unified endeavour rather than as isolated entities with discrete responsibilities. The effect on backlog reduction was significant. Judges and registrars collaborated effectively, under the guidance of Heads of Courts who recognised their responsibility in facilitating rather than merely overseeing registry activities, resulting in cases progressing through the system with enhanced efficiency and predictability. The collaborative culture fostered by the Chief Justice's leadership facilitated shared problem-solving, cooperative solution development, and group celebration of triumphs.

The integrated performance assessment model also had subtle cultural effects. Once registry metrics and judicial output were discussed in the same forum, it became less tenable for either side to attribute delays solely to the other. Instead, Heads of Courts and the Chief Registrar could map how bottlenecks at different points in the process interacted, for instance, how late filing of heads of argument or delayed preparation of records affected judges' ability to meet delivery timelines. This encouraged joint problem-solving, such as agreeing on standard turnaround times for critical steps and clarifying expectations through practice notes and SOPs.

11. An open-door approach: the chief justice's collaborative strategy for driving innovation

During his term, Chief Justice Malaba upheld an open-door policy towards innovation and problem-solving. He remained open to concepts and techniques that could improve court efficiency, irrespective of their origin. This openness to feedback from registry personnel, legal professionals, and other stakeholders developed a culture of ongoing enhancement inside the judiciary. Registrars and other court officials recognised that their thoughts and observations were important and worth consideration. When a registrar noticed a procedural impediment or a persistent issue, there was a mechanism for that observation to ascend to the highest echelons of court authority within the Judicial Service Commission and influence policy formulation. This transparency not only produced useful suggestions for enhancement but also cultivated a sense of ownership and commitment among court personnel, who perceived themselves as active contributors to the judicial transformation rather than passive recipients of commands from superiors.

In leadership terms, this willingness to listen and to adapt policy in light of operational feedback, distinguishes the Honourable Chief Justice Malaba's approach from other hierarchical models of judicial administration. Rather than viewing registrars and clerks as mere implementers of top-down directives, he treated them as sources of practical knowledge about how rules functioned on the ground. This approach not only produced better designed reforms; it also deepened staff commitment, because those implementing changes could see their own insights reflected in institutional policies.

12. Cultivating a service mindset: Promoting a service-oriented registry culture

Chief Justice Malaba recognised that, in addition to formal rules, technical systems, and practical training, enduring institutional transformation necessitates a change in organisational culture, a redefinition of how registry staff view their duties, responsibilities, and purpose. As continuously enunciated by the Chief Justice, public "confidence in the Judiciary is the yardstick by which any Judiciary's worth can be measured. A proper judicial system must be viable, responsive and fair."[27]

Consequently, he implemented an apparently straightforward, yet extremely impactful motivating instrument referred to as the 'CJ Asks' posters. These posters, publicly exhibited in registry offices throughout the superior courts, functioned as continual visual reminders of the anticipated standards of conduct and performance for every registry member. The posters read as follows:

1. Are you at work or on a frolic of your own?
2. If you are at work, are you doing the right thing?
3. Do you know?
a. What to do?
b. How to do it?
c. And why you do it?
THEN DO IT NOW
Please enjoy your day at work.

The Chief Justice's initial inquiry 'Are you engaged in work or pursuing personal interests?' encouraged staff to assess their concentration and commitment during office hours. This inquiry confronted the complacency that may infiltrate routine administrative tasks, reminding registry staff that their work hours are not personal but are entrusted to the people they serve. It necessitated deliberate utilisation of working hours, insisting that each moment be focused on the efficient

27 Malaba L, Chief Justice of Zimbabwe, On the Occasion of the Official Opening of the 2019 Legal Year (2019).

management of court affairs rather than personal diversions or unproductive endeavours.

The subsequent series of inquiries 'Are you aware ... What actions should be taken? What is the procedure for accomplishing this task? "And why do you do it?" underscored the significance of expertise, clarity, and purpose in registry operations. This set of inquiries focused on the essential components of professional performance: comprehending the work (what), mastering the execution methods (how), and grasping the overarching aim of the task within the judicial system (why). For registry personnel engaged in essential tasks including case filing, record maintenance, exhibit handling, and compliance verification, these inquiries provided a structure for self-evaluation and ongoing enhancement. A registrar unable to confidently answer all three questions was advised to seek clarification or further training prior to continuing.

The final element- 'THEN DO IT NOW' constituted a summons for prompt, proactive engagement. This injunction opposed the bureaucratic inclination towards delay, postponement, and procrastination that had historically afflicted registration operations. The Chief Justice aimed to instil a culture of urgency and responsiveness inside the registry by encouraging workers to act decisively upon comprehending their assignments. This principle of immediacy was subsequently formalised in the Standard Operating Procedures, which required that new processes be approved within one hour and that after-hours filings be processed during the first registry hour of the subsequent day.[28]

Seen through the lens of administrative justice, the emphasis on courtesy, promptness and clarity in dealing with court users is not cosmetic. It gives concrete content to the constitutional requirement that administrative conduct be lawful, reasonable and procedurally fair. When registrars answer queries timeously, provide clear written explanations and document their decisions on IECMS, they reduce the scope for arbitrary or opaque decision-making and make it easier for aggrieved parties to seek review where appropriate. In this way, cultural change at registry level reinforces the broader constitutional framework. The sign ultimately culminated in a seemingly straightforward yet impactful invitation: 'Please enjoy your day at work.' This last statement indicated the Chief Justice's acknowledgement that enduring institutional excellence cannot be attained solely by discipline; it necessitates job satisfaction, morale, and a sense of fulfilment in one's work. By motivating people to get pleasure from their responsibilities, he recognised that an engaged and satisfied team is crucial for providing exceptional service. This affirmative framing reconciled the

28 SOPs (n 20 above).

responsibility required by the preceding inquiries with a compassionate acknowledgement of the dignity and significance of registry work.

The cumulative impact of the 'CJ Asks' posters was to establish a common vocabulary of accountability inside the registry. Staff members would cite the questions during their everyday contacts, holding themselves and one another to the standards set forth by the Chief Justice. The posters evolved into emblems of a redefined professional identity where registrars perceived themselves not merely as functionaries managing documents, but as key contributors to the administration of justice, responsible for their diligence, expertise, and proactive involvement. This cultural shift, bolstered by accompanying training initiatives and structural reforms, established the foundation for the subsequent technical development.

The Chief Justice also encouraged the registry to maintain professionalism and courtesy when dealing with litigants and legal practitioners. Courts are public institutions and the Chief Justice emphasised the need for the registry to show accountability which builds confidence in the justice system. As the first point of contact for court users, registrars were urged to attend to complaints and queries promptly, thereby enhancing transparency in case management, streamlining procedures, and ensuring that errors, delays or misconduct are addressed. The registry learnt that timely responses to queries help clarify procedures and prevent disputes from escalating unnecessarily. He instilled a culture of thoroughly investigating complaints and, where necessary, addressing legal issues before responding to queries. This approach fostered a registry that not only understood the applicable rules and the law but also applied them to resolve issues effectively. These complaint-handling mechanisms significantly reduced the number of complaints escalated to the superior courts.

The Chief Justice also championed transparency by directing that all correspondence relating to filed cases be managed through the Integrated Electronic Case Management System (IECMS), ensuring that all parties have access to, and visibility of, communications between the registrar and litigants. Further, the Chief Justice, leading by way of example, taught the registry to set clear boundaries especially when dealing with vexatious litigants whilst at the same time maintaining professionalism and ensuring fair treatment. He encouraged the use of written responses if verbal ones triggered repeated arguments and the written responses also created records and reduced misunderstandings.

13. Recognizing the difficulties: limitations and ongoing tensions

It would not be fair to judge the Chief Justice's transformative agenda without also

talking about the challenges that came with the changes. To digitalise the registry and optimise its performance required a lot of funding and resources to be spent on information technology infrastructure, especially on making sure that all court stations had reliable internet and hardware. In some outlying places, connectivity challenges made it hard to access the IECMS, which created temporary bottlenecks. Additionally, the transition from a paper-based, hierarchical culture to a transparent, data-accountable environment faced resistance from both registry staff and some legal practitioners, whose lack of experience with electronic operations initially slowed down the process. To lessen these, there needed to be ongoing capacity-building activities, such as ongoing training, help desks, and gradual adoption.

The empowerment of registrars as digital gatekeepers mandated to reject noncompliant documents at the point of filing has been central to reducing procedural delays. Yet this enhanced gatekeeping function risks excluding the self-actors, the litigants who most need access to justice. Within the confines of a paper-based system, registrars could have exercised discretion informally, permitting a flawed pleading with a verbal admonition or a minor extension. In contrast, the IECMS framework often requires registrars to timeously automatically reject processes and pleadings that do not meet the requirements.

For those lacking familiarity with legal procedures, a dismissal of this nature can be discouraging, possibly resulting in the abandonment of a valid legal claim. The conflict between rigorous compliance with procedural requirements and the fundamental principle of justice continues to be a topic of considerable discussion. Comparative research with Singapore[29] indicates that digital gatekeeping systems require strong user support. This support should include help desks, easy-to-understand documentation, and guidance presented in clear language. These elements are essential to reduce the risk of excluding vulnerable people, and they have been adopted in our current system with the establishment of e-filing offices and help desks throughout the Judicial Service Commission court stations.

14. Conclusion: Pioneering modern judicial administration

Chief Justice Luke Malaba's leadership of Zimbabwe's court signifies a pivotal time in the country's legal history. This article contends that, although his jurisprudential contributions will be examined for generations, his greatest lasting institutional impact is the change of judicial administration, especially the registry. The Chief Justice has acknowledged that the constitutional obligation for efficient, effective, and transparent justice necessitates a fundamental reconfiguration of

29 Henderson (n 5 above).

the administrative framework supporting the courts, thereby transforming both case processing and the justice experience for litigants, practitioners, and the public. The IECMS, Practice Direction 1 of 2025, Practice Direction 1 of 2026, the statistical governance mechanisms, the specialised registry divisions, and the collaborative performance frameworks that implement his vision have transformed the registrar's role from a passive custodian to an active digital gatekeeper, enabled registrars to manage caseflow proactively, and instituted accountability mechanisms that improve performance while preserving judicial independence.

The advantages are quantifiable: decreased processing durations, increased transparency, expanded access to justice, and more effective resource utilisation. However, beyond these quantifiable improvements exists a deeper significance: a redefinition of the essence of judicial leadership. Chief Justice Malaba has illustrated that heading the judiciary entails not only influencing jurisprudence but also refining the institutional framework through which justice is administered. His practical training of registrars, his readiness to delve into operational specifics, his receptiveness to innovation, and his collaborative leadership style have collectively established a legacy that will persist well beyond his retirement. The registry he has developed is efficient, empowered, professional, and results-driven, serving as evidence of a leader who recognised that justice necessitates not only astute judges but also effectively managed courts. Consequently, the Chief Justice's legacy extends beyond his four decades of judicial service. It is ingrained in the architecture of Zimbabwe's modern judiciary, a testament to a leader who revolutionised both the adjudication and administration of justice.

For scholars and practitioners of judicial administration, the Malaba era therefore offers a concrete case study of how leadership, technology, rules and culture can interact to reshape a court system from within. It illustrates that meaningful reform does not depend solely on new constitutions or dramatic landmark cases; it can also be achieved through sustained attention to the “ordinary” spaces of justice, such as the registry counter, the case-allocation desk and the digital dashboard. In these spaces, Chief Justice Malaba’s influence will continue to be felt daily in how files are received, processed and brought before judges, long after judgments have faded from public attention.

JUDICIAL ROBES AND POLITICAL MANTLES: THE POLITICAL TIGHTROPE OF ZIMBABWE'S CHIEF JUSTICES, FROM VINTCENT TO MALABA

TAZORORA TG MUSARURWA[1]

Abstract

This article employs a historical-analytical methodology to trace the institutional evolution of Zimbabwe's Chief Justice office through the biographies of its occupants from 1889 to the present. It argues that the apex of the judiciary is inextricably entangled with politics, perpetually operating on a "political tightrope" between strict legal demands and the state's survivalist imperatives. Situating this dynamic within the jurisprudential debate between legal formalism and legal realism, the paper contends that Zimbabwe's judicial leaders have constantly oscillated between these poles. The historical analysis reveals a foundational absence of the separation of powers during Company Rule, establishing a legacy of political entanglement that continues to haunt the post-colonial bench. While the Honourable Mr Justice Enoch Dumbutshena briefly achieved a zenith of rights-based independence, the violent executive backlash against Honourable Mr Justice Anthony Gubbay's strict formalist approach during the Fast Track Land Reform Program exposed the absolute limits of judicial power. Consequently, the paper argues that the subsequent tenures of Honourable Mr Justice Godfrey Chidyausiku and Honourable Mr Justice Luke Malaba represent a calculated "strategic pragmatism". To ensure institutional survival in a highly securitised environment, these jurists conceded to the executive on "off-limits" existential matters – such as land redistribution and electoral contestations – while utilising the resulting stability to advance progressive socio-economic jurisprudence and modernise court infrastructure. Ultimately, the article concludes that until comprehensive structural reforms and a resilient culture of constitutionalism take root, the office of the Chief Justice cannot function as an unconstrained arbiter of justice but must continue to master the complex art of political survival.

Keywords: *Zimbabwean Judiciary; Judicial Independence; Separation of Powers; Constitutional History; Legal Pragmatism; Executive Power; Rule of Law*

1. Introduction

There is a fascinating history behind the development of the Zimbabwean judiciary that should not be overlooked. This paper traces the evolution of the

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office of the Chief Justice by analysing the lineage of its occupants. From the very beginning of Company Rule in 1889, when Sir Justice Joseph Vintcent operated without a clear separation between the executive and the judiciary, to the constitutional crises of the Unilateral Declaration of Independence (UDI) under Chief Justices Hugh Beadle and Hector Macdonald, the bench has consistently served as a site of political contestation. By placing Chief Justice Malaba's tenure within this wider 130-year historical context, this paper argues that the office of the Chief Justice in Zimbabwe – from Vintcent to Malaba, has always involved walking a political tightrope. It examines how judicial leaders across different eras have had to balance their strict legal responsibilities against the overriding, and often survivalist, imperatives of the state.

This paper argues that the office of the Chief Justice in Zimbabwe has always been inseparably entangled with politics, requiring its occupants to navigate a hazardous intersection between the demands of law and the exigencies of state power. It is contended that, from the colonial era under Company Rule in 1889 through the present day, every Chief Justice has faced persistent pressure to balance judicial independence against the imperatives of executive authority and national survival. Understanding this dynamic is crucial to analysing both the historical development of Zimbabwe's judiciary and its contemporary challenges.

To fully grasp this dynamic, it is necessary to situate the Zimbabwean judicial experience within the broader jurisprudential debate between legal formalism and legal realism. While the formalist tradition demands strict, text-bound adherence to the law – often regardless of the political fallout – the realist and pragmatic approaches recognise that judges do not operate in a vacuum. They must frequently weigh the survival of the legal order against pure legal doctrine. This paper contends that Zimbabwe's Chief Justices have constantly oscillated between these two poles, finding that strict formalism is often punished by executive retaliation, while pragmatism risks undermining the institution's legitimacy.

Methodologically, this paper adopts a historical-analytical approach to trace the institutional evolution of a constitutional office through the biographical trajectories of its occupants. As comparative constitutional scholarship has established, examining the interplay between individual judicial actors and broader state imperatives provides a robust framework for understanding how legal institutions adapt to periods of extreme political volatility.[2]

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[2] T Roux, 'The Postcolonial Adaptation of Authoritarian Legalism in Zimbabwe' in [Editor] (Ed) (2018) *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*- Cambridge University Press.

2. Company Rule 1889 -1924

When Cecil John Rhodes' Pioneer Column first entered the territory that would eventually be named Southern Rhodesia, the southern region was mainly occupied by the Ndebele people.[3] The Ndebele Kingdom was ruled by King Lobengula, whose father, King Mzilikazi, had decades earlier acrimoniously parted ways with King Shaka Zulu.[4] Shaka's Zulu Kingdom was located several thousand kilometres away, in what is now the province of KwaZulu-Natal in the Republic of South Africa.[5] Meanwhile, the northern and eastern parts of the territory were occupied by various Shona chiefdoms.[6]

From 1890 to 1894, there was no High Court in Rhodesia, although one already existed at the Cape and in other South African provinces.[7] The Administrator, serving as Chief Magistrate, held the authority of a superior court of record with complete jurisdiction over all civil and criminal cases. Additionally, he was authorised to hear appeals from Magistrate's Courts and to review their decision-making proceedings.[8] These extensive powers were held at that time by Dr Leander Star Jameson.[9] At this stage, there was clearly no distinction between the executive and the judiciary.

According to Kimberley:

> Under the Order in Council of 1894 the High Court of Matabeleland was set up, with full jurisdiction in all matters, both civil and criminal, including appeal and review jurisdiction over inferior courts. The area of the court's jurisdiction, notwithstanding its title which implied that jurisdiction was confined to Matabeleland, encompassed the whole of Southern Rhodesia.[10]

The first judge to be appointed to the bench of Southern Rhodesia was Sir Justice Joseph Vintcent.[11] He was sworn in on 10 September 1894.[12] For the next four years, he would be the only judge for the entire colony.[13]

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3 'Ndebele' *Encyclopaedia Britannica* (online edn) https://www.britannica.com/topic/Ndebele-Zimbabwean-people (accessed 1 April 2026).
4 'Ndebele' (n 2 above).
5 'Ndebele' (n 2 above).
6 'Ndebele' (n 2 above).
7 MJ Kimberley 'Sir Joseph Vintcent - Rhodesia's First Judge' (1979) Vol 40 *Rhodesiana* 2.
8 Kimberley (n 6 above) 2.
9 Kimberley (n 6 above) 3.
10 Kimberley (n 6 above) 2.
11 Kimberley (n 6 above) 2.
12 Kimberley (n 6 above) 2.
13 Kimberley (n 6 above) 2.

According to Kimberley, Vintcent, during his tenure as Judge, would at one time act as Administrator of Southern Rhodesia.[14] This occurred in 1895, in the absence of Dr Jameson, who was the substantive administrator. Vintcent was already one of the four members of the council, responsible for running the Colony's affairs. In 1896, the local Ndebele people revolted against company rule, and Justice Vintcent had to assume military functions, serving as the army's commander-in-chief.[15] A military uniform is said to have been sewn for him as he pursued this function. Once the rebellion was contained, and with Jameson's return, he removed his military buttons and tucked back into his judicial robes.[16]

In December 1898 John Watermeyer a practising advocate from the Cape Bar was appointed as the second judge of Rhodesia.[17] Vintcent J was in the same notice, appointed as a senior judge, and Watermeyer J as a puisne (junior) judge.[18] Vintcent J was based in Bulawayo, and Watermeyer J became the first judge to be based at the Salisbury (now Harare) High Court.[19]

2.1. 1924 - 1961

In 1925, Murray Bisset, an advocate from the Cape Bar, retired from politics after serving as a member of the South African Party. He moved to Southern Rhodesia where he took up the appointment of Senior Judge before being appointed Chief Justice in 1927.[20] He became the first Chief Justice of Southern Rhodesia.[21] The following year, he would act as Governor of the colony in the absence of the Governor, and he did the same in 1931 before he passed away that year.[22] Sir Murray Bisset, as he would later be called, was the last judge to be appointed from the Cape.[23]

Bisset would be succeeded as Chief Justice by Sir Alexander Fraser Russell in 1931.[24] Like Bisset, Russell served as Governor on three occasions in 1934,

14 Kimberley (n 6 above) 7.
15 Kimberley (n 6 above) 7.
16 HM Hole 'Old Rhodesian Days' *London Times* 15 August 1914 (as quoted by Kimberley (n 3 above).
17 MJ Kimberley, 'John Philip Fairbairn Watermeyer: Rhodesia's second judge' (1979) Vol 40 *Rhodesiana* 14.
18 Kimberley (n 16 above) 2.
19 Kimberley (n 16 above) 2.
20 Obituary – Sir Murray Bisset' The Times 26 October, 1931 p19.
21 Obituary – Sir Murray Bisset' (n 19 above) 19.
22 Obituary – Sir Murray Bisset' (n 19 above) 19.
23 See also the speech by Beadle CJ as he welcomed Justice Maisels to the Southern Rhodesian bench in 'Mr. Justice Maisels' (1961) Vol 78 *South African Law Journal* 227.
24 Speech by Beadle CJ (above n22) 227.

1936, and 1942, before retiring in 1943 and passing away in 1952 at the age of 75.[25]

Robert James Hudson succeeded Russell. Although Hudson was a Capetonian, he was called to the Middle Temple Bar in Britain and later came to Rhodesia where he practised as an advocate in Bulawayo.[26] Following Responsible Government in 1923 he became the first Attorney-General.[27] He joined the Rhodesian Party and won a parliamentary seat in Bulawayo North, after which he was appointed Minister of Justice.[28] In 1933, he resigned from his parliamentary seat and took up judicial office as a judge in Bulawayo.[29] In 1943 he was appointed Chief Justice of Southern Rhodesia.[30] Like his predecessors, Hudson would also act as Governor in the absence of the Governor. This occurred from 26 October 1944 to 20 February 1945, and the second from 19 July 1946 to 14 January 1947.[31] He retired in 1950 at the age of 65.[32]

In 1950 Vernon Lewis acted as Chief Justice after Hudson's retirement but was never made substantive and never received the knighthood that came with it as he died that very year.[33]

The magistrates' court in Bulawayo is situated in the Tredgold Building. The building is named after Sir Robert Tredgold who became chief justice when Vernon Lewis died.[34] Tredgold was the first chief justice born in Rhodesia. Before he was appointed a judge, he had been called to the bar at the Inner temple and thereafter worked as an advocate in Bulawayo. He entered politics and won the Insiza North Constituency, which enabled him to be appointed to various ministerial posts, including Minister of Justice and Minister of Defence.[35]

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25 'Sir Fraser Russell' *The Times* 29 March, 1952.

26 'In Memoriam: Sir Robert Hudson' (1963) Vol 80 *South African Law Journal* 318.

27 'In Memoriam: Sir Robert Hudson' (n 25 above) 318.

28 'In Memoriam: Sir Robert Hudson' (n 25 above) 319.

29 'In Memoriam: Sir Robert Hudson' (n 25 above) 319.

30 'In Memoriam: Sir Robert Hudson' (n 25 above) 319.

31 'In Memoriam: Sir Robert Hudson' (n 25 above) 319.

32 According to Christie, Hudson had said that "in a hot country like Rhodesia no judge should remain in office beyond 65, because his mental faculties would be exhausted and he would be incapable of sustaining the workload." See RH Christie 'Recollections of the Rhodesian Bench and Bar Some Forty Years Ago' (1994) Vol 111 *South African Law Journal* 619.111 S. AFRICAN L.J. 619 (1994).

33 Christie (n 12 above) 619, where he says Vernon stayed in a haunted house and that could be why he died when he was on the verge of being a substantive chief justice.

34 Christie (above n31).

35 'Resignation of the Rt. Hon. Sir Robert Clarkson Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland' (1961) Vol 78 *South African Law Journal* 13.

In 1953, Southern Rhodesia merged with Northern Rhodesia (Zambia) and Nyasaland (Malawi) to form the Federation of Rhodesia and Nyasaland.[36] While a federal constitution was brought into force, according to Linington, "this did not affect Southern Rhodesia's Constitution which continued in force although some governmental functions now became the function of the federal government."[37] With Federation, the Federal Supreme Court was established in 1955, and Tredgold was made chief justice of the Federation.[38]

In the same year as Tredgold's elevation to the Federal Supreme Court, John Murray, a judge in the then Transvaal Provincial Division, accepted an offer to become Chief Justice of Southern Rhodesia. Murray had been a judge in Pretoria for 18 years before. At the age of 67, he was unexpectedly elevated to the post of Chief Justice of Southern Rhodesia. Like his predecessors, Murray would also serve as Governor of Southern Rhodesia before retiring in 1961 and returning to his homeland.[39]

Ultimately, the foundational years of the Rhodesian bench reveal a complete absence of the separation of powers. The recurring phenomenon of Chief Justices—from Bisset and Russell to Hudson and Murray—acting as the colony's Governor illustrates that early judges were viewed primarily as senior administrators of the colonial project. Sir Joseph Vintcent's assumption of military command to suppress the 1896 uprising starkly demonstrates that whenever the colonial state faced an existential threat, judicial independence was immediately discarded in favour of state survival. Consequently, the Zimbabwean judiciary was born into a culture of deep political entanglement, establishing a historical precedent that would relentlessly haunt the post-colonial bench in its quest for true independence.

3. The 1961 Southern Rhodesian Constitution

The sixties were a defining time in African politics, as black consciousness rose, with many Africans now politically aware of their rights and some economically empowered as well. The sixties saw countries like Ghana and Northern Rhodesia attain independence, which put severe pressure on both the British and Rhodesian governments. Edgar Whitehead, the then Prime Minister of Southern Rhodesia had devised a plan in the late 1950s to have the British government

36 G Linington *Constitutional Law of Zimbabwe* (2001) Legal Resources Foundation 27.

37 G Linington (above n35) 27.

38 'Resignation of the Rt. Hon. Sir Robert Clarkson Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland' (n34 above) 13.

39 The Late Sir John Murray," *South African Law Journal* 93, no. 3 (August 1976):324-328.

transfer its remaining powers over the colony to the Rhodesian government[40]. Rhodesians felt that they did not need to remain subject to British veto powers and needed complete self-rule.

Tredgold was appalled by the direction the country was taking, especially in severely restricting civil liberties, notably those of Africans and African nationalists advocating for majority rule. He resigned in protest over the bill that was later enacted into the Law and Order (Maintenance) Act.[41] Tredgold believed his resignation would spark public protests and a revolt against what was becoming an authoritarian state, but it largely went unnoticed, and the new normal continued as if nothing had changed.[42] Nevertheless, this was the first time a senior judge had publicly protested the government's actions. This act was likely to inspire other judges in the future. Tredgold was succeeded in the Federal Supreme Court by John Clayden, a former Johannesburg advocate and judge who had sat with him there.

John Murray, having retired in 1961, was immediately replaced by Thomas Hugh William Beadle as Chief Justice of Southern Rhodesia. Beadle was the first Rhodesian to ever be appointed to the post. This nationality would mark a difference in how he viewed his position and in the way he made both political and judicial decisions.

Beadle, who is arguably the most prominent of Rhodesian Chief Justices, was born and raised in Southern Rhodesia. Before donning judicial robes in 1950, he had spent 20 years as a career politician. In that capacity, he had served as Minister of Justice and Internal Affairs and also Minister of Education and Health. His political career included serving as Prime Minister Huggins' Private Secretary and as a member of the Monckton Commission, which was set up to advise on the review of the Federal Constitution. As will be seen below, his political career continued well after wearing judicial robes.

4. UDI and the 1965 Constitution

With the breakdown in talks between London and Salisbury on 5 November 1965, the Smith government declared a state of emergency and, on 11 November, announced the Unilateral Declaration of Independence (UDI). A new constitution was introduced immediately repealing the 1923 constitution. The British government retaliated by enacting the Southern Rhodesia Act, 1965, which confirmed that Rhodesia remained a British colony and that the Smith

40 C Palley The Constitutional History and Law of Southern Rhodesia [1966] 312.

41 'Chief Justice Quits: Bill Outrages Basic Rights' *Rhodesia Herald* 2 November, 1960.

42 Palley (n 17 above) 313.

government was entirely illegal, with all its acts having no force of law. The British government also passed the Southern Rhodesia Constitution Order, 1965 which prohibited the Rhodesian Parliament from exercising its legislative powers.

The 1965 Constitution purported to repeal the 1961 Constitution in its entirety. 'Purportedly' is used because this was the key issue in Madzimbamuto which constitution was in effect Rhodesia. The sovereign (the Queen of England) who had previously been represented by the Governor was replaced with the Officer Administering Government. There were other vast changes but this chapter shall limit itself to those changes made to the judiciary.

As a result of the state of emergency in place, one Madzimbamuto had been detained without trial, as permitted by the emergency regulations. When the state of emergency expired after its statutory three months, Parliament renewed it, and the Minister of Justice, Mr Lardner-Burke, promulgated new regulations that effectively extended Madzimbamuto's detention period. Madzimbamuto's wife then brought an application in the High Court challenging the renewal of the detention period. The crux of the application was that Lardner-Burke had no power to extend the detention period, as the entire Smith government and Parliament had been rendered illegal by the Southern Rhodesia Act, 1965, and the Southern Rhodesia Constitutional Order, 1965, which had been passed in Britain.

This case brought the legitimacy of the government of the day squarely into the hands of the judges who had been appointed by the Queen. Whatever legal justification they were to provide, the judges were being put in an invidious position to choose between Rhodesia and the Crown. The political stakes were extremely high, and there could be no harder test for judicial independence than this one. The *Madzimbamuto* matter is extremely lengthy and cannot be summarised effectively here; it is, however, mentioned in passing for its colossal historical significance.

The matter of *Madzimbamuto v Lardner-Burke NO*[43] was heard in the first instance by the General Division of the High Court, which delivered a unanimous decision. The court agreed that UDI, the 1965 Constitution and the entire Smith government were illegal. However, on the basis of the doctrine of necessity, the court ruled that the Smith government was the *de facto* government as they had effective control of the country and this was necessary for the maintenance of law and order. The court made it clear that it was no longer under the Crown when it rejected a ministerial certificate by the British Secretary for the Commonwealth.

43 1966 (2) RLR 756 (GD),1966 (2) SA 445 (R).

The certificate required the court not to enquire into the legality of the Smith regime as this was already the position of the Crown that the regime could not be recognised either *de jure* or *de facto.* The regulations were therefore valid and Madzimbamuto's case was dismissed.

The applicants appealed, and it went to the Appellate Division where Beadle CJ, "the evil genius",[44] presided. Beadle's decision was concurred in by three out of four judges. Two other judges wrote concurring opinions. There was a lone and brave voice from Fieldsend AJA, who dissented. In a scathing judgment, he made it clear that judges were sworn to uphold the Constitution, and that when asked to determine the legality of a government, they ought to be bound by that Constitution. His view was that the Applicant's detention was not reasonably necessary for the orderly running of the country and therefore upheld the appeal and ordered the Applicant to be released. Fieldsend would later resign in protest over the majority's decision in these matters.

Beadle never truly abandoned his political shoes. When UDI was declared, and the 1965 Constitution was promulgated, the Smith regime asked Governor Gibbs to resign, as the Office of the Officer Administering Government had been formed to replace that of the Governor. Gibbs refused to resign and decided to move out of Government House, his official residence. It was Beadle who persuaded the Governor to remain in occupation.[45] According to Faccini;

> between 1965 and 1968, Beadle took on the roles of adviser, negotiator and frequently that of the 'only suitable messenger between the parties'. It was only once the judiciary granted legal recognition to the regime that he came into conflict with London. Not only was the chief justice able to approach the Rhodesian prime minister without intermediaries, to advise the Governor and to assist him every time Smith visited Government House, but he also had private discussions with Wilson and his ministers.[46]

Beadle would thereafter continue to act as a broker between the Smith regime and the British Crown. By not rebelling against the Smith government, the rest of the judiciary (save for Fieldsend) would follow suit. In November 1966, he was invited to attend a conference on the ship *HMS Tiger.* Having attended

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44 The term “evil genius” is said to have been coined by Secretary of the Commonwealth Arthur Bottomley, who described Beadle as “the evil genius of UDI” Daily Telegraph 1971, (*Wikipedia).*

45 M Facchini 'The 'Evil Genius': Sir Hugh Beadle and the Rhodesian Crisis, 1965-1972' (2007) Vol 33 *Journal of Southern African Studies* 673.

46 Facchini (n 44 above).

conferences like these, Beadle would attend cabinet and act like an Attorney-General, explaining all the provisions of draft agreements to restore legality.[47]

The *Madzimbamuto* appeal was dismissed by the Beadle court.[48] In his judgment, Beadle CJ ruled that UDI and Smith were indeed illegal but that they had *de facto* control of the country which control could become *de jure* if it remained effective for a considerable time. In that regard, the 1965 Constitution was invalid, and the 1961 Constitution had to be in operation until the government had firmly established effective control for some time. Beadle further made a strange pronouncement that the courts derived their authority neither from the 1961 nor the 1965 constitution but from the fact that the government allowed them to operate and respected their judgments. The judgment reflected Beadle's approach of trying to appease both sides, who were at completely different ends, yet remaining legally legitimate.[49]

This approach subsequently made it very difficult for the judiciary. It is not the nature of judicial decisions to be stuck on the fence and as Christie would reflect, judges were often met with cases whose questions would make a judge seem either pro or anti-revolutionary.[50]

When Mrs Madzimbamuto's appeal was dismissed by the Appellate Division, in 1968 she sought leave to appeal to the Privy Council.[51] Leave to appeal had been dismissed by the Appellate Division, which, strangely, held that although she had proved that the whole constitution had been violated, she had failed to prove a violation of an entrenched right. In a separate concurring opinion, Macdonald JA held that, as the 1965 Constitution was now the *de facto* constitution, there was no longer any right of appeal to the Privy Council. She was, however, granted leave to appeal by the Privy Council and her appeal was successful. The Privy Council overturned the Appellate Division's decision, but it was a *brutum fulmen*,

47 Facchini (n 44 above).

48 Madzimbamuto v Lardner-Burke NO and Another 1968 (2) SA 284 (RAD).

49 This paper cannot do justice to the extensive debates around *Madzimbamuto* which Claire Palley has called "manna for jurisprudes". Further reading can be found from: Jaffey, AJE 'The Rhodesian Constitutional cases' (1968) Vol 8 *Rhodesian Law Journal* 138.; C Palley 'The Judicial Process: UDI and the Southern Rhodesia Judiciary' (1967) Vol 30 *Modern Law Review* 265; RS Welsh 'The Constitutional Case in Southern Rhodesia' (1967) Vol 83 *Law Quarterly Review* 64; JM Eekelaar 'Splitting the Grundnorm' (1967) Vol 30 *Modern Law Review* 156; AM Honoré 'Reflections on Revolutions' (1967) Vol 2 *Irish Jurist* 268; Wharam, A 'Treason in Rhodesia' (1967) Vol 25 *Cambridge Law Journal* 189.

50 RH Christie 'Practical Jurisprudence in Rhodesia II Allegiance of Natural' (1969) Vol 2 *The Comparative and International Law Journal of Southern Africa* 3.

51 *Madzimbamuto v Lardner-Burke and Another* (1968) 3 ALL ER 561 (PC).

as it would not be enforced in the country, since the Appellate Division was no longer recognised as a valid court.

There was a final attempt to assert the Crown's power when three convicts who had been sentenced to death were granted clemency by the Queen.[52] The Smith regime refused to abide by the clemency order, and the applicants sought a stay of execution. Advocate McNally (who would later be appointed a judge and a Supreme Court judge) argued that the 1961 Constitution was still in operation and that the Queen's prerogative of clemency still existed. This time Beadle CJ would be clear on which side him and the judiciary would be supporting. The application was dismissed with costs by a unanimous court which held that it would not recognise any right by the United Kingdom government to exercise the prerogative of mercy over Rhodesia. The following morning Dhlamini and Mlambo, the convicts, were executed by hanging.[53] The battle lines had been drawn and the Judiciary was now clearly in bed with the Smith regime and would continue to be so until 1980.

In 1977, Hugh Beadle retired as Chief Justice and was replaced by Judge of Appeal Hector Macdonald. McDonald was born in Bulawayo in November 1915. He attended Plumtree High School. He practised law at Grays Inn, Johannesburg Bar and at the Bulawayo Bar. He enlisted in the army and lost his right leg on the battlefield in Sicily in 1943. He was appointed a judge in 1958 and to the appellate division in 1963. He became judge president of the appellate division in 1970 before accepting the appointment of chief justice in 1977.[54]

When UDI was declared, Macdonald did not hide that he was on the side of the usurpers. In his separate concurring opinion in the *Madzimbamuto* matter MacDonald rejected the distinction between *de facto* and *de jure* control. It was his opinion that once a government has *de facto* control then automatically it must have *de jure* status.[55] Linnington describes this decision as being far-reaching and not an accurate statement of the law.[56] In *Dhlamini* [57] MacDonald did not

52 *Dhlamini & Others v Carter NO & Others* 1968 (2) SA 445 (RAD).

53 JRT Wood, A matter of weeks rather than months – The Impasse between Harold Wilson and Ian Smith Sanctions, Aborted Settlements and War 1965 – 1969, Trafford Publishing 2008.

54 See tribute paid to Hector Macdonald on his retirement by Mr Justice Lewis Judge President of the Appellate Division of the High Court of Zimbabwe (1980) 97 *SALJ* 452.

55 *Madzimbamuto* at page 416.

56 G Linnington p43.

57 *Dhlamini & Others v Carter NO & Others (*above n51).

hide his disdain for the lead counsel who was pursuing the argument that the 1961 Constitution was still in force.[58]

He was deeply opposed to majority rule and called it the antithesis of democracy.[59] Nicknamed "Hanging MacDonald" for imposing the death penalty in many cases involving "terrorists", McDonald CJ was unapologetically part of the system, and in the three years that he was Chief Justice, he did not hesitate to show where his loyalties lay.[60] In *S v Lamont,*[61] a case referred to by Mafukidze, McDonald CJ provides a long commentary countering the speech that Reverend Lamont had given in the dock, where he stated how it was the church's duty to help oppressed Africans, and this included medically treating the so-called terrorists.

According to The Times, in late 1979, he became controversial during the final phase of the Lancaster House conference in London, which led to a ceasefire and elections between the government and black nationalists. Lord Carrington, the conference chair, invited him to London to discuss the future of the judiciary. Macdonald told Carrington, without consulting all judges, that he and several others would resign if Mugabe took power.[62] His last act as Chief Justice was to swear in Robert Gabriel Mugabe as the new Prime Minister of Zimbabwe in 1980.

5. Independence & the Lancaster House Constitution 1980 - 2013

With the retirement of Macdonald, there was a vacancy for the office of Chief Justice. At this time, no qualified black Zimbabweans were available to take up the post. Mugabe then offered the position to Fieldsend, the lone judge who had opposed UDI and resigned in protest after the Appellate Division had allowed the Smith government to proceed with the execution of black convicted prisoners. Fieldsend agreed to take up the position only if there were no objections from current sitting judges. There were no objections.

The retention of old-order judges under Fieldsend was partly a function of the absence of trained African lawyers, but it sent a clear signal that ZANU-PF was,

58 RS Welsh 'The Function of a Judiciary in a coup d'etat' (1970) Vol 87 *South African Law Journal* 168.

59 DT Mandudzo's Lawyers Against the Law? Judges and the Legal Profession in Rhodesia and Zimbabwe' (1997) Vol 14 *Zimbabwe Law Review* 87.

60 T Mafukidze 'Enter hanging judge Hector Macdonald'. https://thenewshawks.com/enter-hanging-judge-hector-macdonald/. Accessed 1 April 2026.

61 1977 (1) RLR 112(S) at 116.

62 https://www.thetimes.com/best-law-firms/profile-legal/article/hector-macdonald-9tp36wvmzx3 Accessed 30 April 2026.

at least temporarily, committed to restoring the best traditions of the Bench and Bar.[63]

In his eulogy, Bulawayo lawyer David Coltart praised Fieldsend for upholding human rights at a tumultuous time when the government had maintained a state of emergency and was detaining people without trial under regulations.[64] According to Coltart, Fieldsend was unwavering in standing up for human rights and the rule of law. An analysis of his judgments reflects a jurist who was persuaded only by the law.

In *Hayes v Baldachin & Others (2),*[65] he upheld an appeal against the Secretary for Justice who had issued a certificate against the appellant to have his matter held *in camera.* He found the certificate irregular and a violation of fair trial rights. In *Commissioner of Police v Wilson*,[66] the Commissioner of Police was not found to have violated the law when he reduced the Respondent's rank from Commissioner to Superintendent after the latter had signed an agreement committing to serve at least 12 months and then sought to renege on it.

It may be argued that Fieldsend CJ was able to be a proper independent chief justice, as had been promised to him by Mugabe.

5.1. Philip Telford Georges: The Transient 'Uberjudge' (1984)

When Sir John Fieldsend retired in 1984, the government's project of "Africanising" the bench was still in its infancy. The Minister of Justice, Simbi Mubako, faced significant difficulties in recruiting experienced black Zimbabwean lawyers to the judiciary. Many of these practitioners, having been historically starved of lucrative commercial work, preferred the financial returns of private practice over the relatively modest remuneration and intense public scrutiny of the bench.[67] To bridge this critical gap, the government turned to the international Commonwealth network, leading to the brief but symbolically potent appointment of Philip Telford Georges.

63 Roux T 'The Postcolonial Adaptation of Authoritarian Legalism in Zimbabwe' in [Editor] (Ed) *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018) 193.

64 P Ndou 'Zimbabwe's first Chief Justice dies' *Bulawayo 24 News* https://bulawayo24.com/index-id-news-sc-national-byo-105134.html. Accessed 2 April 2026.

65 1980 *ZLR* 422 (AD).

66 1981 (1) *ZLR* 451 (S).

67 GH Karekwaivanane 'The Struggle over State Power in Zimbabwe Law and Politics since 1950' (2017) 162.

Justice Georges, a Dominican national, belonged to an elite echelon of Caribbean jurists often characterized in academic literature as "uberjudges"—highly respected legal professionals who effortlessly transcended juridical borders to serve across the post-colonial developing world. Prior to his arrival in Zimbabwe, Georges boasted a brilliant transnational career. He had served as a Judge of the High Court and Acting Justice of Appeal in Trinidad and Tobago, and profoundly, as the Chief Justice of Tanzania from 1965 to 1971.[68] George's tenure lasted only six months.

5.2. Enoch Dumbutshena: The Golden Age of Human Rights and Judicial Independence (1984–1990)[69]

The appointment of the Honourable Mr Justice Enoch Dumbutshena as Chief Justice on 29 February 1984 marked a watershed moment in Zimbabwe's legal history – the first black Zimbabwean Chief Justice.[70] Dumbutshena had been the first black lawyer to be appointed to the High Court in May 1980, breaking a century of racial exclusion.[71] His background was deeply rooted in the struggle for liberation, but notably, his elevation to the Chief Justiceship was not an act of political patronage by the ruling party. Dumbutshena had never been a member of ZANU-PF; his political lineage traced back to the rival Zimbabwe African People's Union (ZAPU) and he had later served as a legal adviser to Bishop Abel Muzorewa's United African National Council (UANC).[72]

Dumbutshena's tenure is widely regarded by domestic and international legal scholars as the zenith of judicial independence and human rights protection in Zimbabwe.[73] He presided over the Supreme Court during a volatile period when the government, facing internal unrest, frequently relied on inherited colonial-era

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68 NM Young in A Dziedzic & SNM Young (Eds) The Cambridge Handbook of Foreign Judges on Domestic Courts (2023).

69 De Bourbon refers to this as the golden era of human rights litigation. See A De Bourbon 'Human rights litigation in Zimbabwe: Past, present and future' (2003) Vol 2 *African Human Rights Law Journal* 195.

70 'The legal professions in a new South Africa: Judge Enoch Dumbutshena Former Chief Justice of Zimbabwe' https://www.gcbsa.co.za/law-journals/1993/october/1993-october-vol006-no2-pp130-132.pdf (accessed 1 April 2026).

71 The legal professions in a new South Africa: Judge Enoch Dumbutshena Former Chief Justice of Zimbabwe' https://www.gcbsa.co.za/law-journals/1993/october/1993-october-vol006-no2-pp130-132.pdf (accessed 1 April 2026).

72 Dumbutshena, E 'The rule of law in a constitutional democracy: the Zimbabwean experience' (1989) Vol 1989 *De Rebus* 535. https://journals.co.za/doi/pdf/10.10520/AJA02500329_2638 (accessed 1 April 2026).

73 De Bourbon A 'Zimbabwe: Human rights and the independent Bar' https://journals.co.za/doi/pdf/10.10520/AJA10128743_256 (accessed [Date]).

State of Emergency regulations to suppress political opposition, particularly during the violent *Gukurahundi* conflict in Matabeleland. Despite intense executive pressure and a prevailing atmosphere of state insecurity, Dumbutshena's court consistently ruled in favour of civil liberties, refusing to be cowed by executive mandates.

Dumbutshena maintained an uncompromising stance on judicial review, firmly rejecting the notion that executive prerogatives could oust the jurisdiction of the courts. This was starkly illustrated in a case involving former Rhodesian Prime Minister Ian Smith. When the government suspended Smith's parliamentary pay and benefits, Smith challenged the action. The Speaker of Parliament produced a certificate stating the matter fell within parliamentary privilege and was beyond the court's reach. Dumbutshena boldly dismissed this argument and struck down the termination of Smith's benefits.[74] The executive's angry response — with the Speaker stating that Parliament must "liberate itself from the Supreme Court Judges" — anticipated the intense, fundamental conflicts that would eventually engulf the judiciary.

Furthermore, Dumbutshena's court was a trailblazer in interpreting the Declaration of Rights. In December 1987, the Supreme Court decided that whipping an adult offender violated section 15(1) of the 1980 Lancaster House Constitution, as it was considered "inhuman and degrading" punishment.[75] He also pioneered protections for detainees, clarifying that detention cannot be used for illegitimate reasons like investigating ordinary crimes, and requiring the executive to allow detainees access to lawyers and review tribunals.

Dumbutshena's legacy is that of an uncompromising jurist who briefly but brilliantly normalised the supremacy of the Constitution over the immediate, often coercive, desires of the state, earning Zimbabwe a deserved reputation throughout the Commonwealth for its enlightened approach to human rights.[76]

While Dumbutshena's tenure is rightly celebrated for its robust defence of civil liberties, it is crucial to contextualise his judicial independence within the political realities of the 1980s. It can safely be argued that, while his court frequently delivered judgments against the government, none of these rulings threatened the ruling party's existential position or political hegemony, which at the time enjoyed overwhelming national support. Progressive rulings—such as striking down corporal punishment or protecting the parliamentary benefits of Ian Smith —were politically irritating to the executive but did not imperil its grip on power.

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74 *Smith v Mutasa N.O. & Another 1989 (3) ZLR 183 (SC).*
75 *S v Ncube and Others* 1987 (2) ZLR 246 (S).
76 De Bourbon A (n65 above) 204.

Furthermore, Dumbutshena's background provided him with a unique political shield. As a black nationalist who had participated in the liberation struggle, he represented a definitive break from the colonial past. Even though his political lineage traced to ZAPU and the UANC rather than to ZANU-PF, he possessed inherent racial and historical legitimacy that enabled the political elite to view him as an indigenous jurist. Because his jurisprudence did not threaten the state's core survival, he was never branded an enemy of the revolution—a devastating fate that would inevitably befall his successor, Anthony Gubbay, who lacked such historical cover and presided over a court during a period of acute existential crisis for the state.

5.3. Anthony Gubbay: The Collision of Law, Land, and Revolution (1990–2001)

When Enoch Dumbutshena retired in 1990, he was succeeded by The Honourable Mr Justice Anthony Gubbay. Gubbay, a white judge appointed to the bench in 1977 under the Rhodesian regime, was elevated by Mugabe solely on the basis of seniority and judicial excellence. This dispelled early fears that race would dictate judicial appointments. For the first decade of his tenure, Gubbay largely continued Dumbutshena's progressive tradition, expanding an impressive body of human rights jurisprudence.[77] However, his tenure ultimately became the flashpoint for the most severe constitutional crisis in post-colonial Zimbabwe, triggered by the Fast Track Land Reform Program (FTLRP).

6. The Land Crisis and the Breakdown of Legality

The late 1990s saw Zimbabwe plunged into economic turmoil due to structural adjustment programs, leading to the rapid rise of a formidable political opposition, the Movement for Democratic Change (MDC). This rising discontent culminated in the government's shocking defeat in the February 2000 constitutional referendum.[19] Facing an unprecedented, existential threat to its power ahead of the 2000 parliamentary and 2002 presidential elections, ZANU-PF abandoned its reliance on standard legal frameworks and initiated a chaotic, violent campaign of land expropriation.[78] War veterans and ruling party loyalists began forcibly invading white-owned commercial farms, a process that ultimately saw approximately 4,500 white commercial farmers forced off their land, 350,000 farm labourers lose their livelihoods, and numerous murders, tortures, and abductions occur with complete state impunity.[79]

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77 De Bourbon (n65 above) 205.

78 Kriger, N. (2005). ZANU(PF) Strategies in General Elections, 1980-2000: Discourse and Coercion. *African Affairs*, *104*(414), 1–34. https://www-jstor-org.uz.remotexs.co/stable/351863.

79 Kriger (n47 above).

The Gubbay-led Supreme Court was forced into a direct, high-stakes confrontation with the executive branch. In a series of rulings in late 2000, particularly following petitions from the Commercial Farmers Union, the Supreme Court held that the land reform program, as violently executed, was unconstitutional. The Court ruled that the invasions violated the fundamental right to protection of the law and constitutional property rights.[80] Gubbay's court issued interdicts requiring the government and the police to restore order, protect farmers and their workers, and evict illegal occupiers until a lawful, workable program of land acquisition was established.[81]

The executive response was swift, brutal, and extra-legal. The government explicitly adopted a policy of defying court orders, viewing the judiciary not as an independent constitutional arbiter, but as an immediate impediment to revolutionary justice and regime survival.[82] President Mugabe publicly declared that the courts could "do whatever they want, but no judicial decision will stand in our way," labelling the judges as remnants of colonialism and "guardians of white racist commercial farmers". The Minister of Information, Jonathan Moyo, directly accused Gubbay of aiding and abetting racism.[83]

The crisis reached its terrifying zenith on November 24, 2000, when over 200 war veterans forcibly invaded the Supreme Court building in Harare. They danced on the court tables, shouted political slogans, and chanted death threats against the judges, all while the state police stood by and watched, refusing to intervene.[84] Shortly thereafter, in January 2001, the Minister of Justice, Patrick Chinamasa, formally informed Chief Justice Gubbay that the government could no longer guarantee his physical safety from the mobs and explicitly demanded his resignation. Under immense psychological duress and fearing for his life, Gubbay resigned in March 2001, well before his term was due to expire.[85] This forced capitulation triggered a mass exodus of other independent judges, including Justices Michael Gillespie, Nicholas McNally, David Bartlett, and Ishmael Chatikobo, who fled into exile.

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80 *Commercial Farmers Union v Minister Of Lands & Ors* 2000 (2) ZLR 469(S).

81 Human Rights Watch 'Our Hands Are Tied: Erosion of the Rule of Law in Zimbabwe' https://www.hrw.org/reports/2008/zimbabwe1108/5.html (accessed 1 April 2026).

82 Human Rights Watch (n 77 above).

83 F Tolu-Honary 'Judicial Responses to Weaponized Citizenship in Zimbabwe' https://citizenshiprightsafrica.org/wp-content/uploads/Tolu-Honary-Judicial-Responses-to-Weaponized-Citizenship-in-Zimbabwe-2023.pdf (accessed 1 April 2026).

84 Human Rights Watch (n 77 above).

85 N Dancaescu 'Land Reform in Zimbabwe' (2003) Vol 15 *Florida Journal of International Law* Article 5.

7. The Gubbay Legacy: Rule of Law vs. Restorative Justice

Gubbay's legacy remains a subject of intense, polarised academic and political debate. To legal scholars, he was a jurist of note, and his judgments continue to lead the interpretation of laws to this date. He was a torchbearer in upholding civil liberties, and his decisions are persuasively cited in several progressive foreign jurisdictions.

However, critics aligned with the government's revolutionary nationalist ideology view Gubbay through a markedly different perspective. They contend that Gubbay was a judicial "conformist" to colonial values whose strict adherence to Roman-Dutch property law only served to uphold the unjust, racially biased land distribution inherited from a violent colonial past. From this ideological standpoint, Gubbay's rigid legalism was deliberately blind to the socio-economic needs of historical restorative justice and the moral importance of returning land to indigenous populations.[86] Nevertheless, regardless of ideological leanings, his forced removal remains the definitive, tragic moment when the Zimbabwean state openly and violently subordinated the judiciary to the executive.

7.1. Godfrey Chidyausiku: Strategic Pragmatism and the Limits of Judicial Power (2001–2017)

The Honourable Mr Justice Godfrey Chidyausiku, who was Judge President of the High Court, was sworn in as Acting Chief Justice sometime in March 2001.[87] He was substantively sworn in as Chief Justice sometime in July 2001.[88] His appointment was a serious break with tradition, in which the Chief Justice was appointed from serving Supreme Court judges rather than a judge of the High Court.[89]

Chidyausiku must have been alive to the assertion that the primary task of an apex court in a new democracy is to ensure its own survival.[90] The violent, forced departure of Anthony Gubbay provided a stark, inescapable lesson to his successor. When Godfrey Chidyausiku was elevated to Chief Justice in March

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86 Masimirembwa G 'Chidyausiku Leaves Behind a Commendable Legacy of Defending Zimbabwe's Heritage' *ZILS Articles* https://www.zils.ac.zw/articles1b.php Accessed 1 April 2026.

87 EDITORIAL COMMENT: Justice Chidyausiku a cadre par excellence – *The Herald* https://www.heraldonline.co.zw/editorial-comment-justice-chidyausiku-a-cadre-par-excellence/. Accessed 2 May 2026.

88 *The Herald* (n83 above).

89 Mapfumo T 'Whither to, the judiciary in Zimbabwe? A critical analysis of the human rights jurisprudence of the Gubbay and Chidyausiku Supreme Court benches in Zimbabwe and comparative experiences from Uganda' (Unpublished LLM thesis, University of Pretoria, 2005) 40.

90 Roux T 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) Vol 7 *International Journal of Constitutional Law* 106.

2001, he assumed control of a judiciary operating under an explicit state of siege. Chidyausiku, a former ZANU-PF Member of Parliament and Deputy Minister of Justice,[91] was intimately familiar with the immense power of the ruling party and the extreme lengths to which the executive would go to secure its political survival.

While critics have frequently dismissed Chidyausiku's tenure merely as an era of "authoritarian legalism", a period where the court was packed to rubber-stamp executive excesses, a deeper analysis reveals a highly calculated pragmatism.[92] Chidyausiku understood that open confrontation with the state over existential political imperatives would only lead to the total destruction of the judiciary. Both he and his eventual successor, Luke Malaba, provide a profound lesson for future Chief Justices of Zimbabwe: how does one manage an overbearing, highly securitised executive while simultaneously preserving institutional functionality and delivering a mandate of progressive, people-oriented jurisprudence?

7.2. The "Off-Limits" Cases: Land and Regime Survival

For Chidyausiku, the survival of the judiciary required acknowledging that certain core political issues were effectively "off-limits" for judicial nullification. The most prominent of these was the Fast Track Land Reform Program. Recognising that the executive viewed land expropriation as a non-negotiable revolutionary objective, Chidyausiku acted pragmatically to harmonise the law with the state's political reality. In December 2001, he convened a reconstituted bench, excluding (save for one) the remaining liberal, longer-serving judges and successfully reversed the Gubbay court's rulings, effectively declaring the violent farm acquisitions legal.[93]

Similarly, he deployed an aggressively "purposive" judicial methodology strictly when the state's electoral survival was at stake. This was most evident in the 2013 *Jealousy Mawarire* case, where Chidyausiku authored a controversial majority judgment ordering early national elections.[94] By dismissing the literal text of the Constitution to mandate an immediate election, the ruling conveniently pre-empted SADC-mandated democratic reforms and handed the ruling ZANU-PF party a massive logistical advantage. In these existential matters, Chidyausiku functioned as a reliable legal shield, accepting that delivering these outcomes to the government was the steep price of institutional survival.

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91 Roux T (n62 above).

92 Roux T (n62 above).

93 *Minister of Lands, Agriculture and Resettlement & Others v Commercial Farmers Union* 2001 (2) ZLR 457 (S) (Also cited as 2001 (9) BCLR 956 (ZS) or 2001 (2) SA 925 (ZSC).

94 *Mawarire v Mugabe N.O. & Others* 2013 (1) ZLR 469 (CC).

This strategic pragmatism, however, invites a profound jurisprudential critique: if an apex court consistently capitulates to the executive on the most fundamental questions of constitutional democracy such as the rule of law, the sanctity of elections, and the protection from arbitrary expropriation, what actual value remains in the institution it purports to "save"?[95] Critics legitimately argue that preserving the court's physical and administrative infrastructure at the cost of legitimising unconstitutional state action fundamentally hollows out the core of judicial independence. Yet, within a hyper-securitised environment, defending this pragmatism requires acknowledging a grim calculus: that a compromised court delivering incremental justice in civil, commercial, and socio-economic matters may be viewed by its occupants as preferable to the total annihilation of the judicial branch, the exact reality that precipitated Gubbay's exit.

8. Progressive Jurisprudence and People-Oriented Law

However, framing Chidyausiku solely through his handling of land and elections obscures a critical element of his legacy. When operating outside the restrictive confines of regime-threatening politics, Chidyausiku demonstrated a robust capacity for progressive, human rights-oriented jurisprudence. Once the existential pressures of the land crisis stabilised, his court delivered rulings that significantly expanded civil liberties and protected ordinary citizens.

A defining example of this selective but vital progressivism was the landmark 2016 case of *MISA-Zimbabwe et al v Minister of Justice et al*.[96] In a unanimous decision by the full bench of the Constitutional Court, Chief Justice Chidyausiku boldly struck down Section 96 of the Criminal Law (Codification and Reform) Act, which enshrined criminal defamation. This ruling was hailed internationally as a massive victory for freedom of expression and the press, effectively disarming the state of a colonial-era weapon that had frequently been used to muzzle independent journalists and political critics. By striking down such oppressive legislation, Chidyausiku proved that a pragmatic Chief Justice could still advance democratic rights and protect the citizenry, provided the ruling did not pose an immediate, fatal threat to the executive's hold on state power.

9. Luke Malaba: The Pragmatist on a Political Tightrope (2017–Present)

As Godfrey Chidyausiku approached the mandatory retirement age of 70 in 2017, the political battle for his succession exposed deep, factional fractures within the ruling ZANU-PF elite. Luke Malaba, who had scored the highest in the

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95 Posner, RA 'Legal Pragmatism' (2004) Vol 35 *Metaphilosophy* 147. See also Radin, M 'Legal Realism' (1931) Vol 31 *Columbia Law Review* 824.

96 *MISA-Zimbabwe & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors*2016 (1) ZLR 217 (CC)

constitutionally mandated public interview process, was ultimately appointed Chief Justice despite attempts by elements within the executive to halt the process and engineer an alternative outcome.[97] Malaba assumed office on 27 March 2017 a few months before the historic November 2017 "military-assisted transition" that ousted Robert Mugabe and installed Emmerson Mnangagwa.[98]

Malaba's tenure has been characterised by a complex, often underappreciated balancing act. He assumed the helm of the judiciary during a deeply volatile period of national transition, inheriting an institution historically entwined with the executive. The circumstances of his rise and the hyper-politicised environment were not of his own making; rather, they reflected the intense politics of the times. The defining question of his tenure is how effectively he has navigated these political tides, a journey marked by significant administrative triumphs, moments of progressive jurisprudence, and an approach to high-stakes political cases that walks a fine line between strict legalism and executive deference.

9.1. Pre-Elevation Independence: The Anglican Church and Mawarire Cases

Malaba's eventual appointment as Chief Justice was preceded by a reputation for bold, principled legal reasoning during his tenure as Deputy Chief Justice. Two cases in particular highlighted his capacity to swim against powerful political tides. In 2012, Malaba penned the Supreme Court judgment in *Church of the Province of Central Africa v Diocesan Trustees for the Diocese of Harare*.[99] In this deeply acrimonious dispute, he ruled in favour of the official Anglican Church against a breakaway faction led by former Bishop Nolbert Kunonga, who had unilaterally seized church property. Despite the highly charged, quasi-political nature of the schism, given Kunonga's controversial political alignments[100] - Malaba's judgment remained steadfastly apolitical, strictly applying the legal principles of voluntary association to order the surrender of the properties back to the official church.

Equally significant was his powerful dissenting opinion in the 2013 *Jealousy Mawarire v Robert Mugabe* case.[101] While the majority, led by Chief Justice Chidyausiku, relied on a highly controversial "purposive" interpretation to

97 See *Zibani v Judicial Service Commission & Others* HH-797-16 and *Judicial Service Commission v Zibani & Others* SC-68-2017.
Malaba appointed Chief Justice – The Herald
https://www.heraldonline.co.zw/malaba-appointed-chief-justice/ Accessed 2 May 2026.

99 *Church of the Province of Central Africa v Diocesan Trustees for the Diocese of Harare* 2012 (2) ZLR 392 (S)
'Kunonga now Zanu PF political commissar' -Newsday Zimbabwe
https://www.newsday.co.zw/news/article/230902/kunonga-now-zanu-pf-political-commissar. Accessed 2 May 2026.

101 *Mawarire v Mugabe NO* CCZ-1-2013.

mandate early national elections that favoured the ruling party's agenda.[102] Malaba DCJ (as he then was) bravely dissented. He rejected the majority's reasoning, demonstrating an uncompromising commitment to strict constitutional adherence even when it directly contradicted the executive's immediate political desires.[103] These formative, courageous stances provided him with the gravitas that preceded his ascension to the highest judicial office.

9.2. Institutional Reforms and Modernisation

To fully assess Malaba's legacy, one must look beyond the political headlines to his substantial achievements as an institution-builder. Malaba has driven an ambitious agenda to modernise the Zimbabwean justice delivery system, aiming to enhance transparency, efficiency, and public trust. His hallmark administrative achievement has been the introduction and phased implementation of the Integrated Electronic Case Management System (IECMS).[104] Launched to transform the Constitutional Court, Supreme Court, and Commercial Court into paperless environments, the IECMS has been praised for improving access to justice, accelerating the judiciary's digitisation, and building resilience against disruptions, particularly during the COVID-19 pandemic.[105] Furthermore, under his leadership, the Judicial Service Commission (JSC) successfully established specialised Anti-Corruption Courts in multiple provinces to actively complement national efforts against graft alongside specialised Commercial Courts designed to improve the ease of doing business and resolve corporate disputes expeditiously.[106]

9.3. Progressive Jurisprudence and Legal Activism

While often viewed through the lens of political controversy, Malaba's court has also delivered internationally lauded judgments that protect human rights and advance socio-economic justice. In extra-curial speeches, Malaba himself has advocated a dynamic role for the judiciary, agreeing that constitutional justice

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102 See Manyatera G, & Hamadziripi C 'Electoral Democracy in Africa: Critique of Jealousy Mbizvo Mawarire Robert Gabriel Mugabe N.O. and Others CCZ 1/13' *University of Botswana Law Journal*, 17, 55-64.

103 Manyatera & Hamadziriripi (above n98) 62.

104 Poshai L and Vyas-Doorgapersad S 'Digital justice delivery in Zimbabwe: Integrated electronic case management system adoption' http://www.sajim.co.za Open Access South African Journal of Information Management Published Online:26 Sep 2023 https://hdl.handle.net/10520/ejc-info_v25_n1_a1695. Accessed 2 May 2026.

105 Poshai & Vyas-Doorgapersad (Above n103) 5.

106 The Miranda March 202 19th Edition p9 https://jsc.org.zw:8222/media/uploads/compressed.tracemonkey-pldi-09_qx3j2eD.pdf Accessed 2 May 2026.

must go "beyond mere legalism" and that judges should "assume the role of legal activism" to guarantee popular participation and human dignity.[107]

This progressive philosophy was brilliantly displayed in *Mudzuru v Minister of Justice,*[108] where Malaba CJ boldly penned the unanimous Constitutional Court decision declaring child marriages unconstitutional in Zimbabwe. The judgment received immense international praise and earned the Court recognition from global rights groups for its robust protection of children's rights. Similarly, his court delivered a highly progressive ruling in *Mawere v Registrar-General,*[109] successfully confirming the constitutional right to dual citizenship, an issue the government had previously contested bitterly. These cases demonstrate Malaba's capacity to act as a formidable guardian of the Constitution when operating outside the immediate, existential crosshairs of executive power.

9.4. Procedural Legalism in Political Storms

However, Malaba CJ's ability to "swim the political tides" is most rigorously tested in matters threatening the core hegemony of the state. In these instances, Malaba CJ tends to retreat from the expansive activism he applies to socio-economic rights, seeking refuge instead in strict procedural legalism. This was most evident in the August 2018 Constitutional Court challenge to President Mnangagwa's election victory (*Chamisa v Mnangagwa*).[110] In a unanimous decision penned by Malaba CJ, the Court dismissed the opposition's petition with costs. Malaba's legal reasoning was anchored in the "substantial effect" doctrine codified in the Electoral Act [Chapter 2:13], ruling that the applicant failed to provide primary evidence showing that the alleged irregularities mathematically altered the final outcome.[111]

Nonetheless, the Court's strict dependence on the "substantial effect" doctrine exposes a strong judicial bias towards procedural formalism, which often

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107 Malaba L 'Models of electoral justice: shared experience of the Zimbabwean model of electoral justice system' Paper presented at 3rd International Symposium of the Conference of Constitutional Jurisdictions of Africa (CCJA) Theme: "Electoral Justice: Transparency, Inclusion and Integrity of the Process" 14-15 October, 2021 | Maputo, Mozambique https://cjca-conf.org/wp-content/uploads/2022/09/Actes-Symposium-Mozambique.pdf. Accessed 2 May 2026.

108 *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs & Others* 2016 (1) *ZLR* 12 (CC).

109 *Mawere v Registrar General & Others* 2013 (2) *ZLR* 154 (CC).

110 *Chamisa v Mnangagwa & Others* 2018 (2) ZLR 471 (CC).

111 See the review by Kaaba O 'Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others CCZ 42/18 (August 2018)' *SAIPAR Case Review* Volume 2 Issue 1 May 2019 Article 4 5-2019 available on https://scholarship.law.cornell.edu/scr/vol2/iss1/4/. Accessed 2 May 2026.

undermines substantive electoral justice. By requiring the applicant to prove not just the occurrence of irregularities but also that these irregularities mathematically changed the final result, the Court imposed a very high and possibly unattainable evidentiary burden on the challenger.

This formalistic approach has faced strong criticism, especially regarding how the Court handled the V11 electoral forms. Commentators and regional observers pointed out a clear inconsistency: the Court penalised the applicant for failing to provide primary election data but refused to exercise its constitutional authority to require the Zimbabwe Electoral Commission (ZEC) to submit the contested V11 forms.[112] Since ZEC is the only official holder of this primary data and had already acknowledged several calculation errors, the Court's decision not to investigate ZEC's internal procedures created an evidentiary stalemate for the applicant.

Ultimately, the Chamisa judgment clearly favoured procedural compliance over substantive justice. Instead of acting as a strong check on the electoral management body, the Court relied on procedural proof rules to overlook ZEC's evidentiary shortcomings. This suggests that the judiciary sees its role more as a passive referee than as an active investigator of democratic truth, permitting systemic electoral opacity so long as the challenger's paperwork is deemed inadequate.

10. Conclusion: The Perpetual Tightrope

The exhaustive history of Zimbabwe's post-colonial Chief Justices from the principled, expansive human rights jurisprudence under Enoch Dumbutshena to the strategic pragmatism of Godfrey Chidyausiku and Luke Malaba, demonstrates unequivocally that the judiciary cannot be viewed in isolation from the political economy of the state in which it operates. In societies where the ruling elite views the retention of state power not as a democratic contest but as an existential, revolutionary imperative, the judiciary is rarely permitted to act as an unconstrained, neutral arbiter of justice.

Anthony Gubbay's noble but doomed attempt to erect an impregnable firewall of strict legalism around private property rights and due process was ultimately crushed by the brute, extra-legal force of the Fast Track Land Reform Program. This dark chapter proved that judicial decrees, no matter how legally sound, are utterly impotent without the consent and compliance of the executive apparatus.

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112 Mavedzenge J 'A Critical Review of Jurisprudence on the Adjudication of Presidential Election Petitions in Africa' *Journal of Comparative Law in Africa* Vol. 11, No. 1 1 at 16.

Consequently, the tenures of both Chidyausiku and Malaba offer profound, enduring lessons for future Chief Justices of Zimbabwe. Both jurists keenly understood the immense, overbearing power of the executive and the limits of judicial intervention. Their tenures suggest that in a highly securitised, politically volatile state, the apex of the judiciary must operate with calculated pragmatism. By conceding to the state on core, "off-limits" existential imperatives such as the redistribution of land or the certification of highly contested electoral processes, they ensured the survival of the institution. Crucially, they utilised the resulting stability to successfully deliver on their mandate of progressive, people-oriented jurisprudence, expanding socio-economic rights, modernising court infrastructure, and striking down archaic, oppressive laws in areas that did not threaten the state's immediate hegemony.

Looking ahead, the critical question remains whether the Zimbabwean judiciary can ever safely dismount this political tightrope. An extremely repressive state may ultimately render the judiciary its lackey. For future Chief Justices, the lessons of the past century suggest that individual judicial courage is ultimately insufficient without robust structural reinforcement. True judicial independence will require comprehensive constitutional and institutional reforms such as fully depoliticising the judicial appointment and promotion processes, granting the Judicial Service Commission absolute financial autonomy, and explicitly insulating the apex court from executive overreach. In doing so, judges must still guard against ceding their individual independence to the independent judicial services commission. Until the broader political culture evolves to respect the separation of powers not as an obstacle to revolutionary imperatives but as the foundational bedrock of legitimate statecraft, the venerated office of the Chief Justice will remain a hazardous balancing act.

WHEN THE LAW IS SILENT, MUST FAIRNESS STILL SPEAK? A CASE NOTE ON FIDELITY PRINTERS AND REFINERS (PVT) LTD V THE MINISTER OF MINES AND MINING DEVELOPMENT N.O. SC 107/22 AND ANESU GOLD MINE (PVT) LTD V ONESIMO MAZAI MOYO N.O. & 3 OTHERS HH 642/23

ZINGANO SAKUGA[1] & CHENGETAI HAMADZIRIPI[2]

Abstract

This article critically examines under what circumstances, if any, are administrative bodies bound by the principles of administrative law permitted to lawfully depart from the requirements of natural justice as enshrined particularly in Section 3 of the Administrative Justice Act [Chapter 10:28]. The analysis is anchored in the Supreme Court decision of Fidelity Printers and Refiners (Private) Limited v The Minister of Mines and Mining Development N.O., The Provincial Mining Director for Midlands Province (hereinafter called "the PMD") & Jonah Nyevera SC 107/22. The Fidelity case articulated the boundaries of procedural fairness in the context of deprivation of mining rights arising out of the forfeiture of a gold mining claim belonging to Fidelity by the Provincial Mining Director for the Midlands Province, effected in terms of section 260 of the Mines and Minerals Act [Chapter 21:05], without prior notice to or representations from Fidelity. While the High Court dismissed Fidelity's claim to set aside the PMD's forfeiture of its gold mining claim, the Supreme Court, on appeal, held that the forfeiture was unlawful. The article dives into the Supreme Court's assessment of the key arguments in the case including the Respondent's justification for administration burden in not serving the forfeiture notice personally on Fidelity and the court's interpretation of Section 260 of the Mines Act in light of Section 3 of the AJA. The article further makes reference to the subsequent High Court decision in Anesu Gold Mine (Pvt) Ltd v Onesimo Mazai Moyo N.O. & 3 Others HH 642/23, which arose from strikingly similar facts involving mining claim forfeiture under the same legislative regime.

Keywords: *Administrative law; the principles of natural justice; mining administration; review; procedural fairness*

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1. Introduction

The Judicial Services Commission (Hereinafter "JSC") announced the retirement of Chief Justice on 17 January 2026.[3] The Chief Justice of Zimbabwe occupies an important role in the judicial landscape, as the head of the judiciary, and the leader of the Constitutional Court and leader of the Supreme Court.[4] The Chief Justice presides over and manages the JSC. He has administrative duties which results in drafting and implementing Practice Directives to ensure the proper administration of justice in the country,[5] as well as appointing and assigning judges to preside over matters.[6] In this regard the role of the Chief Justice is central to the development of jurisprudence, owing to his own jurisprudential outlook and influence which may permeate the rest of the bench. It is therefore acceptable that even in matters where the Chief Justice does not personally participate in, credit is nonetheless due to him/her as the first amongst equals. Part of the Chief Justice's success therefore is the quality of jurisprudential output of the court as he/she is involved in creating conditions for this output.

It is in this vein that this article critically examines the principles of administrative law in Zimbabwe as they pertain to the obligations of administrative bodies to observe natural justice, with particular focus on the circumstances under which such bodies may lawfully depart from the requirements of the Administrative Justice Act [Chapter 10:28] (hereinafter "the AJA"). The analysis is anchored in the landmark Supreme Court decision of *Fidelity Printers and Refiners (Private) Limited (hereinafter "Fidelity") v The Minister of Mines and Mining Development N.O., The Provincial Mining Director for Midlands Province & Jonah Nyevera*[7] (hereinafter "the *Fidelity* case"), a landmark judgment that articulated the boundaries of procedural fairness in the context of statutory mining administration in Zimbabwe.

The Fidelity case arose from the summary forfeiture of a gold mining claim by the Provincial Mining Director for the Midlands Province, effected in terms of section 260 of the Mines and Minerals Act [Chapter 21:05] (hereinafter the Mines Act), without prior notice to or representations from the claim holder. The Supreme Court, on appeal, held that the forfeiture was unlawful for failing to comply with the right to be heard as codified in section 3 of the AJA. In so doing, the Court engaged with the interplay between sector-specific legislation and general administrative justice norms, and with the narrow grounds on which an

3 Judicial Service Commission, Announcement Regarding the Retirement of Chief Justice Luke Malaba (17 January 2026) https://jsc.org.zw:8222/media/uploads/CJs_retirement.pdf; "Chief Justice Malaba retirement date announced" The Herald 18 January 2026.
4 Section 163(2) of the Constitution of Zimbabwe, 2013.
5 Section 190 (1) and (2) of the Constitution of Zimbabwe, 2013.
6 Section 180 of the Constitution of Zimbabwe, 2013.
7 SC 107/22.

administrative body may claim exemption from the duty to act fairly. Delivered under the tenure of Chief Justice Malaba, this landmark judgment echoed the Chief Justice's outlook on judicial restraint and approach to statutory interpretation that favours the giving effect to the intention of the legislature.[8]

The article further analyses the subsequent High Court decision in *Anesu Gold Mine (Pvt) Ltd v Onesimo Mazai Moyo N.O. & 3 Others*,[9] which arose from strikingly similar facts involving mining claim forfeiture under the same legislative regime. The article identifies and evaluates the convergences and divergences between the two cases in terms of facts, legal issues, and judicial reasoning. Drawing on international standards including those from South African administrative law, the United Kingdom, Canada and international human rights instruments, the article situates Zimbabwe's jurisprudence on permissible departures from natural justice within a broader comparative framework. The article concludes with reform recommendations aimed at strengthening procedural safeguards in the mining sector and aligning Zimbabwe's administrative law framework more fully with constitutional imperatives.

2. International standards and constitutional framework

The right to be heard before an adverse administrative decision is made; *audi alteram partem*; and the rule against bias; *nemo iudex in causa sua*; constitute the twin pillars of natural justice. These principles were developed in the nineteenth century in English common law.[10] They were developed to regulate the growing powers of administrative bodies in the United Kingdom, who were entrusted with functions such as fact finding and decision making.[11] A wide range of regulatory powers were also assigned to a diverse number of administrative bodies which began emerging at that time.[12] As the need grew to regulate these

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7 *Zambezi Gas (Private) Limited vs N R Barber (Private) Limited & Sheriff for Zimbabwe* SC 3/20 where Malaba CJ demonstrated preference for the golden rule of interpretation by stating at page 7 of the cyclostyled judgment that: *"It is the duty of the Courts to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given their ordinary grammatical meaning. However where the language used is ambiguous and lacks clarity, the court will need to interpret it to give it meaning."* See also *Innscor Africa Limited & Another v Competition and Tariff Commission* SC 52/18 where at page 13 Malaba CJ stated that, *" Interpreting words in their context requires the courts to pay due regard not only to the meaning assigned to the grammatical use of language but also the context which requires consideration of the rest of the statute as well as the subject matter and its content."*

9 HH 642/23.

10 C Parker *Administrative Law Cases and Materials* (2019)122.

11 MA Roderick 'Judicial review and procedural fairness in administrative law: I' *McGill LJ* 25 (1979): 520 at 530- 531.

12 MA Roderick (n10 above) 536 -537.

bodies, the UK courts developed the principles of natural justice to establish their control over the actions of administrative bodies.

In the seminal case of *Cooper v Wandsworth Board of Works,*[13] the UK courts established that public authorities must adhere to the principles of natural justice. The court held that Mr Cooper's house could not be demolished without being heard first despite the applicable statute giving the Board the right to demolish a house in respect of which seven (7) days' notice to build, something which Mr Cooper had failed to do, had not been given.[14] It has been rightly contended that this decision is justifiable on the grounds of respect for due process. This has been confirmed in further cases such as *Ridge v Baldwin*,[15] where the House of Lords affirmed that the right to be heard applies whenever a public authority takes action that affects the rights, interests or legitimate expectations of a private party. In *Council of Civil Service Unions v Minister for the Civil Service*,[16] the House of Lords further confirmed that the duty to act fairly is not displaced merely because an administrative power is conferred in broad or unconditional terms.

2.1. International and Regional human rights regional standards

The concept of a party being heard before an adverse decision is made against it has also found expression in international instruments. Article 14 of International Covenant on Civil and Political Rights (ICCPR) enshrines the right to a fair trial. The Human Rights Committee has emphasized the right to know the charges against oneself and to get justifications for actions that impact one's rights.[17] In the African regional legal system, the right to be heard and the right to know the rationale behind administrative judgements are protected and advanced by several regional human rights treaties that seek to improve public administration's accountability, openness, and equity.[18] Article 7(1) of the African Charter on Human and People's Rights grants every individual the right to have his cause heard, which is a broad guarantee of access to justice and a cornerstone of the African human rights system.[19]

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13 (1863), 143 ER 414 (HL).
14 (n11 above).
15 [1964] AC 40.
16 [1985] AC 374 (the GCHQ case).
17 Article 14 of the International Covenant on Civil and Political Rights (ICCPR), 1966. International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Practitioners Guide No. 1. pg. 5.
18 African Commission on Human and Peoples' Rights, Guidelines on the Right to Administrative Justice (2010) 4-10. African Union, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2003) Article 3 & 7.
19 Article 7(1) of the Banjul Charter.

2.2. Zimbabwe's constitutional and legislative framework

In Zimbabwe, the proposition that persons whose rights, interests, or legitimate expectations may be adversely affected by an administrative decision are entitled to prior notice and an opportunity to be heard is one of the foundational pillars of common law administrative jurisprudence. This principle, initially given statutory expression by the AJA, enacted in 2004, was elevated to constitutional status by section 68(1) of the Constitution of Zimbabwe, 2013 (hereinafter "the Constitution"),[20] which guarantees every person the right to administrative action that is lawful, prompt, efficient, reasonable, proportionate, impartial, and both substantively and procedurally fair. Additionally, and taking cue from the international instruments, Section 69 of the Constitution provides for rights to fair trial in various situations pertaining to a person accused of an offence,[21] determination of civil rights and obligations,[22] access to courts, tribunal or forum established by law[23] and right at the person's own cost to be represented by a legal practitioner.[24]

However, the right to be heard is not absolute, it is prone to limitation. The right may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. [25] It further stipulates that the limitation must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.[26] Against these standards, section 3(3) of Zimbabwe's AJA, which permits departure from procedural fairness requirements where "the enactment under which the decision is made "expressly provides" for such departure or where the departure is "under the circumstances, reasonable and justifiable," must be interpreted strictly and in conformity with the Constitution. The question raised in the Fidelity case was precisely whether the Mines Act met these threshold requirements.

2.2.1. The Fidelity Case- Facts

Fidelity is a company incorporated in Zimbabwe that operates as the principal gold-buying arm of the Reserve Bank of Zimbabwe. Among its assets was a registered gold mining claim known as Mirage 3, located in Kwekwe in the Midlands Province. The first respondent, the Minister of Mines and Mining Development (cited in his official capacity), and the second respondent, the

20 Amendment (No. 20), 2013.
21 Section 69(1) of the Constitution of Zimbabwe, 2013.
22 Section 69(2) of the Constitution of Zimbabwe, 2013.
23 Section 69(3) of the Constitution of Zimbabwe, 2013.
24 Section 69(4) of the Constitution of Zimbabwe, 2013.
25 Section 86 of the Constitution of Zimbabwe, 2013.
26 Section 86 (2) (a-f) of the Constitution of Zimbabwe, 2013. See also TG Kasuso and G Manyatera 'The Right to Reasons for Administrative Action in Zimbabwe' *Southern African Public Law* 36:2 (2021) at 113.

Provincial Mining Director for the Midlands Province (Mr Nelson Munyanduri), are administrative authorities vested with powers under the Mines Act to regulate, administer and enforce compliance with mining legislation. The third respondent, Jonah Nyevera, is a private individual who, following the purported forfeiture of Fidelity's mining claim, was issued with a special grant over the same area.

In June 2020, the Provincial Mining Director caused the Mirage 3 mining claim to be forfeited to the State on the basis that Fidelity had failed to pay the statutory annual inspection fees required under the guise of Section 260 of the Mines Act. The forfeiture was effected by the posting of a notice on a public board at the Provincial Mining Director's offices in Gweru. No direct communication was made to Fidelity or to the occupiers of the mine. No prior warning was given, no notice of the intention to forfeit was served, and no opportunity to remedy the alleged default or make representations was afforded.

Following the forfeiture, a special grant was issued to Jonah Nyevera, who proceeded to take possession of the mine. When Fidelity became aware of the forfeiture, apparently through a letter from the Minister dated 11 January 2021 which referenced statutory provisions without giving substantive reasons, it sought to set aside the forfeiture of the mining claim in a review application to the High Court. The High Court dismissed Fidelity's application holding that the forfeiture and subsequent reallocation of the mine to Nyevera were lawful because Fidelity had failed to pay the required statutory fees for more than six years.[27] The High Court accepted the respondents' argument that the Mines Act did not require prior notice to be given before forfeiture under section 260, and that the posting of notices on the notice board was sufficient compliance with the Act's requirements.

Fidelity appealed to the Supreme Court, advancing two principal grounds. First, it argued that the High Court had erred in its interpretation of section 260 of the Mines Act, contending that the provision did not authorise arbitrary forfeiture without due notice to the affected party. Second, it submitted that even if section 260 was silent on prior notice, the mining authorities remained bound by section 3 of the AJA, which required them to act lawfully, reasonably, and in a fair manner, including by giving Fidelity adequate notice and an opportunity to be heard before the drastic step of forfeiture was taken.

A unanimous bench of the Supreme Court allowed the appeal, finding that the forfeiture notice produced by the respondents was itself evidence that Fidelity's administrative right to be heard had never been acknowledged. The Supreme Court set aside the High Court order and reversed the forfeiture, thereby restoring Fidelity's possession of the mine. An application for leave to appeal to the

27 *The Fidelity case*, at 4.

Constitutional Court by the Respondents in the Supreme Court case was struck off the roll due to non-compliance with the rules of the Constitutional Court.[28] The Supreme Court decision thus stands as the authoritative precedent on the matter.

2.2.2. The decision of the court and the reasons for judgment

The decision of the Supreme Court centred on the interpretation of section 260 of the Mines Act which reads as follows:

> Forfeiture for failure to obtain inspection certificate for block. Failure to obtain an inspection certificate within the period prescribed therefor shall, unless a protection certificate has been obtained under s 270 in respect of such block, render liable to forfeiture

It was held by the Supreme Court that section 260 of the Mines Act, properly interpreted, does not expressly authorise the mining authorities to act without giving notice to the affected miner.[29] While the section sets out the circumstances under which a forfeiture may occur, it does not in explicit terms exclude the application of the AJA or the common law right to be heard. Applying the presumption that Parliament does not intend to abrogate fundamental rights without clear language, the Court held that the mere silence of section 260 on notice was not an authorisation to dispense with procedural fairness.[30] The court also echoed the statement of Malaba CJ[31] in interpreting Section 260 of the Mines Act, in particular the phrase "render liable to forfeiture" in a manner which gave effect to legislative intent in both the Mines Act and the AJA as follows:

> The fate of this appeal hinges on s 260 of the Act, in particular the words render liable to forfeiture. It also hinges on s 272 of the Act as read with s 3 of the AJA. Given their ordinary grammatical meaning these words do not connote automatic forfeiture by operation of the law as contended by the respondents. The words used by the legislature in this section simply mean the mining block in respect of which a statutory fee has not been paid is susceptible to forfeiture. It may be forfeited at the discretion of the Mining Commissioner

The Court therefore affirmed the centrality of section 3 of the AJA, which requires administrative authorities to act lawfully, reasonably, and in a fair manner. For the action to be taken in a fair manner, the AJA specifies that the administrative authority must give the affected person adequate notice of the nature and purpose of the proposed action, a reasonable opportunity to make

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28 CC09/22.

29 The *Fidelity case* at 7.

30 The *Fidelity case* at 8-9. Y Burns & R Henrico *Administrative Law* (2019) 292.

31 See the *Zambezi Gas* case (n7 above)7. See also the *Innscor case* (7 above) 13.

representations, and adequate notice of any right of review or appeal. The mining authorities had complied with none of these requirements. The mere posting of a notice on the mining director's office board, without direct communication to Fidelity, could not, in the Court's view, constitute compliance with the obligation to give "adequate notice.

It was pointedly observed that the forfeiture notice produced by the respondents in evidence was in itself proof that Fidelity's right to be heard had been disregarded. The notice simply announced the completion of the forfeiture as a *fait accompli*; it did not invite representations, it did not warn of the impending forfeiture, and it did not explain the basis on which the alleged default had been determined. This, in the Court's view, was paradigmatic of the arbitrary and high-handed administrative action the AJA was enacted to prevent. The court contrasted other provisions of the Mines Act such as sections 263 and 265 as different to section 260 in that the former sections prescribed a procedure for hearing before forfeiture of claims hereby replacing the regime prescribed for administrative bodies by Section 3 of the AJA.[32]

The Court rejected the Respondents' argument in the alternative that the departure from natural justice requirements were justifiable under section 3(3)(b) of the AJA. This section permits departure where it is, in the circumstances, reasonable and justifiable, having regard to the need to promote efficient administration and good governance. The justification of the Respondents appeared to be that they could not serve notices of forfeiture personally on thousands of miners. The court reiterated that one could not disregard the rights of persons because they were too many.[33]

2.2.3. Lessons arising from the Fidelity case

The Fidelity case can be regarded as crystalising the international standard for permitting departure from natural justice in administrative proceedings into two requirements. First, the departure must be authorised by clear and specific statutory language, ambiguous or implied exclusions will not suffice.[34] Drafters of sector-specific legislation must therefore be deliberate and precise when they intend to create a scheme of administrative decision-making that operates outside the general framework of the AJA. In the absence of such express provision, the AJA will apply.

Second, the departure must be proportionate and no broader than is necessary to achieve the legitimate objective of the enabling legislation and this probably informs the reason why the Court in the Fidelity case was of the opinion that

32 The *Fidelity case* at 13.
33 *Fidelity case* at 14.
34 *Fidelity case* at 14.

Section 260 of the Mines and Minerals Act had to be given a narrow interpretation because abrogation of rights could not be regarded as automatic.[35] The primary lesson of the Fidelity case is that administrative bodies in Zimbabwe cannot avoid their procedural obligations under the AJA by simply failing to observe them and hoping that affected parties will not litigate. The Mines Act applies to all administrative authorities as defined, and it imposes binding obligations. A mining authority that proceeds to forfeit a claim without notice, reasoning and an opportunity for representations acts unlawfully, however clear-cut the underlying default may appear to be. Similarly, in *Mandewo vs City of Harare,*[36] the High Court dismissed an administrative authority's bid to dispense with the right to be heard based on Section 3 (3)(b) of the AJA on the grounds that the cession being challenged was a nullity at law.

One other lesson arising from this case appears to be the need to clarify the provisions of the Mines Act particularly those of Section 260. Indeed, counsel for the Respondents conceded that the Mines Act was in need of amendment to simplify the language used.[37]

2.3. Aftermath of the Fidelity case and application to Anesu Gold Mine (Pvt) Ltd v Onesimo Mazai Moyo N.O. & 3 others

The High Court case of *Anesu Gold Mine (Pvt) Ltd v Onesimo Mazai Moyo N.O. & 3 Others* (hereinafter called the Anesu Gold Mine) arose from another episode of mining claim forfeiture by the Ministry of Mines without prior notice or hearing. Anesu Gold Mine (formerly known as Start Mining Services (Pvt) Ltd, its name having been changed by the Registrar of Companies on 31 March 2011), was the registered holder of eight gold mining claims in Mberengwa district in the Midlands Province. This change of name and notification of the address of Anesu Gold Mine had not been notified to the Ministry of Mines as required by Section 60 of the Mines Act. The Ministry of Mines, through Forfeiture Notice No. 1 of 2019 and Forfeiture Notice No. 2 of 2019, purported to forfeit all eight mining claims on the basis of non-payment of inspection fees and failure to obtain protection certificates under the Mines Act. The forfeiture notices were posted on the Ministry's notice board in Gweru in January 2019. As in the *Fidelity* case, no direct notice was given to Anesu Gold Mine, no prior warning was communicated, and no opportunity to make representations was afforded.

Following the forfeitures, the Secretary for Mines and Mining Development issued Special Grant No. 7321 on 14 May 2019 to Golden Reef Mining (Pvt) Ltd, the third defendant, over the entire area of the eight forfeited claims. The Special Grant was subsequently renewed. Anesu Gold Mine issued summons on 29

35 *Fidelity case* at 8-9.
36 HH201/14.
37 *The Fidelity case* at 14.

September 2021 against Onesimo Mazai Moyo N.O. (then Permanent Secretary for Mines), Tariro Ndhlovu N.O. (the Midlands Provincial Mining Director), Golden Reef Mining, and former Minister Winston Chitando, seeking cancellation of the Special Grant, cancellation of the forfeiture notices, reinstatement of its rights over the mining claims, an order for Golden Reef to vacate the claims, and an order for Golden Reef to account for all gold mined.

The matter proceeded as a stated case in terms of Rule 52(1) of the High Court Rules, 2021, with the parties filing an agreed statement of facts and heads of argument. On the lawfulness of the forfeitures, the Respondents argued that their matter was different to the one decided by the Supreme Court in the Fidelity case on the grounds that Anesu Gold had not communicated its address to the Mines Commissioner contrary to the statutory requirements of the Mines Act and as such the Respondents were justified in publishing the forfeiture notices on the notice board. The High Court disagreed, quite correctly, on the grounds that the issue remained on whether notice of intention to forfeit the claims had been given as what had been posted on the notice board was a forfeiture in itself without a hearing afforded to the Anesu Gold Mine. The Court therefore was accordingly bound by the Supreme Court judgment in its interpretation of Section 260 of the Mines Act.

3. Comparative perspectives

The Fidelity case and Anesu Gold mine case have raised important considerations in our jurisdiction which speak to what must be done when legislation is silent pertaining procedural aspects which must be followed. Comparative perspectives in administrative law are useful in strengthening domestic reform. By analysing how other jurisdictions have addressed the same problem, best practices can be drawn out, and applied to the national context.[1] This case note draws perspectives from 3 (three) common law jurisdictions: South Africa, the United Kingdom and Canada, focusing on the application of the key principles of natural justice, even where the legislative framework may be silent. These jurisdictions are particularly relevant as they share the same common law foundations which originated in the United Kingdom, as is the case with Zimbabwe's Administrative Law, which has been heavily influenced by English common law. Both South Africa and Canada are jurisdictions which have not only been influenced by English common law, but can also provide lessons on how Zimbabwe can improve its law in this regard.

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1 S Rose-Ackerman and PL Lindseth '*Comparative administrative law: an introduction*' in *Comparative administrative law* (2010). See also J Boughey 'Administrative law: the next frontier for comparative law' *International & Comparative Law Quarterly* 62:1 (2013): 55-95.

3.1. South African Developments — Promotion of Administrative Justice Act

South Africa's Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA) significantly influenced the modelling of Zimbabwe's AJA. Under PAJA, section 3 provides that administrative action that materially and adversely affects the rights or legitimate interests of any person must be procedurally fair. Section 4 of PAJA imposes public participation requirements in rule-making. Crucially, section 3(4) of PAJA permits departure from its procedural fairness requirements only when a "fair procedure" would be impossible or impracticable in the circumstances, or where the urgency of the matter so requires — and even then, an administrator must provide reasons as soon as reasonably practicable.

South African courts have read the permitted departures from procedural fairness very narrowly. In *Minister of Health v New Clicks South Africa (Pty) Ltd*[2] the Constitutional Court emphasised that exceptions to procedural fairness must be grounded in law and must be necessary and proportionate. In *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*,[3] the Court held that administrative action affecting constitutional rights is subject to heightened procedural scrutiny. These principles inform the proper interpretation of similar provisions in Zimbabwe's AJA.

3.2. United Kingdom – Legitimate Expectations and Contextual Flexibility

English administrative law has developed the doctrine of legitimate expectations to calibrate the extent of procedural fairness owed in any given case. In *R v North and East Devon Health Authority, ex parte Coughlan*,[4] the Court of Appeal held that where a public authority has made an unequivocal promise or established a consistent practice, fairness may require it to honour that expectation before departing from it. The doctrine is, however, flexible. The degree of procedural protection afforded varies with the nature and gravity of the decision and the interests at stake.

The UK courts have also addressed statutory displacement of natural justice. It is well-settled that clear and unambiguous statutory language is required before a court will infer that Parliament intended to exclude the right to be heard. In *R v Secretary of State for the Home Department ex parte Doody*,[5]Lord Mustill stated that where a statute is ambiguous as to whether a hearing is required, the

2 [2006] 2 SA 311 (CC).
3 [2014] 3 SA 34 (CC).
4 [2001] QB 213.
5 [1994] 1 AC 531.

presumption favours procedural protection. The mere absence of an explicit statutory requirement to hear the affected party does not amount to a statutory exclusion of natural justice.

The case of *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [6] is of particular interest. The Appellant applied for asylum on 31 August 1998. Whilst her application was under consideration, she received income support. After she was assessed by an immigration officer, a decision was taken by the Home Secretary to refuse her application. This decision was taken on 20 November 1999. The Benefits Agency which was responsible for the payment of income support was informed on 9 December 1999 and forthwith stopped the payment of benefits to the Appellant.[7] However, the Appellant was not informed directly that her asylum claim had been refused, nor was she given any reasons for the refusal of her application. She was only made aware of this decision months later.[8] The key issue which the Court had to decide was when a determination of a public office took effect; the moment it was recorded on an internal file, or the moment it was the affected individual was notified?[9] The court ruled in favour of Appellant, holding that the internal recording does not constitute a legal determination. Notice of a decision to the affected party is required before such decision can have legal effect.[10] Lord Steyn's reasoning was that it is in line with the rule of law and access to justice that an individual be informed of an adverse decision before it could affect them.[11]

The *Fidelity* case can also be considered through the lens of the Rule of Law, as this is a key tenet of the Zimbabwean legal system.[12] Generally, the Rule of Law in administrative law entails that every administrative conduct should be authorized by a valid legal authority.[13] The Minister's interpretation of section 260 of the Mines Act sought to extend the ordinary, grammatical meaning of the words in the statutory provision from "liable to forfeiture" to include "automatic forfeiture". This can be viewed as against the principle of the Rule of Law which requires every administrative conduct to be authorised by valid legal authority.

Notwithstanding this progressive legislative and constitutional framework, the *Fidelity* case has exposed a recurring and troubling practice within the Zimbabwean mining administration: the summary forfeiture of mining claims

6 [2003] UKHL 36.
7 *Anufrijeva* case, para. 6.
8 *Anufrijeva case*, para 6.
9 *Anufrijeva case*, para 11 and 14.
10 *Anufrijeva case* para 26.
11 *Anufrijeva case*, 26 and 36.
12 Section 3 (b) of the Constitution of Zimbabwe, 2013.
13 KM Stack 'An administrative jurisprudence: The Rule of Law in the Administrative State' *Colum. L. Rev.* 115 (2015) at 1985.

without prior notice, without reasons, and without any opportunity for the affected miner to make representations.[14] The Provincial Mining Director for the Midlands Province, purportedly acting under section 260 of the Mines Act, forfeited the Mirage 3 Kwekwe mining claim held by Fidelity Printers and Refiners (Pvt) Ltd, a subsidiary of the Reserve Bank of Zimbabwe, simply by posting a forfeiture notice on a public board, without ever communicating directly with the claim holder or affording it any hearing.

3.3. Canada – 'Contextual analysis guiding principles on procedural fairness on review'

In Canada, a number of cases have addressed the issues of procedural fairness. Of note is *Baker v Canada (Minister of Citizenship and Immigration)* (Hereinafter called the *Baker* case).[15] The appellant was an illegal migrant who entered Canada on a visitor's visa in 11981 andstayed on illegally in Canada to work as a domestic worker for 11 years. She had four children whilst living in Canada, who were all Canadian citizens.[16] In 1992, the appellant was ordered to be deported on the basis that she had overstayed her visitor's visa and was working illegally in Canada.[17] For one to apply for permanent residence, they had to apply from outside Canada. The appellant applied for an exemption from this requirement on humanitarian and compassionate grounds.[18] This application was rejected by the Immigration office, on the basis that there were insufficient humanitarian and compassionate grounds which had been established by the appellant. The appellant appealed against the decision of the Immigration Office to the Federal Court, which dismissed her appeal.[19] The appellant further appealed to the Supreme Court. The issues raised on appeal before the Supreme Court were whether the principles of procedural fairness had been violated in this case as the appellant had not been given the opportunity to make oral representations to the Immigration office.[20]

The Court considered the nature of the duty of procedural fairness. In determining the content of the duty of fairness, the Court noted that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".[21] All the circumstances of the case must be carefully considered to establish the breadth of the content of this duty. The duty of

14 T Endicott *Administrative Law* (2011), 113.
15 [1999] 2 SCR 817.
16 *Baker* case at para 2.
17 *Baker* case at para 2-3.
18 *Baker* case at para 3.
19 *Baker* case at para 8.
20 *Baker* case, para 11.
21 *Baker* case para 21. The court quoted *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 682.

procedural fairness is flexible and variable and ultimately depends on the context of each case.[22] Thus, this case established that in determining the duty of procedural fairness, the court must consider the contextual factors of each case.

Several factors were identified in the *Baker* case as being relevant to determining the duty of procedural fairness which is required in each case. Firstly, the court will consider the nature of the decision being made, and the process followed in making such a decision.[23] The more the administrative process provides for judicial processes, the more likely it is expected that procedural processes closer to that provided in the set up of a trial will be required by the duty of fairness.[24] The second factor the court looks at is the legislative scheme which informs the manner in which an administrative decision is made. The legislative scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made.[25] Thirdly, the court will consider the importance of the decision to the individual(s) affected by the decision. The greater impact the decision has on the lives of persons affected by the decision, more stringent the procedural protections will be required.[26]

Fourthly, the legitimate expectations of the person challenging the decision may be important in determining what procedures would be required to satisfy the duty of fairness in that case.[27] Where claimant has a legitimate expectation that a certain procedure should be followed, this procedure will be required by the duty of fairness.[28] Due regard must be given to the promises or the regular practices of administrative decision makers. It would be unfair for administrative decision makers to act contrary to representations they made, or the regular practices which they would have established.[29] Due deference should also be given to the procedural choices which are taken by administrative authority, specifically where the statute gives the administrative authority the ability to choose its own procedures, or when the authority has expertise to determine the procedural safeguards that are appropriate under the given circumstances.[30] The court noted

22 *Baker* case, para 22.
23 *Baker* case at para 23.
24 Supra para 23. The court also makes reference to the following cases: *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at 896.
25 *Baker case at para 24.*
26 *Baker case at para 25.*
27 *Baker case at para 26.*
28 *Baker case at para 26.*
29 *Baker case at para 26.*
30 *Baker case at para 27.*

that these factors are not exhaustive, and other relevant factors could also be invoked in a given case to determine the duty of fairness which is required.[31]

It is submitted that where legislation is silent on the procedures which should be followed, our Zimbabwe Courts can be guided by the contextual factors which have been laid down in the *Baker* case. This will ensure that even when the legislation is silent, fairness will be achieved. Of particular note is the third factor set out in the *Baker* case, and its applicability to the *Fidelity* case. Where the decision taken by an administrative body has a greater impact on the lives of the persons affected, the more the requirement to abide by the duty of procedural fairness stands. In the *Fidelity* case, the decision to forfeiture the appellant's mining claim without affording the appellant the right to make representations, undoubtedly impacted the appellant. Exploiting a mining claim is a costly investment, where the holder of the mining claim undoubtedly invests a considerable amount of resources to obtain minerals. Courts in Canada have held that where a person's livelihood is at stake, a high standard of justice will be required, which mandates the use of stringent procedural protections to ensure fairness.[32]

3.3.1. The correctness standard of review

Courts in Canada also have applied the standard of correctness in reviewing whether an administrative authority has acted in line with the common law principles of natural justice.[33] The "correctness review" entails that in analysing administrative procedures, a stringent level of scrutiny is imposed by the courts. The court gives no weight or deference to the administrative body's own interpretation of the law, or its procedural choices. The Court steps into the shoes of the decision maker and asks if the decision reached was the correct choice.[34] In the case of *Mission Institution v Khela*,[35] Mr khela was an inmate who was transferred from a medium to maximum security prison. The decision was based on information provided by informants. However, Mr Khela was not furnished with this information, nor given a chance to respond to such information. He was not provided with reasons why he was being transferred. The court quashed the transfer on the basis of a lack of procedural fairness. The Court in that case was of the opinion that the "*standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be correctness*".[36]

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31 *Baker* case at para 28.

32 *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p.1113.

33 M Derek 'The standard of review for questions of procedural fairness' *Queen's LJ* 41 (2015): 355.

34 M Derek (n 46 above) at 370.

35 2014 SCC 24, [2014] 1 SCR 502.

36 *Khela* case at para 79.

Procedural fairness essentially speaks to the manner in which a decision has been reached.

In *Ellis-Don Ltd v Ontario (Labour Relations Board)*[37] the court noted that where "...the administrative decision-maker had breached the rules of natural justice or the duty of procedural fairness by failing to permit any, or adequate, participation by the person concerned will usually be assessed on the basis of 'correctness'…"[38] In *Canadian Pacific Railway Company v Canada (Attorney General)*[39] (hereinafter the Canadian Pacific Railway Case) it was stated that the content of the correctness review standard as applicable to procedural fairness may also be informed by the contextual factors set out in the *Baker* case.

The procedural correctness standard is not to be equated with the correctness standard for judicial review on the merits of the matter as enunciated by the Canadian Supreme Court in the case of *Canada (Minister of Citizenship and Immigration) v Vavilov,*[40] (hereinafter "Vavilov Case").[41] In the *Vavilov* case, the matter review of merits through the correctness standard was preserved for limited circumstances pertaining to legislative administrative review, mechanisms, legislated administrative appeal mechanisms , jurisdictional issues between tribunals as well as central important issues pertaining to the constitution and legal system. An additional circumstance pertaining to concurrent jurisdiction between administrative bodies and courts of first instance was added to this correctness review in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Assn*.[42] On the other hand, the *Canadian Pacific Railway* case emphasised the comments in the *Khela* case that the standard of review for procedural matters continues to be correctness as denoting that this has always been the case and went on to qualify that *" correctness in the context of procedural fairness simply means a court must be satisfied that the right to procedural fairness has been met".*

37 2001 SCC 4, [2001] 1 *SCR* 221 *[Ellis-Don]*.

38 DJM. Brown and JM Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 2, at para.14:2300 at 14-15.

39 2018 FCA 69 (*CanLII*) [2019] 1 FCR 121.

40 [2019] 4 *SCR* 653.

41 S Ruel, The Review of Procedural Fairness Post Vavilov: More of the Same? (2021) 33 *Canadian Journal of Administrative Law and Practice* 160 at 168. The author asserts that Vavilov did not change anything pertaining to review on grounds of procedural fairness. The author also recognises the designation of the standard of review in procedural cases as the correctness standard but expresses preference for an independent term of a standard of procedural fairness. See also D.P Jones & D V Jones, Vavilov What it does, and what it does not do, Legal Education Society of Alberta at page 14 Vavilov-What-it-does-and-what-it-does-not-do-April-2022.pdf (accessed 1st May 2026).

42 [2022] SCC 30.

In Zimbabwe, the standard of review was set out in *Affretair (pvt) ltd & Another v MK Airlines (Pvt) ltd*,[43] where the Court noted that:

> The function of judicial review is to scrutinise the legality of administrative action, not to secure a decision by a judge in place of the administrator. As a general principle, the court will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be ultra-vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted to the public authority by the legislature'. Thus, it is said that: 'the ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness.

Where the legislative provision does not provide for any specific procedure to be followed, Zimbabwean courts may also consider applying the 'correctness standard'. This approach has several advantages. The requirement of administrative bodies to abide by the common law tenets of natural justice as non-negotiable rights which must be applied strictly as a matter of law, will ensure that procedural fairness is upheld in cases where the statutory provision is silent. Where the statute is silent, and this creates a lacuna, the court should apply a 'correctness standard' to address how that gap should be filled.

However, some criticisms in applying the 'correctness standard' have been raised, which if the approach is to be adopted, the Courts should be mindful of. It has been argued that applying the 'correctness standard' ignores the practical realities on the ground, in favour of abstract legal theory. In most cases, the administrative authorities who are on the ground, are best placed to determine what procedures are practical, to ensure that procedural fairness is achieved. However, the contextual factors laid out in the Baker case are likely to prove sufficient in mitigating any harsh application of the correctness review standard.[44]

In the *Fidelity case*, the respondent raised the argument that it was not practical for them to be required to notify all parties whose mining blocks were to be forfeited as there were too many.[45] The court rejected that argument, citing that mere inconvenience on the part of the Respondent was not enough to invalidate the procedural requirement of fairness.[46] The Court noted that the Respondent

43 1996 (2) ZLR 15 (SC).
44 *Gwarazimba vs Gurta N.O* SC10/15 at 9.
45 *The Fidelity case* at 9.
46 *The Fidelity case* at 15

should explore practical avenues in ensuring that the relevant parties are served, such as the use of digital platforms and information technology tools.[47] While setting the standard that forfeiture without notice was not in line with the tenets of procedural fairness, it seemed that the Court was open to receive practical solutions from the Respondent. As such, the 'correctness standard' should be tempered with practical considerations. The alternative and practical measures must also be lawful. Hence the Court in the *Fidelity* case was open to the Respondent utilising technologically adept solutions which are permissible by law in our jurisdiction by serving the notices through the government gazette, print media or various websites and information technology platforms.[48]

4. Conclusion and recommendations for reform

4.1. Conclusion

The Fidelity Printers case is a significant contribution to Zimbabwean administrative law jurisprudence which can be attributed to the shared philosophical and jurisprudential outlook of the Supreme Court as led by the Chief Justice Malaba. It decisively affirms that administrative bodies exercising statutory powers in the mining sector are not exempt from the duty to observe natural justice as codified in the AJA. The Supreme Court's rejection of the proposition that the Mines and Minerals Act implicitly displaced the AJA's procedural requirements is consonant with the best comparative international standards on the subject, which demand clear and express statutory language before natural justice obligations can be excluded.

The case equally reaffirms the constitutional importance of procedural fairness in Zimbabwe. Section 68 of the Constitution elevates the right to administrative justice to the highest tier of the legal hierarchy. Administrative decisions affecting vested property rights, particularly those with significant economic consequences such as the forfeiture of mining claims, are precisely the kind of decisions that demand the fullest application of natural justice principles. No amount of administrative convenience can justify bypassing that fundamental right.

The *Anesu Gold* case, decided at High Court level approximately two years after the Supreme Court's decision in Fidelity, confirms that the lower courts have embraced and applied the Fidelity precedent. Together, the two decisions reveal a systemic pattern of procedural non-compliance by the Midlands Provincial Mining Director — a pattern that suggests institutional rather than individual failure. This has important implications for reform, discussed below.

47 *The Fidelity case* at 14.
48 *The Fidelity case* at 15.

4.2. Recommendations for Reform

To improve the proper administration of mining in the country, the following reforms are proffered: -

a) The Mines Act should be amended to incorporate an express, codified pre-forfeiture notice and hearing procedure. The amendment should require the provincial mining director, before effecting any forfeiture under section 260 of the Mines Act , to serve a written notice on the registered holder of the mining claim at its registered address, specifying the alleged default, the consequences of continued default, and the period within which the holder must remedy the default or make representations. This procedure would align the Act with the AJA and the Constitution, and would remove the ambiguity that gave rise to the litigation in the *Fidelity* and *Anesu Gold* cases.

b) Legislation should be amended to compel the Ministry of Mines and Mining Development to develop and maintain an updated electronic register of mining claim holders' contact details. Where mining claim holders are to be notified of any important developments pertaining to their mining claim, this can be done electronically through the use of sending emails. This is in line with developments in the country, where the administration of justice is being digitalised through the implementation of the Integrated Electronic Case Management System (IECMS) as spearheaded by C J Malaba.[49]

c) The AJA, under section 3(3) contains broad provisions under which administrative authorities may be excused from abiding by the principles of natural justice. These exclusionary clauses have long been criticised by scholars as being unconstitutional, counter to the rule of law, and contrary to the principles of just administrative action.[50] The recent *Fidelity* and *Anesu Gold* cases cast the limelight again on the country's administrative law framework. The AJA must be amended to give full effect to the right to administrative justice as espoused under the country's Constitution.[51]

d) It is recommended that the judiciary adopts the Canadian procedural fairness approach by applying a stringent duty on administrative authority to respect and apply the rules of procedural fairness as enshrined in section 3 of the AJA together with the contextual factors laid out in the

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49 CJ Malaba, Address the Occasion of the Official Opening of the 2023 Legal Year, Promoting Competence and Quality of Service to Enhance Public Confidence in the Judiciary (2023) 34.

50 Feltoe, G. (2004) 'Giving with one hand and taking back with the other: The exemptions and exclusions in the Administrative Justice Act' (11) *Zimbabwe Human Rights Bulletin* 106.

51 Section 68 of the Constitution of Zimbabwe, 2013.

Baker case when the relevant statute is silent. This would act as a guideline for the courts in similar circumstances.

ECONOMIC DIMENSIONS OF JUDICIAL REASONING IN ZIMBABWE: A CONTEXTUAL ANALYSIS OF THE JURISPRUDENCE OF CHIEF JUSTICE HON. LUKE MALABA

NKOSANA MAPHOSA,[1] DOUGLAS MUSEBENZI[2] & DR. AMANDA MUGADZA[3]

Abstract

While conventional wisdom has relied on separation of powers, constitutionalism and other facets, this article invokes an unconventional and undogmatic economic legal analysis to analyse Zimbabwean jurisprudence. Methodologically, it is qualitative and doctrinal in nature and applies aspects of Law and Economics, Law and Development (L&D) and constitutional jurisprudence to dissect the issue under consideration. The article evaluates the judiciary's role in an open and democratic society to create an enabling environment for commerce to occur. Importantly, given the nature of the Special Issue, avoids being an 'adversarial critique'. Contrariwise, it is a primer that cuts across selected themes, including the Constitution, administrative law, labour law and commercial law. It unpacks jurisprudence that lies on the border of institutional stability and context-sensitive adjudication. The article develops what can be termed "contextual institutionalism," a doctrine characterised by an adjusted balance between judicial intervention and restraint in response to complex socio-economic conditions. The technique is characterised by non-exhaustive discernible contradictions and paradoxes that confront the judiciary. Resultantly, considerations of stability, adaptability, economic efficiency and social protection are involved in the heightened interpretive 'tension'. While contentious, these epochs are indicative of spectrums whereby doctrinal development is possible. Furthermore, a methodological attempt is made to contrast Zimbabwean jurisprudence with selected comparators. The main denominator in all of this is contemporary debates on economic constitutionalism and development. Another important contribution is that the article proposes a Judicial Economic Mediation Framework, which conceptualises the judiciary as situated along the tripartite pillars of stability, flexibility and legitimacy. The argument is that what may be

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termed the Chief Justice Malaba jurisprudence demonstrates a stability-weighted approach to the adjudication of economic development. Based on charity in jurisprudential analysis, the emergent jurisprudence may be classified as contentiously feeding into institutional continuity in a developing constitutional democracy context. Accordingly, the conclusion is that the most notable contribution of legal reasoning and interpretation to economic development may lie in the sustained cultivation of legal predictability and institutional trust.

Keywords: *Constitutionalism; development; judicial reasoning; law and economics*

1. Towards economic constitutionalism

Given the topic's contentious nature, a 'reflective' economic development analytical perspective was preferred to analyse the economic development aspects of the theme under review, with particular reference to the jurisprudence of Chief Justice Malaba. The main premise is that superior courts in developing constitutional democracies are interpretive bodies tasked with the exposition of legal doctrine and 'midwives' whose jurisprudence contributes, in subtle but enormous ways, to socio-economic progress in a country.[4] Consequently, flowing from the defensible view above, court decisions become constitutive elements within the broad-based architecture of economic development.[5] They influence expectations, stabilise norms and mediate the interrelationships between the central authority and (economic) market activity.[6] Therefore, the Chief Justice's tenure of over four decades provides an excellent opportunity to analyse the jurisprudential patterns in myriad sub-legal themes.[7] This analysis, however, must

4 RR Mzikamanda '*Constitutionalism and the judiciary: A perspective from Southern Africa'* In Conference for Law Reform Agencies for Eastern and Southern Africa on 'The Role of law reform in constitutionalism, rule of law and democratic governance', Lilongwe, Malawi, 7th-11th November (2011); J Tsabora *The judiciary and the Zimbabwean Constitution* (2022); H Chitimira 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution 2013' (2017) Vol 25 *African Journal of International and Comparative Law* 221-238; G Manyatera & C Manga Fombad 'An assessment of the Judicial Service Commission in Zimbabwe's new Constitution' (2014) Vol 47 *Comparative and International Law Journal of Southern Africa* 89-108.

5 KW Dam *The judiciary and economic development* (2006); A Sen 'What is the role of legal and judicial reform in the development process?' (2006) Vol 2 in *The World Bank Legal Review*: *Law, Equity and Development*, 33-49.

6 WT Atuegwu 'The Role of the Judiciary in Promoting Economic Stability in Nigeria' (2024).

7 B Mushohwe 'A positive step towards ending child marriages: A review of the Loveness Mudzuru & Anor vs Minister of Justice, Legal & Parliamentary Affairs NO & Others case' (2017) *Midlands State University Law Review Journal*; S Hofisi 'The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis'(2018); B Mushohwe' A ray of hope for the outlawing of corporal

be contextualised. In line with the objectives of this (Midlands State University Law Review (MSULR)) Special Issue, this article avoids adversarial critique or personalised evaluation.[8] On the contrary, the article constitutes a contextual analysis of jurisprudence as an evolving body of reasoning entrenched within specific institutional, historical, and socio-economic conditions.[9] The main inquiry, therefore, is what the jurisprudence highlights about the interplay between law and economic development.[10] This is true in contexts characterised by a volatile economic environment, regulatory transformation and extant constitutional consolidation. In light of this, it is prudent to note that the judiciary has, over the past two decades, been called upon to adjudicate matters with significant economic consequences, such as property rights, land reform, labour rights, and administrative justice.[11] For example, in *Nyambirai v National Social Security Authority*,[12] the court considered profound questions of state regulatory authority and economic policy. Whereas in *Nyamande & Donga v Zuva Petroleum (Pvt) Ltd*

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punishment in Zimbabwe: a review of recent developments' (2018); P Mhlanga 'Zim sitting on debt time bomb' 23 Insight (2020)29; P Ruhanya, 'The militarisation of state institutions in Zimbabwe, 2002–2017' in The History and Political Transition of Zimbabwe: From Mugabe to Mnangagwa (2020_181.; S Verheul'From 'defending sovereignty' to 'fighting corruption': the political place of law in Zimbabwe after November 2017' (2021) Vol 56 (2) *Journal of Asian and African Studies* 203.

8 KA Findley 'Adversarial inquisitions: Rethinking the search for the truth' (2011) Vol 56 *NYL Sch. L. Rev* 911.

9 T Mapfumo 'Whither to, the judiciary in Zimbabwe? A critical analysis of the human rights jurisprudence of the Gubbay and Chidyausiku Supreme Court benches in Zimbabwe and comparative experiences from Uganda' Master's thesis, University of Pretoria (South Africa), 2005; H Chitimira 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution 2013' (2017) Vol 25 (2) *African Journal of International and Comparative Law* 221-238; WT Chikwana 'Digitalization of Justice in Zimbabwe: Institutional Challenges and Practical Solutions' (2026) Vol 4 (1) *Journal of Digital Technologies and Law*26-72.

10 HL Root& K May 'Judicial systems and economic development' Rule by law: The politics of courts in authoritarian regimes 304 (2008) 304-14; DM Klerman 'Legal infrastructure, judicial independence, and economic development' (2006) Vol 19 *Pac. McGeorge Global Bus. & Dev. LJ* 427; AN Allott 'Legal development and economic growth in Africa' in Changing law in developing countries (2021)194-209.

11 A Moyo 'Standing, access to justice and the rule of law in Zimbabwe' (2018) Vol 18 (1) *African Human Rights Law Journal 18*266-292; G Feltoe A guide to administrative law and local government law in Zimbabwe'(2012); C Mucheche 'Labour law dispute resolution in Zimbabwe and the law: The concept of fairness in adjudication of labour disputes in Zimbabwe'(2021); TG Kasuso, Tapiwa 'Enforcement of Labour Court judgments in Zimbabwe: Lessons and perspectives from Southern Africa' (2018) Vol *38 Pt. 2 Indus. LJ 39* (2018); A Magaisa 'The land question and transitional justice in Zimbabwe: Law, force and history's multiple victims' (2010) *Oxford Transitional Justice Working Paper Series* (2010).

12 1995 (2) ZLR 1 (S).

,[13] the court addressed the delicate balance between labour flexibility and social protection in a challenging economic environment. Also, most administrative law decisions, including *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe*, highlight the potential role of judicial oversight in shaping regulatory certainty in key economic sectors.

The selected decisions are not analysed in isolation. To create suitable scaffolding for later economic analysis, they are conceptualised as integral constituents of a broader jurisprudence. The latter is typified by an effort to balance institutional stability and complex socio-economic considerations. Three arguments are advanced in this article. The first is that the jurisprudence of the period is largely concerned with legal certainty and institutional continuity.[14] In principle, these are indispensable to economic development. Secondly, the jurisprudence may be characterised as a nuanced, context-sensitive balancing of court intervention and restraint, especially in matters concerning executive economic policy.[15] Thirdly, the jurisprudence invites further scholarly analysis of the role of courts to facilitate development within constrained institutional environments.[16] In advancing these arguments, the article remains attentive to the structural context within which the jurisprudence develops.[17] There is a practical reason for this. It is that the judiciary does not function in a vacuum since the interplay of legal doctrine, institutional capacity, and the broader political economy shapes their decisions.[18] The evaluation that follows, therefore, seeks to situate the jurisprudence within this complex praxis. The analysis provides a measured, analytically thorough account of the economic perspective on constitutional jurisprudence.

The article in the main argues that the 'Malaba jurisprudence' can best be conceptualised as a form of contextually rooted economic adjudication

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13 SC 43-15].

14 *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land,*
Land Reform and Resettlement [2008] available at http://www.saflii.org/zw/cases/ZWSC/2008/1.html.

15 P Ruhanya & B Gumbo 'The securocratic state: conceptualising the transition problem in Zimbabwe' (2023) Vol 8 (4-6) *Third World Thematics: A TWQ Journal* 237.

16 See for example, E Jorovlea Examining the Political Culture of Jurisprudence: Influences, Ideologies and Implications for Legal Decision-Making' (2025) European *Science* 246-255.

17 B Muronda & G van der Waldt 'A good governance framework for state institutions: The case of the Government of Zimbabwe' (2023) Vol 31 (4) *Administratio Publica* 117-142.

18 S Tembo &A Singh 'Mutilation of the independence of the judiciary: threats, intimidation and constitutional amendments in Zimbabwe (2023) Vol 44 (3) Obiter 560.

characterised by a consistent emphasis on institutional stability, judicious judicial restraint, and incremental doctrinal development.[19] The effect, therefore, is to demonstrate that, in the Zimbabwean constitutional setting, the judiciary's role in economic development extends beyond engineering socio-economic transformation to sustain the legal conditions within which economic and institutional ordering can progressively emerge. Furthermore, the structural conditions within which jurisprudence has evolved must be examined. The departure point is that any serious account of judicial reasoning that foregrounds institutional stability and restraint must also be sensitive to the extant political economy in which such judicial postures acquire meaning. Over the years, Zimbabwe's constitutional system has developed in a context characterised by economic instability and heightened institutional contestation, particularly in domains such as land reform, executive authority, and fiscal governance.[20] Given the nature of matters involved in adjudication, courts may find themselves entangled in a complex web of inter-institutional relations.[21] Institutional comity is paramount here. A careful balance must be maintained between 'continuity' and ability to manage clashes and potential encroachments while upholding sacrosanct constitutional principles and institutional values.[22]

The article affirms the above approach. Judicial restraint may favour a methodology that comports with minimalist adjudication and an awareness of the limits of judicial capacity in contexts where enforcement, compliance, and institutional legitimacy cannot be assumed. Moreover, emphasis on legal certainty and continuity is a response to the destabilising effects of economic disruption, where the judiciary's role to manage expectations becomes particularly essential. To engage seriously with the superior court jurisprudence, therefore, requires an approach that recognises both the internal consistency of legal reasoning and the external conditions that shape its articulation. Incorporating these factors into the analysis has a formidable basis. The article situates jurisprudence in constitutional governance and analyses how restraint, stability and incrementalism are implemented.

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19 See Generally, S Hofisi, N Ndlovu & N Maringe, *Constitutional Law: Identity and Interpretation under Zimbabwe's Rights Constitutionalism* (2025) 79-80.

20 *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabw*e [2008] SADCT 2 available at http://www.saflii.org/sa/cases/SADCT/2008/2.pdf, accessed on 30 March 2026.

21 PH Solomon Jr'Courts and judges in authoritarian regimes' (2007) Vol 60 (1) *World Politics* 145.

22 GA Dzinesa 'Zimbabwe's constitutional reform process: Challenges and prospects *'Institute for Justice and Reconciliation* (2012).

2. Methodology and scope

To achieve the above, the paper employs a qualitative doctrinal methodology,[23] complemented by a law and economics analytical framework, to examine the economic dimensions of judicial reasoning in Zimbabwe. In the main, the article uses a purposive selection of judgments spanning constitutional, administrative, labour and commercial law to indicate areas in which courts have had a demonstrable impact on economic governance. This suggests a non-exhaustive approach. The evaluation draws on a representative body of jurisprudence that reflects broader legal patterns and institutional tendencies. Importantly, the methodology is largely interpretive and thematic because it prioritises the identification of recurring principles, modes of reasoning and structural implications over the evaluation of individual case outcomes in isolation. This has been done elsewhere and can be further augmented in future works. Therefore, the article analyses jurisprudence within the broader political economy and recognises that legal reasoning is both shaped by and contributes to the institutional environment in which it operates. The methodology is advantageous because it enables a more contextualised and finer analysis of the courts' function in economic development, while remaining attentive to the limits inherent in doctrinal analysis

3. Theoretical framework

An evaluation or analysis of the economic dimensions of jurisprudence must be grounded in a robust, context-sensitive theoretical framework. This is often true in emerging constitutional systems, where the interrelationship between law and economic development cannot be reduced to simplistic causal assumptions. As such, the article, therefore, draws on a holistic, comprehensive framework that merges insights from Law and Economics,[24] Law and Development theory,[25] and contemporary approaches to constitutional adjudication.[26] In totality, these

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23 N Majeed, H Amjad & AN Khan 'Doctrinal research in law: Meaning, scope and methodology' (2023) Vol 12 (4) *Bulletin of Business and Economics (*BBE)559.

24 JR Commons 'Law and economics' *in Law and Economics* Vol 1 (2024) 432-444.

25 MA Baderin' Law and development in Africa: Towards a new approach' *Lagos: Nigerian Institute of Advanced Legal Studies*(2010); KE Davis& MJ Trebilcock 'The relationship between law and development: optimists versus skeptics' (2008) Vol 56 (4) *The American Journal of Comparative Law* 946; I Ayua 'Law and development in Africa' (1986*) International Journal on World Peace*71-81; MO Chibundu 'Law in development: on tapping, gourding, and serving palm-wine' (1997) Vol 29 *Case W. Res. J. Int'l L*.167.

26 CM Fombad 'An overview of contemporary models of constitutional review in Africa' (2017) Constitutional *adjudication in Africa* 48; CM Fombad 'Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes' (2014) Vol 46 (2) The *Journal of Legal Pluralism and Unofficial Law* 46275.

approaches, assuming they are free from 'coloniality',[27] may provide a strong conceptual foundation to analyse jurisprudence as doctrinal articulation and, importantly, as a form of institutional practice with tangible economic consequences. Fundamentally, Law and Economics emphasises the primacy of legal infrastructure to shape economic behaviour by structuring incentives and reducing transaction costs.[28] The traditional approaches of Law and Economics, especially those based on the neoclassical efficiency theory, postulate that laws should be analysed in terms of their ability to maximise social welfare, often conceptualised as allocative efficiency.[29] Nevertheless, the direct transplantation of these precepts into Zimbabwe should not be automatic, as this may lead to undesirable outcomes.[30] Moreover, in contexts characterised by systemic vulnerabilities, regulatory uncertainty and socio-economic inequality, the pursuit of efficiency must be balanced with considerations of stability, legitimacy and distributive impact.

Furthermore, any comprehensive account of Law and Economics in Global South contexts must analyse the distributive and political dimensions of legal systems more directly.[31] Laws allocate benefits and burdens across different social groups and structure incentives, often in ways that reflect or reinforce existing power imbalances.[32] Accordingly, the economic effects of jurisprudence should be analysed cognisant of how doctrines shape access to resources, exposure to risk and the distribution of economic opportunity.[33] This perspective is especially important in countries such as Zimbabwe, where legal disputes frequently arise against a backdrop of historical socio-economic inequality, structural economic adjustment and contested state intervention.[34] Court decisions on land, labour and administrative justice inevitably carry distributive consequences, even where

27 S Esmeir 'On the coloniality of modern law' (2015) (2) *Critical Analysis L*19.

28 RD Cooter 'Decentralized law for a complex economy: the structural approach to adjudicating the new law merchant' (1996) 144 (5) University *of Pennsylvania Law Review* 1643.

29 JR Hackney Jr 'Law and neoclassical economics theory: a critical history of the distribution/efficiency debate' (2003) (32) (4) *The Journal of Socio-Economics* 390.

30 BA Knežević, MV Milica & G Mirjana 'International Standards on Judicial Ethics and the Pitfalls of Cursory Legal Transplantation' in *Balkan Yearbook of European and International Law* (2021) 84.

31 WF Menski Comparative law in a global context: the legal systems of Asia and Africa (2006).

32 LD Molm, QM Theron & PA Wiseley 'Imbalanced structures, unfair strategies: Power and justice in social exchange' (1994) *American Sociological Review* 98.

33 P Cserne 'Consequence-based arguments in legal reasoning: A jurisprudential preface to law and economics' in *Efficiency, sustainability and justice to future generations* (2011) 54.

34 P Maguchu *Transitional justice and socio-economic rights in Zimbabwe*. (2019).

these are not expressly articulated in jurisprudence.[35] In conventional parlance, there is consensus that the judiciary should discharge its functions to achieve social, economic and political stability and predictability.[36] This can be realised by consolidating existing economic arrangements. Despite this, another strand of the argument holds that the transformative vision of the law, as interpreted by courts, may create uncertainty with uneven social effects.[37] However, in practical terms, neither option is inherently neutral, as they imply competing normative imperatives.[38]

Accordingly, the article sees distributive consequences of adjudication as instrumental.[39] This may be true even though, in some cases, the judiciary may not expressly articulate its reasoning in such terms. The implication, therefore, is that the distributed implications of judgments permeate the body of jurisprudence. Though essential, some qualification is, however, inevitable. Bearing in mind that the non-juridical consequences of judicial decisions do not necessarily entail that judges should become *de facto* redistributive agents, as this would be *ultra vires* their constitutional mandate. On the contrary, the postulation suggests, in the main, that a comprehensive account of the economic development dimensions of adjudication must remain alive to how laws interact with underlying patterns of socio-economic inequality and power that characterise our polity, as enunciated under the 2013 Zimbabwean Constitution and upheld by superior courts. While this view is cogent, it must nonetheless be approached with some caution. It does not denote perfection since society, including the judiciary, is generally imperfect. The main thrust is to appreciate the unassailable role (subject to limitations) of courts to re-engineer society, as it were.

Contextually, therefore, the judiciary under the leadership of Chief Justice Malaba may be characterised as navigating paramount notions of efficiency and uniformity of judicial practice, as well as the more complex terrain of distribution, whereby the pursuit of stability intersects with the other variables of socio-economic differentiation. Institutional and development-oriented works, such as those by Douglass North, Amartya Sen, and others, further buttress the extant

35 GJ Naldi 'Land reform in Zimbabwe: Some legal aspects' (1993) Vol 31 (4) The *Journal of Modern African Studies* 585.

36 NK Komesar 'A job for the judges: the Judiciary and the Constitution in a massive and complex society' (1987) 86 *Mich. L. Rev* 657.

37 GN Rosenberg *The hollow hope: Can courts bring about social change?* (2008).

38 M Clair 'The Cultural Study of Law and Social Crisis' (2026) *Annual Review of Law and Social Science*.

39 KH Ragnarsson 'Conceptions of Equality and the Distribution of Wealth in Human Rights Adjudication' (2022) Vol 68 *Scandinavian Studies in Law* 2.

theoretical framework.[40] For example, North emphasises the role of institutions as the rules of the game, reducing uncertainty and structuring economic interaction.[41] He provides an important perspective through which the judiciary, as an institution, can be understood as part of the broader system of economic governance.[42] In terms of this view, the judiciary contributes to the interpretation of laws, the stabilisation of expectations, and the reduction of transaction costs, thereby facilitating economic exchange.[43] Moreover, Sen's comprehensive and holistic conception of development as the expansion of real freedoms that people enjoy further amplifies the analysis by supporting the normative dimensions of the legal system.[44] It can be argued that judgments, specifically in fields such as labour and administrative law, may therefore be construed as contributing to enhanced or limited individual capabilities within the economic domain.

Additionally, the views of Cass Sunstein on what is termed 'judicial minimalism' and Dani Rodrik on institutional diversity emphasise the utility of context-sensitive adjudication.[45] According to Sunstein, minimalism is a strategy of incremental decision-making. This perspective may apply in Zimbabwe, given the observable approach to jurisprudence, whereby the judiciary often delivers 'narrow rulings' that may preserve institutional stability while allowing gradual doctrinal evolution. Rodrik argues that there can be no single institutional pathway to economic development.[46] While this view is debatable, it may be relied upon to support the premise that jurisprudence must be analysed in light of exigent local socio-economic, institutional conditions rather than external ones.[47] Cumulatively, these non-exhaustive analytical views provide the scaffolding for the main argument that the (selected) jurisprudence under consideration shows a form of 'contextual institutionalism'. Under this purview, legal reasoning is shaped by the paramount

40 DC North 'Institutions and the performance of economies over time' in *Handbook of new institutional economics,* (2025) 25-35; R Baishnabi 'Amartya Sen's Ideas of Justice' (2023) 5 (2) *Indian JL & Legal Rsch* 1.

41 DC North *Institutions, institutional change and economic performance* (1990).

42 DC North 'he contribution of the new institutional economics to an understanding of the transition problem' in *Wider perspectives on global development* (2005) 15.

43 OE Williamson 'Transaction-cost economics: the governance of contractual relations' (1979) 22 (2) The *journal of Law and Economics* 261.

44 A Sen 'Development as freedom (1999)'*The globalization and development reader: Perspectives on development and global change* 525 (2014).

45 CR Sunstein & A Vermeule 'Conspiracy theories: causes and cures' (2009) 17 (2) Journal *of political philosophy*; D Rodrick 'Reinventing Capitalism' (2009) 23 (1) International *Economy*.

46 D Rodrik 'One economics, many recipes: globalization, institutions, and economic growth' (2008).

47 BZ Tamanaha 'Understanding legal pluralism: past to present, local to global' in *Legal theory and the social sciences* (2017) 483.

need to balance economic functionality, social legitimacy, and institutional constraints.[48]

Consequently, the article adopts a more nuanced and institutionally appropriate approach to Law and Economics, drawing lessons from New Institutional Economics (NIE) and the theory of the second best.[49] In light of this, court judgments should be seen as performing an essential economic role that extends beyond the limited pursuit of efficiency. Judicial decisions may reduce uncertainty by clarifying legal rules, thereby lowering transaction costs in commercial transactions. This function manifests in the commercial and administrative domains, where predictability in judicial interpretation can, to a great extent, affect investment decisions and market behaviour. Second, the judiciary influences economic incentives by indicating (un)acceptable conduct in vertical and horizontal relationships.[50] For example, a Supreme Court decision sought to resolve an employment dispute and also influence broader expectations regarding employment practices in the context of economic adjustment.[51] Third, the judiciary plays an essential role in producing institutional legitimacy, which is itself a key ingredient of economic development. Thus, increased positive (rule of law) perceptions or confidence in the courts may enhance strong compliance with laws and reinforce the credibility of legal frameworks. Moreover, while Law and Economics is an important framework, it must nonetheless be supported by an economic development perspective that speaks to the extant socio-economic context. The proposed add-on here is contemporary Law and (Economic) Development wisdom, as exemplified by Yong-Shik Lee's recent theorisation, which can serve as a helpful framework for understanding the pertinent issues under consideration.

In the main, Lee's *General Theory of Law and Development* debunks deterministic accounts of the relationship between law and economic development.[52] On the contrary, Lee conceptualises law as an essential enabler whose development function largely depends on its comportment with socio-economic factors.[53] Lee opines that LFIs may be understood as fulfilling the tripartite objectives of facilitation, constraint, and mediation. Specifically, judicial

48 GC Shaffer 'How business shapes law: A socio-legal framework' (2009) Vol 42 *Conn. L. Rev* 147.

49 K Rafi 'Literature review: new institutionalist economics (NIE)' (2022) Patriarchal *Hierarchy: Market Capitalism and Production in Afghanistan* 68.

50 RA Posner 'Judicial behavior and performance an economic approach' (2004) 32 *Fla. St. UL Rev*1259.

51 *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* [SC 43-15].

52 YS Lee 'General theory of law and development' (2017) 50 *Cornell Int'l LJ* 415.

53 S Ghebremusse 'Application of YS Lee's general theory of law and development to Botswana' (2019) 12 (2) *Law and Development Review*424.

decisions that enhance legal certainty may facilitate economic activity, while those that are uncertain or misaligned may undermine it. Generally, though, jurisprudence functions as a mediating force to balance competing objectives such as economic efficiency, social justice and institutional stability.

The courts' umpire function is demonstrable in administrative law and property rights.[54] In these areas, the judiciary's responsibility is to manage tensions between public and private economic interests. Resultantly, cases such as *Commercial Farmers Union & Others v Minister of Lands and Rural Settlement & Others*[55] and *Telecel Zimbabwe (Pvt) Ltd v POTRAZ* indicate the heightened complex interaction between legal rules and economic development policy.[56] This shows the court's role to define the contours of regulatory intervention. Considering this, the article does not wholly evaluate court decisions in binary terms but however treats them as part of a gradual process of institutional negotiation. According to this strand of analysis, the judiciary should contribute to the incremental shaping of an economic development-oriented legal system. Also, the theoretical framework is further amplified by theories of constitutional adjudication, especially transformative constitutionalism.[57] Although this doctrine has been most upheld in South Africa, its underlying aspiration to use the constitution as an engine for social and economic transformation applies across Africa.[58]

The invocation of transformative constitutionalism in Zimbabwe must be approached with consideration of local conditions. Unlike contexts characterised by relatively stable legal environments, Zimbabwe's constitutional project has unfolded amid economic volatility and political contestation.[59] In such circumstances, the transformative potential of jurisprudence is often realised through incremental and context-sensitive development. The article, therefore, proposes the doctrine of "pragmatic transformative adjudication" as a more

54 RB Stewart 'Administrative law in the twenty-first century' (2003) 78 *NYuL Rev*437; J Getzler 'Theories of property and economic development' (1996) 26 (4) The *Journal of Interdisciplinary* 669.

55 SC31-10.

56 *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) & Ors* (HH446-15, Case No. HC 3975/2015).

57 P Langa 'Transformative constitutionalism' (2006) 17 (3) *Stellenbosch Law Review* 360; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 188.

58 H Klug 'Constitution making and social transformation' in *Comparative Constitution Making* (2019) 68.

59 GA Dzinesa 'Zimbabwe's constitutional reform process: Challenges and prospects' (2012) *Institute for Justice and Reconciliation*; M Ndulo 'Zimbabwe's unfulfilled struggle for a legitimate constitutional order' Framing the state in times of transition: Case studies in constitution making (2010)176.

appropriate conceptual approach.[60] This approach recognises that courts may pursue transformative objectives while remaining attentive to institutional constraints and the potential economic consequences of their decisions.[61]

It is within this space of practical balancing that much of the jurisprudence developed during the Chief Justice's tenure may be situated. In terms of this approach, viewing judicial restraint as antithetical to transformation should not be the automatic response. Conversely, the judicial reasoning can serve the function of preserving constitutional legitimacy and economic stability in a challenging and evolving environment. The article infuses aspects from a concept known as 'judicial minimalism', which at its core emphasises narrow, case-specific adjudication and caution in the application of legal principles. In some respects, the minimalist approach 'may' become an assailable vehicle to achieve stability and avoid disruptive shifts in legal doctrines. At the same time, it raises important questions regarding capacity of courts to provide clear guidance in areas of significant economic importance. This tension between stability and doctrinal clarity is a recurring theme in jurisprudence and will be examined in subsequent sections. The theoretical approaches discussed above provide a comprehensive framework to analyse the economic dimensions of jurisprudence. The paradigm enables a shift away from simplistic evaluative judgments towards a more holistic conceptualisation of the judiciary as an institution involved in the important task of managing law, the economy, and development. Therefore, the article is a primer on this broader and fluid shift in seismic jurisprudence. The next sections expand on this view.

4. The judicial role in economic governance in Zimbabwe

It has been stated that in developing countries, the judiciary is structurally significant, especially for economic development.[62] In most jurisdictions, including Zimbabwe, courts have been called upon to adjudicate disputes at the border of law, policy, and socio-economic transformation.[63] In this context, the superior court jurisprudence in Zimbabwe may be classified as indicating an orientation that conceptualises the judiciary beyond being an arbiter of disputes, to an

60 WA Shutkin 'Pragmatism and the Promise of Adjudication' (1993) 18 *Vt. L. Rev* 57; D Moseneke 'Transformative adjudication' (2002) 18 (3) South *African Journal on Human Rights* 319; C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 (2) *South African Journal on Human Rights* 299.

61 R Gargarella, P Domingo & R Theunis *Courts and Social Transformation in New Democracies: an institutional voice for the poor?* (2017).

62 HL Root & K May 'Judicial systems and economic development' (2008) 304 *Rule by law: The politics of courts in authoritarian regimes* 304.

63 D Sigwegwe 'Limitations of Litigation as a Tool for Achieving Social Change: A Perspective on South African and Zimbabwean Litigation Environment' Master's thesis, University of the Witwatersrand, Johannesburg (South Africa) (2023).

integral stabilising force within a dynamic and, at times, volatile socio-economic environment.

4.1. Judicial technique and economic reasoning

As a result, an examination of the economic development facets of jurisprudence enjoins consideration of both the substantive outcomes of cases and the techniques by which judgments are articulated.[64] So far, the jurisprudence associated with Chief Justice Malaba shows, for the most part, a discernible pattern of adjudicative approach, characterised by a preference for doctrinal clarity, measured language, and incremental development.[65] The jurisprudence frequently engages carefully with legislative or constitutional text, often supplemented by purposive interpretation when necessary to ensure consistency within the broader legal and institutional framework.[66] While arguable, the methodology that characterises legal reasoning may contribute to legal certainty, which is a critical constituent of economic development.

Moreover, the jurisprudence highlights a consistent awareness of institutional boundaries, informed by the separation of powers (including the political questions doctrine, a principle with a 'troubled' and unclear status in our law), specifically in matters implicating intricate economic policy. Therefore, the judiciary's approach to deference, while subject to heated debate, is exemplary, as it acknowledges the primary role of other branches, especially the executive and specialised regulatory bodies, in economic decision-making.[67] The article cites a few examples to illustrate this arguable point.[68] The developments are

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64 S Tembo & A Singh 'Prospects for Constitutional and Human Rights Transformation through Constitutional Adjudication in Zimbabwe after 2013' (2021) 29 (3) African *Journal of International and Comparative Law* 29399; T Chikwati. 'Adjudication of Presidential Election Disputes in Zimbabwe: A Case of Chamisa v Mnangagwa' in *Electoral Politics in Zimbabwe, Volume I: The 2023 Election and Beyond* (2023) pp. 257.

65 J Sloth-Nielsen & K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' (2016) 16 (2) *African Human Rights Law Journal* 568; N Ndhlovu & O Adebola 'The aftermath of Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others: Legal mechanisms as tools against child marriage in Zimbabwe' (2018) 5(1) *Journal of Law, Society and Development* ; A Novak 'Zimbabwe's Contribution to the Transnational Judicial Dialogue on Corporal Punishment: The Constitutional Court's Embrace of a Global Norm in State v Chokuramba' (2022) 14 (3) *African Journal of Legal Studies* 399-422.

66 Ibid.

67 S Hofisi 'The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis' (2018).

68 C Goredema 'Whither judicial independence in Zimbabwe?' *Zimbabwe: Injustice and Political Reconciliation* (2004) 118; L Chiduza 'Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial

mostly evident in administrative and local government law matters, where the judiciary analyses the legality, reasonableness, promptness, fairness and rationality of administrative decisions without substituting their own judgment for that of the relevant administrative authority.[69]

While the article is cognisant of the growing body of knowledge clamouring for greater reliance on administrative law, mainly through judicial review powers to promote democratisation, the rule of law, good governance, and human rights, it concurs for the most part with this strand of analysis but also proposes another layer to the discussion. The proposed approach comports with the principles of 'judicial minimalism' and, if applied judiciously, may reinforce the stability of regulatory frameworks. Essentially, the approach does not preclude meaningful judicial oversight. In essence, its claim to promise is that it demonstrates a tailored theory of adjudication that strives to balance accountability with institutional competence. Therefore, in economic development terms, the approach to judicial reasoning may contribute greatly to a predictable and stable legal environment, while also leaving enough room for the gradual evolution of doctrine.

Notwithstanding these unavoidable liberal and progressive effects, a more searching analytical perspective requires that the practice of judicial restraint be examined both in terms of its institutional virtues and its potential limits. While restraint may serve to preserve institutional balance and avoid undue judicial encroachment on economic policy paradigms, it may also, in certain contexts, narrow the scope of constitutional oversight in ways that are not always immediately apparent in doctrinal jurisprudence.[70] This applies in jurisdictions where the interrelationship between adjudication and policy making evolves and is subject to contestation. In these contexts, the distinction between appropriate deference and insufficient judicial scrutiny is blurred.[71] When this happens, the judiciary may be reluctant to examine substantive implications of administrative or executive conduct. On the other hand, courts may adopt a principled respect for institutional competence as informed by the separation of powers.

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independence suffice?' (2014) 17 (1) Potchefstroom *Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 418.

69 N Makuzwa 'A Transformative Rule of Law Approach to Increase Efficiency in Public Administration Through an Improved System of Administrative Justice: A Case Study of Zimbabwe' in *Sustainable Governance in Contemporary Law* (2026)156.; TG Kasuso & G Manyatera 'The Right to Reasons for Administrative Action in Zimbabwe' (2021) 36 (2) *Southern African Public Law*.

70 A Moyo 'Standing, access to justice and the rule of law in Zimbabwe' (2018) 18 (1) *African Human Rights Law Journal* 292.

71 G Manyatera 'A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe' (2015).

Conversely, the approach may produce unintended consequences such as constraining the healthy development of strong standards of judicial review, especially in areas with significant economic and distributive consequences. Be that as it may, this is not to suggest any inconsistency in the jurisprudence under consideration, but, contrariwise, to indicate an inherent tension within the practice of adjudication itself. The Malaba jurisprudence may thus be analysed as operating within a carefully tailored adjudicative space, where the objectives of stability and accountability are held in a dynamic, at times delicate, equilibrium.[72] In numerous examples, the emphasis on legality, rationality and procedural propriety can provide a comprehensive and helpful foundation for oversight without necessarily displacing policy discretion. However, the evolving nature of economic governance itself may raise the profound question of whether, over time, there may be scope for a more elaborated articulation of substantive review standards in certain domains. A caveat is necessary here. It is that such a proposal would not necessarily depart from the underlying commitment to institutional balance; rather, it would refine the jurisprudential tools used to maintain that balance. Aptly put, increased exercise of judicial restraint may emerge as both a fixed doctrinal posture and also a context-dependent approach whose effectiveness is heavily dependent on context. Importantly, its contribution to economic development may manifest in the form of stability and predictability and also in how it is continually contextualised in response to changing legal and economic circumstances.

Therefore, at core, the judiciary's function in economic development is to promote legal certainty. The justification for this is that economic players, be it private persons, business entities or state actors, operate within a system of expectations that is significantly shaped by the predictability and consistency of legal rules. Court decisions, therefore, play a critical role in reducing uncertainty, thereby lowering transaction costs and facilitating economic activity. Commercial and regulatory contexts are examples where the above stated function applies. The case of *Delta Corporation (Pvt) Ltd v Zimbabwe Revenue Authority*,[73] is an example where the court applied of law of taxation principles and therefore emphasises compliance with fiscal obligations. Furthermore, financial sector stability has been emphasised by the judiciary. Accordingly, in addition to certainty, courts are arbiters of competing economic interests and manage private competing interests between state regulatory objectives and private rights. The dispute resolution role is evident in administrative law. In this case, judicial review for example attempts to ensure that the exercise of public power is consistent with principles of legality, rationality and procedural fairness.

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72 G Helmke & R Frances 'Regimes and the rule of law: Judicial independence in comparative perspective' (2009) 12 (1) Annual *Review of Political Science* 366.

73 SC62-24.

In *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe*,[74] the court was required to strike a delicate balance between regulatory authority and market participation in a key economic sector. Moreover, the judiciary has also resolved licensing and compliance matters. In principle, these case studies show the extent to which administrative adjudication may influence the broader issues of economic governance or development. However, the country context upon which the judiciary operates is important as well.[75] For example, in Zimbabwe, economic policy has often been influenced by rapid shifts and structural challenges which has placed courts in the position of adjudicating matters with far-reaching ramifications.[76]

In land and property disputes, for instance, cases like *Commercial Farmers Union v Minister of Lands* and *Minister of Lands v Commercial Farmers Union* demonstrate the profound economic interests implicated in adjudications.[77] While some of the cases invoke the Constitution and legislation, they also raise broader questions of economic redistribution, investment and rule of law.[78] The court's approach, while contested, in these contexts may be understood as showing an awareness of the need to balance competing interests, including the protection of rights, the recognition of state policy objectives and the preservation of systemic stability.[79]

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74 *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & 4 Ors* HH-446-15.

75 J Scott & S Sturm 'Courts as catalysts: re-thinking the judicial role in new governance' (2006) 13 Colum. *J. Eur. L*. 565.

76 T Kondo 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence' (2017) 17 (1) African *human rights law journal* 193; K Moyo, Khulekani Socio-*Economic Rights under the 2013 Zimbabwean Constitution* (2020) 497.

77 See also, MC Ogwezzy 'The Decision in Mike Campbell v. The Republic of Zimbabwe: A Functional Paralysis of the SADC Tribunal' (2016) 8 *Silesian Journal of Legal Studies* 8: 80.

78 D Zongwe 'The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations' Zimbabwe to the Foreign Investment Law on Expropriations (December 1, 2009). *Namibia Law Journal* 2, no. 1 (2010); PN Ndlovu 'Campbell v. Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal' (2011) 1 SADC *Law Journal* 79; A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 (2*) African Human Rights Law Journal* -614.

79 A Magaisa 'The land question and transitional justice in Zimbabwe: Law, force and history's multiple victims' (2010) *Oxford Transitional Justice Working Paper Series* ; CT Chokuda, 'International investment dispute resolution: a review of the resolution of investment disputes arising out of the land reform programme in Zimbabwe' (2009) 21 (5*) SA Mercantile Law Journal* 21772; P Sixpence & P Chigora 'Land compensation and land conflict resolution in Zimbabwe: Challenges and prospects for the Second Republic's relations with the west' (2020) 5 (2) *Journal of Public Administration and Development Alternatives* (JPADA) 82-96.

Moreover, labour decisions provide a further epoch on the judiciary's role in economic development.[80] Decisions such as *Zuva Petroleum (Pvt) Ltd v Nyamande* and *Don Nyamande v Zuva Petroleum (Pvt) Ltd* have yielded enormous consequences for employment relations, particularly in the context of economic adjustment and labour market flexibility.[81] The cases are analysed in the proposed Framework developed in this article. As mentioned above, this piece is a primer and should thus be understood as introducing the theme of the judiciary and economic development in Zimbabwe. Particularly, the few cases establish how judicial reasoning can shape the incentives of both employers and employees to influence patterns of hiring, termination and dispute resolution.[82] Essentially, the judgements show the broader challenge of reconciling economic efficiency with social protection and a tension that sits at the heart of labour law in many developing countries.

It is also important to recognise that the judiciary operates within a framework of institutional constraints that necessarily shape its role in economic governance. The judiciary is not policy-making body. The constitutional boundaries and separation of powers practical considerations constrain their ability to effect socio-economic transformation. However, on the other hand, there an approach that prioritises judicial pragmatism and involves careful adjustment of judicial intervention and restraint. In cases such as *Mushoriwa v City of Harare*[83] and *Combined Harare Residents Association v City of Harare*, the courts have engaged with local governance issues and service delivery. They illustrate how courts may resolve disputes before them without undermining broader institutional dynamics.[84] This may potentially be classified as a form of responsive 'pragmatic adjudication'. The technique is not overtly interventionist and shows some deference in matters involving complex economic policy and in principle should meet rule of law requirements. Nonetheless, the value-laden balancing adjudicative process should be malleable, casuistic and contextual. The process must reflect the inherently dynamic nature of adjudication. Consequently, the

80 P Maitireyi & R Duve 'Labour arbitration effectiveness in Zimbabwe: fact or fiction?' (2011) 11 (3) African *Journal on Conflict Resolution* 158; TG Kasuso 'Enforcement of Labour Court judgments in Zimbabwe: Lessons and perspectives from Southern Africa' (2018) 39 *Pt. 2 Indus. LJ* 39.

81 MG Gwanyanya 'Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in Nyamande & Another v Zuva Petroleum' (2016) 16 (1) African *Human rights law journal* 299.

82 C Mucheche 'Labour law dispute resolution in Zimbabwe and the law: The concept of fairness in adjudication of labour disputes in Zimbabwe' (2021).

83 *City of Harare v Farai Mushoriwa* SC 54/2018.

84 T Kondo, S Masike, B Chihera & B Mbonderi 'One step forward, two steps back: A review of Mushoriwa v City of Harare in view of Zimbabwe's constitutional socio-economic rights' (2021) 21 (1) *African Human Rights Law Journal* -637.

court's function in economic governance may be categorised institutionally as straddling law, the economy and statecraft. The analysis that follows builds on this postulation. It expands on themes focusing on their implications for economic development.

5. Thematic analysis of jurisprudence

There are recurring jurisprudence themes that may illuminate economic dimensions of judicial reasoning.[85] Rather than engaging in case by case critique, the article uses a thematic approach to identify patterns of reasoning that may contribute to economic governance. Three interconnected themes are examined. These relate to the promotion of economic stability and legal certainty, improved administrative governance and labour relations in a challenging economic environment. The first theme concerns the role of the judiciary to promote economic stability and legal certainty. As intimated previously, predictability in the application of legal rules is a fundamental precondition for economic activity. The jurisprudence partly reflects a sustained concern with this imperative, particularly in commercial and constitutional contexts. For example, in *Unifreight Africa Limited (Formerly Pioneer Corporation Africa Limited) v Mashinya* (13 of 2024) [2024] ZWCC 13 (17 September 2024)[86] the court's analysis of statutory authority and economic regulation emphasised the importance of clear legal frameworks to structure state intervention. Furthermore, decisions such as *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation*[87] show the judiciary's role to ensure that regulatory bodies operate within defined legal parameters to contribute to institutional consistency.

The stability-bound jurisprudence is also manifest in commercial matters, too numerous to mention here. These cases indicate how judicial enforcement of contractual obligations and financial regulations may reinforce or undermine confidence in the commercial sphere.[88] While such decisions are generally

85 *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (CC 12 of 2015; Constitutional Application 79 of 2014) [2016] ZWCC 12 (20 January 2016) (important case on children's rights and broader constitutional issues. This is a seminal case linked to socio-economic development of children.

86 *Vela v Auditor-General of Zimbabwe and Another* (10 of 2024) [2024] ZWCC 10 (26 June 2024); *Ariston Management Services Limited v Econet Wireless Zimbabwe Limited and Another* (8 of 2024) [2024] ZWCC 8 (18 June 2024); *Zambezi Gas Zimbabwe (Pvt) Ltd. v N. R. Barber (Pvt) Ltd. & Another* (Civil Appeal SC 437 of 2019; SC 3 of 2020) [2020] ZWSC 3 (20 January 2020); *Rydale Ridge Park (Private) Limited v Muridzo N.O* (17 of 2023) [2023] ZWSC 42 (3 March 2023).

87 1995 (9) BCLR 1262 (ZS).

88 MZ Mugwati, D Nkala and C Mukanganiki 'The composition and regulation of the financial services sector in Zimbabwe' (2013) 3 (4) *Asian Economic and Financial Review* 483.

technical, their overall effect is to sustain the integrity of economic institutions, which, in turn, underpins investment and commercial activity. Accordingly, the jurisprudence denotes an implicit recognition of the judiciary's role to maintain the infrastructural conditions necessary for economic development. The second theme relates to administrative law and economic governance. Judicial review serves as a critical mechanism to curtail the exercise of public power. In a regulatory environment characterised by complexity and change, the ability of courts to ensure legality, rationality and procedural fairness is central to the functioning of economic systems. Decisions such as *Telecel Zimbabwe (Pvt) Ltd v POTRAZ*[89] and *Econet Wireless (Pvt) Ltd v POTRAZ*[90] demonstrate the judiciary's pre-occupation with sector-specific regulation, particularly in telecommunications, which is a key driver of economic growth in the country. The cases demonstrate how jurisprudence may influence the outcome of individual disputes and broader regulatory issues.

Furthermore, the jurisprudence also reveals a nuanced approach to intervention. While courts have proactively scrutinised administrative action where necessary, there is, nevertheless, also evidence of a measured sensitivity to the executive's institutional role to formulate and implement economic policy. Cases such Mike Campbell (Pvt) Ltd. And Another v Minister of National Security Responsible for Land, Land Reform and Resettlement and *Biti & Another v Minister of Justice, Legal and Parliamentary Affairs,*[91] support this view.[92] In each case, the concern of the Judiciary is to balance its constitutional mandate to promote constitutionalism and the rule of law and other equally important aspects of governance.[93] There must be a balance "between the scope of its judicial powers on the one hands and the executive and the legislative authority on the other in the mediation of disputes".[94] This is extremely important in the context of economic constitutionalism or governance where courts should generally defer. Equally important are the labour and social justice dimensions of judicial reasoning. The legal system becomes essential for resolving industrial disputes arising from volatile market conditions. Specifically, in economies characterised by surging unemployment rates and increased retrenchments, labour law may be instrumental in shaping social and economic development outcomes. In this area, the case law demonstrates how complex a task it is for judges to balance

89 HH 446-15.
90 HH 635-14.
91 SC 10/02.
92 See Generally, Madhuku L 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46 *Journal of African Law* 232.
93 WT Chikwana 'Access to Justice and Administrative Law' Access to Justice Centre Symposium, University of Zimbabwe (2022) 4.
94 Opening of the 2024 Legal Year at 17.

competing interests of employers and employees. For instance, while parties in an employment relationship are entitled to terminate their relationship on notice, the position of employees who wield weaker bargaining power becomes important. This is exactly what the Judiciary was confronted with in in *Zuva Petroleum (Pvt) Ltd v Nyamande*, a case which concerns legal ramifications for the termination of the employment relationship and labour flexibility on the other hand.[95] The *Zuva Petroleum* decision epitomises the heightened tension in the market place whereby employers have more power at the expense of employees. On one hand, the legal system as applied was interpreted in favour of the dominant group in the market, which according to a Marxist legal critique, is detrimental to employee interests. In a constitutional democracy, labour protection has gained provenance, with s 65 of the Constitution constitutionalising labour rights. However, in economic development parlance, *Zuva Petroleum* is a practical example of the heightened intricate tension between labour market adaptability and protection of employees from unfair dismissal.[96] The aftermath of this supports the problematisation we have done here particularly the transitional provision in the Labour Act and subsequent Constitutional Court challenge in a different matter.

Furthermore, in *Magodora v Care International Zimbabwe* SC 24-14, for example, the Judiciary has put the interests of employers and employees on a scale to strike a healthy balance in the employment relationship while cognisant of the contractual obligations and associated organisational priorities. This approach avoids a heavily skewed approach in favour of one party over another. In other words, it does not Adopt a strictly pro-employer or pro-employee rights approach. On the contrary, the Judiciary seems to prefer a casuistic approach where the merits of a particular case are important. This gives courts the leeway to deliver carefully balanced decisions. However, before proceeding, one cannot ignore the fact that *Zuva Petroleum*, for instance, seems incompatible with the approach we are discussing here. That decision was pro-employer for the most part. Now, going back the contextual approach we are advocating for, it would seem, the inconsistently applied approach of the courts tries to contribute incrementally to the Zimbabwean labour protection paradigm. This approach must be strongly rooted in S 65 of the Constitution, which in a big way, is founded on the principles of fairness and justice in labour issues. In the main, labour law jurisprudence finds

95 N Kwaramba & D Uzhenyu 'The Impact of the Labour Amendment Act 2015 on the Termination of Employment Contract in Zimbabwe' (2017) 7 (12) International *Journal of Research in Social Sciences* 142; D Uzhenyu 'Recent supreme court labour judgement: a threat to sound labour relations and sustainable development in Zimbabwe' (2016) 17 (10) Journal *of Business and Management* 17,76-84.

96 R Matsikidze 'Fair Labour Standards Elevated to Constitutional Rights: A New Approach in Zimbabwean Labour Matters' (2009) 14 *ILO* 6.

itself dovetailing with the deeply entrenched economic challenges in Zimbabwe. While employers should not be compelled to retain employees they do not need, the fundamental labour rights must be complied with, and these must not be sacrificed at the cost of certainty. A positivist jurisprudence which does not concern itself with the discontents of the law is unwelcome in a modern polity founded on S 3 of the Constitution principles and values. However, the bottom line is that stability and certainty facilitate the functioning of markets, administrative justice shapes the regulatory environment and balances labour relations in light of the broader socio-economic development in the country. Furthermore, while case outcomes may differ, but the adjudication approach should be context-sensitive to the interrelatedness between law and socio-economic development. It is this perspective that permeates the reflective analysis throughout the article.

6. Judicial reasoning, economic outcomes and institutional tensions

The section above has identified some of the key themes relevant to the issue under review. In this segment, we add another important layer, to evaluate the economic development consequences of adjudication. This is unconventional, complex and therefore requires a befitting methodology to say the least. However, the findings in this article are not universal since they must be further subjected to scrutiny at both macro and micro levels. Practically, however, we proffer important lessons on the function of the judiciary in driving transformation in society. A practical analysis of the jurisprudence uncovers underlying complex tensions that are neither unique to labour markets globally. The challenges largely relate to the complex society expectations placed on the Judiciary to spur prosperity. Sections 164 and 165 of the Constitution for example, support this framing., More importantly, on several occasions, particularly on the Opening of the Legal Year, the Chief Justice emphasised the need to mete out the obligations enunciated under the Constitution. As illustrated below, there are certain times when institutions may fail to meet their constitutional mandates, and when that happens, there may be an uproar. This has happened when it comes to electoral disputes, for example. In our view, the operation of judicial constitutionalism by its very nature is profoundly contentious and must therefore be managed impeccably and judiciously. Moreover, most often, what lies at the heart of the 'tension' would be the need to deliver justice mainly by striking a balance between legal certainty and adaptability. In cases dealing with corporal punishment, the Judiciary has frequently emphasised the flexibility of community mores, for example. However, the most challenging question relates to how courts should manage economic expectations. When it comes to this, it would seem that a positivist approach is preferred by the courts but often with imperfect outcomes. On a more practical level, the changing circumstances or operational environment has even made the situation worse. The Judiciary finds itself being called upon

to deliberate on unprecedented and novel issues, which call for new forms of reasoning or liberalisation at the least. This triggers a change in judicial reasoning. Specifically, it points to the inherent challenge of maintaining consistency in a fluid economic environment. Therefore, adjudication invites further analysis of how courts may continue to refine doctrinal tools that balance stability and responsiveness.

As already argued, policy matters, including economic ones, pose challenges for the judiciary. In the orthodox literature, this has always been dealt with under the separation of powers. The argument proffered here is that courts may entertain matters of economic policy, for example, in socio-economic rights cases. However, there must be some oversight and restraint. The field of administrative law provides further insights into this. Decisions pertaining to regulators point to some willingness to ensure regulatory compliance with legal standards, while equally recognising the institutional competence of specialised bodies in matters of policy implementation. This approach aligns with the principle of separation of powers. Nevertheless, it also raises important questions about the extent to which courts can or should entertain more directly with the substantive economic implications of regulatory decisions. The jurisprudence, in this regard, may be seen as opening a space for ongoing analysis with the appropriate boundaries of judicial review in complex economic contexts. Further reflection may focus on the interaction between labour jurisprudence and economic restructuring. The decision in *Zuva Petroleum (Pvt) Ltd v Nyamande*, alongside related cases such as *Don Nyamande v Zuva Petroleum (Pvt) Ltd* and *Magodora v Care International Zimbabwe*, has had far-reaching implications for employment relations. From an economic perspective, these decisions may highlight the delicate equilibrium between labour market flexibility and the protection of workers' rights. The jurisprudence illustrates an awareness of the need to accommodate economic realities while preserving core principles of fairness. At the same time, it invites continued consideration of how legal frameworks might evolve to provide greater clarity and predictability in this area, particularly in light of ongoing economic transformation.

Another rationale focuses on the role of judicial reasoning to influence perceptions of institutional legitimacy. In environments where economic challenges interface with related questions of good governance, the credibility of legal institutions, for example, becomes an issue of considerable importance. Moreover, judgments such as *Mushoriwa v City of Harare* and *Combined Harare Residents Association v City of Harare*, as already mentioned above, show the judiciary's contribution on matters of public accountability and service delivery and to some extent reinforce the sacrosanct principle that the exercise of public power must remain subject to legal scrutiny or what Mureinik termed a culture of

justification.[97] These selected socio-economic rights cases contribute to a broader narrative in which the judiciary may be seen as an essential component of the institutional framework that underpins both governance and economic activity. Importantly, the reflection herein is part of honouring the Chief Justice (and in turn, the judiciary as an institution) and point to several epochs to evaluate the jurisprudence under consideration. On the contrary, it is hoped that the analysis will highlight the discernible contradictions and paradoxes that arise when courts deal with complex socio-economic development matters. In principle, these tensions form an inherent feature of superior adjudication in particularly in developing countries and therefore they provide fertile epoch for jurisprudential analysis. In the main, the bone of contention is that Zimbabwean jurisprudence may therefore be conceptualised as unearthing the opportunities, pitfalls and possibilities of economic governance adjudication and provides valuable lessons into the ever-evolving role of courts in influencing economic development paradigms.

7. Silences and emerging questions in economic adjudication

Nevertheless, no adjudication is perfect. Despite the above postulation pointing towards a sophisticated examination of significant socio-economic matters, further jurisprudential development is also possible. One such example regards the relatively limited express articulation of economic analysis in judgments. Though the economic ramifications of court decisions are patently evident, judges have not always integrated economic development reasoning in judgments. This raises fundamental questions about the extent to which courts may, in the future, examine more directly the economic dimensions of legal disputes, especially in areas such as regulation and labour relations. Thus, the relative impliedness of economic analysis in adjudication also gives rise to a further set of analytical considerations that merit more express evaluation. When courts adjudicate matters with significant economic consequences without clearly articulating the assumed economic justification, the result may be doctrinal opacity that further complicates both interpretation and application. The adjudication must be accompanied by economic development guidelines developed by the courts to guide litigants. In the absence of these, even when legal outcomes are (for argument's sake) technically consistent, the legal practitioners and economic actors' capacity to fully apprehend the principles that inform those outcomes may be severely diminished. South African courts particularly the Constitutional Court, has developed excellent guidelines on socio-economic rights. Specifically, the guidance on the minimum core, reasonable and so forth is instructive.

97 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31-48.

However, in the Zimbabwean context, while adjudication on economic issue is evolving, this should not be mistaken for silence nor absence. Conversely, we argue that this may denote an entrenched structural feature that influences how adjudication is received, extended and operationalised by the Judiciary. The approach is pronounced administrative law and labour law, whereby court decisions often serve as a signal to a broad range of stakeholders beyond the immediate parties to a legal dispute. Moreover, this spectrum is where Zimbabwe and South Africa differ markedly. South African Administrative Law is far more advanced. The courts in that country seem to be proactive in terms of scrutinising all administrative actions as opposed to their Zimbabwean counterpart that is largely conservative. This is so notwithstanding the existence of a constitutional provision on administrative justice, whose operationalisation may be improved significantly. As such, where the economic dimensions of such legal signals remain under-articulated, there is a risk that the systemic effects of adjudication on investment behaviour, regulatory compliance or labour market practices may become less predictable, even in the presence of formal doctrinal certainty. Thus, there is a possible interpretation to this. There must be improved transparency in the articulation of economic factors in adjudication to enhance the communicative function of court decisions.

At a conceptual level, the conspicuous lack of an express economic analysis in adjudication can also largely influence the development of jurisprudence. In the absence of a clearly articulated framework to address economic consequences, courts may be more inclined to rely on established legal doctrines such as legality, procedural fairness or contractual interpretation without fully 'centring' the broader economic context into their reasoning. While this approach may potentially maintain doctrinal continuity, it may equally limit the evolution of jurisprudence in areas where economic considerations are increasingly central. The pertinent question is not whether there is room for a more deliberate and transparent examination of the economic dimensions already entrenched within the legal system. The conventional legal system, including at the adjudication level, has failed to adequately address the challenges posed by the informal sector and the regulatory challenges it causes. We acknowledge that while existing principles may provide a starting point, they are inadequate to deal with the problem. Therefore, there is need for adaptation. However, these observations are not intended as critiques, but rather as evidence of the dynamism and evolving nature of constitutional adjudication. The silences identified here may therefore be understood as productive spaces for future doctrinal enrichment and refinement to extend existing principles in response to changing economic conditions.

8. Comparative and regional perspectives

Furthermore, the 2013 Zimbabwean Constitution and adjudication practice allows courts to frame economic analysis taking into account foreign and comparative law. While each legal system operates within its own unique context, there are important points of convergence across jurisdictions, particularly within the common law tradition. Comparative analysis thus provides an opportunity to identify shared challenges, divergent approaches and potential avenues for doctrinal development. The experience of South Africa, for example, provides a particularly instructive point of reference, given its well-developed jurisprudence on constitutional and socio-economic rights.[98] The South African Constitutional Court has, in a series of landmark decisions, articulated a vision of transformative constitutionalism that expressly analyses questions of economic justice and redistribution.[99] While the institutional and socio-economic contexts diverge in important respects, the comparative perspective demonstrates the diverse ways in which courts may approach the relationship between law and socio-economic progress. As opposed to interventionist or intrusive approaches, the jurisprudence shows a more measured and context-sensitive analysis with similar issues and suggests the emergence of distinct and contextualised techniques to adjudication.[100]

South Africa is not the only example since countries like Kenya and India provide can be excellent comparators too. These jurisdictions have dealt with similar issues such as the regulation of administrative conduct, justiciability of socio-economic rights and adjudication of deeply complex economic policy matters.[101] The comparative lessons resonate with the inherent challenges identified in Zimbabwe. These straddle stability and change, intervention and restraint, efficiency and equity. Therefore, it is logical to surmise that they are not a unique

98 C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2(2) Law*, Democracy & Development* 2167; M Langford, B Cousins, J Dugard and T Madlingozi (eds*) Socio-economic rights in South Africa: symbols or substance?* (2013); S Liebenberg, & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) 23 (2) South *African Journal on Human Rights* 361.

99 MS Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2003) 6 *Chap. L. Rev*. 137; C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 (2) South *African law journal* 284.

100 Mavedzenge & D J Coltart *A constitutional law guide towards understanding A Zimbabwe's Fundamental socio-economic and cultural human rights*. (2014).

101 NW Orago 'Limitation of socio-economic rights in the 2010 Kenyan Constitution: a proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes' (2013) 16 (5*) Potchefstroom Electronic Law Journal* 219; P O'Connell 'The Death of Socio-Economic Rights' (2011) 74 (4) The *Modern Law Review* 554.

but instead an inherent characteristic of judicial systems operating in developing countries generally speaking. Within this broader context, Zimbabwe's jurisprudence may be seen as contributing to an emerging body of African economic constitutionalism, in which the judiciary plays an instrumental role in shaping the legal foundations of development while remaining attentive to institutional constraints. The decisions discussed in earlier sections, including *Commercial Farmers Union v Minister of Lands* and *Nyambirai v National Social Security Authority*, resonate with similar cases across the region that address the intersection of property rights, state policy and economic transformation. The comparative lens thus reinforces the view that judicial reasoning in Zimbabwe forms part of a wider dialogue on the role of law in development.

Equally, comparative analysis must be undertaken with due regard to socio-economic, legal and political context. The transplantation of doctrinal approaches from one jurisdiction to another is neither straightforward nor always appropriate.[102] Scholars have critiqued the Constitutional Court's reliance on foreign law. However, it appears in most cases that the jurisprudence is conscious of this fact and somehow demonstrates sensitivity to Zimbabwean and institutional capacities. This context-specific orientation is largely a strength rather than a limitation and as such, may enable the development of legal principles responsive to Zimbabwe's particular needs and challenges. Ultimately, the comparative perspective situates the analysis within a broader jurisprudential framework to highlight both commonalities and distinctions. It demonstrates the importance of continued examination of regional and international developments, while affirming the value of contextually grounded approaches to judicial reasoning and economic governance.

Moreover, the comparative analysis of jurisprudence shows both convergence and divergence in the ways courts examine economic governance across various jurisdictions. The experience of South Africa provides a particularly instructive contrast, especially in the domain of labour law and administrative justice. While South African jurisprudence has, in certain instances, adopted a more interventionist approach to socio-economic rights, Zimbabwean courts have tended to adopt a more measured and context-sensitive approach to similar issues. This distinction is evident, for example, when comparing labour jurisprudence such as *Zuva Petroleum (Pvt) Ltd v Nyamande* with South African cases addressing fairness in dismissal and labour regulation. The comparison demonstrates differing judicial responses to analogous challenges and reflects variations in institutional context and constitutional design. Beyond South Africa, developments in Kenya and India further illustrate the diversity of approaches to

102 See Hofisi, Maringe & Ndlovu (note 16 above) 79.

economic constitutionalism. In these jurisdictions, courts have engaged more explicitly with questions of economic rights and state obligations and often adopting expansive interpretive strategies. The Zimbabwean experience, by contrast, indicates a more restrained and incremental trajectory that emphasises stability and institutional consistency. This comparative analysis reinforces the importance of context in shaping jurisprudence and emphasises the value of locally grounded approaches to the relationship between law and social and economic progress.

9. Judicial leadership in context

Additionally, any analysis of jurisprudence over an extended period must inevitably analyse questions of legacy. In the case of Chief Justice Malaba, this involves an examination of jurisprudence and a consideration of his broader contribution to the institutional development of the judiciary and its role within the entire constitutional system. There are articles in this Special Issue that address this extensively. The analysis must be approached with both analytical thoroughness and an appreciation of the complexities of judicial leadership. The jurisprudence examined in this article suggests that a consistent emphasis on institutional continuity and stability has characterised Chief Justice Malaba's tenure. This posture is reflected in the careful development of legal principles across a range of domains, including administrative law, labour relations and commercial disputes. The jurisprudence emphasises predictability and consistency of legal rules. Arguably, courts have helped maintain an environment in which economic activity can take place with a reasonable degree of certainty. This approach, while perhaps less visible than more dramatic forms of judicial intervention, may nonetheless be of considerable significance in the context of economic governance.

In addition to jurisprudential development, the legacy of Chief Justice Malaba may also be considered in terms of institutional stewardship. The effective functioning of the judiciary as a whole depends on the quality of its decisions and its capacity to operate as a coherent and credible institution. Through the management of case law, the articulation of judicial reasoning and the maintenance of procedural standards, the judiciary contributes to the broader governance framework within which economic and social life unfolds. The jurisprudence discussed in this article reflects an awareness of these institutional dimensions and highlights the courts' role as both adjudicative bodies and guardians of the rule of law. Moreover, judicial legacy in a developing constitutional democracy invites a more reflective and at times open-ended analysis. Legacies are formed through the internal consistency of jurisprudence or the stability of institutional practice and shaped by how judicial decisions are interpreted, contested and re-evaluated over time by courts, scholars and the broader legal community. Therefore, legacy is not a

fixed attribute, but an evolving construct that reflects the interaction between jurisprudence and the evolving dynamics of constitutionalism.

This is particularly pertinent in contexts where courts operate within environments marked by both institutional development and periodic contestation. Judicial decisions that emphasise stability and restraint may, in one interpretive frame, be understood as safeguarding the continuity of legal order under challenging conditions. Additionally, they may prompt further inquiry into the extent to which courts have examined with the full range of constitutional possibilities available to them. These perspectives are not mutually exclusive; rather, they form part of the broader discourse through which judicial contributions are assessed and understood. Accordingly, the legacy associated with Chief Justice Malaba may be most productively approached as a site of ongoing analysis rather than as a closed evaluative conclusion. The jurisprudence examined in this article provides a rich foundation for such examination, precisely because it reflects sustained engagement with complex questions of law, economics and institutional roles. The article acknowledges the interpretive openness of legacy. The analysis remains faithful to both achievements of the jurisprudence and the responsibility of continued critical analysis within the legal academy.

It is also important to situate this legacy within the broader socio-economic context. Significant challenges, including economic volatility and institutional transformation, have marked the period during which Chief Justice Malaba served in senior judicial roles. In such circumstances, the task of adjudication is necessarily complex and requires a careful balancing of competing interests and an acute sensitivity to socio-economic context. The jurisprudence may therefore be understood as reflecting legal principles and an engagement with aspects of governance in a constitutional democracy. From this perspective, Chief Justice Malaba may be viewed as a 'transitional figure' within Zimbabwe's constitutional evolution, whose jurisprudence embodies the ongoing negotiation between stability and change. The classification encapsulates socio-economic transformation. Practically, it enjoins that this ideal be pursued subject to constitutional limits and also cognisant of economic implications of court decisions. Pragmatic adjudication permeates the jurisprudence. In this light, the article proposes several pathways. First, there is scope for sustained improvement regarding administrative and regulatory law, which are key components in economic governance. In terms of this proposal, enhanced clarity in the articulation of legal principles improves predictability and strengthens the regulatory environment for economic activity to occur. Second, there is a belief that economic reasoning is integrated into judicial analysis, this may bolster economic dispute resolution and enable courts to manage the practical implications of their judgements. Moreover, any such developments must bear in

mind the judiciary's enshrined constitutional function and its mandate to maintain legitimacy. The extant jurisprudence demonstrates the value of a calculated and context-sensitive approach to adjudication that tries to balance oversight with respect for constitutional limitations. The policy implications identified here should therefore be understood not as prescriptions, but as reflections on potential pathways for the continued evolution of judicial reasoning in the service of economic governance.

10. The Judicial Economic Mediation Framework

However, to avoid being overly theoretical, the article's main contribution lies in developing a modest model or frame to examine the economic development aspects of jurisprudence. While there is no sustained empirical application or stress testing of the proposed framework, it is hoped that introducing the model discussed here will help stakeholders better dissect the issues. The model or framework is called the Judicial Economic Mediation Framework (JEMF). It sees the judiciary as discharging its functions on the continuum of tripartite factors of (i) stability, (ii) flexibility and (iii) legitimacy. The definitions are as follows. First, the pillar of stability refers to the existence or design of consistent and predictable LFIs, which in turn inform economic development planning and investment in a country. The second pillar, known as flexibility, speaks to adaptability. In essence, it examines the inherent institutional capacity of jurisprudence to adapt to fluid socio-economic conditions, enabling LFIs to respond to new challenges. Additionally, the last constituent of legitimacy serves as a barometer to measure public trust or perceptions in the judiciary. It borrows from rule of law thinking that strong perceptions of judicial independence are essential to the effective functioning of legal systems and ultimately prosperity, in the context of the JEMF.

A possible categorisation of the jurisprudence could be that it evinces stability-weighted adjudication. This implies that legal certainty and institutional continuity may serve as the primary axis. However, these factors must be supported by measured flexibility and sustained attention to legitimacy over time to produce desired results. The framework sees potential in adaptation. In terms of the JEMF, change is accommodated within the bounds of consistence and predictability of legal rules. This is a giant-leap forward. The JEMF becomes an analytical tool to evaluate the judiciary's contribution to economic development and provides a formidable base for further case study and comparative legal analysis. At this point in time, while acknowledging the need for empirical testing, it has been established that the jurisprudence in Zimbabwe sits within a structured system of economic mediation characterised by the interaction of tripartite pillars of stability, flexibility and legitimacy. Arguably, the jurisprudence shows how these elements can play out and be balanced in judicial practice. Moreover, it would seem that stability is emphasised as the foundational axis. Therefore, the stability laden

approach, it seems, has room for flexibility or legitimacy. The crux would be to examine how these are situated within the broad-based rule of law commitment to institutional continuity to reinforce the enabling rule of law conditions necessary for sustained economic development.

10.1. Institutional stability, doctrinal silence and the limits of judicial mediation

The post-2017 adjudication approach, for example, is disciplined in its method, cautious in its institutional reach, and consequential in its economic effects. However, the jurisprudence has not directly dissected the economic development consequences of its own reasoning. Regarding the interrelationship among the three pillars (Executive, Legislature and Judiciary), Chief Justice Malaba explained it as follows on 8 January 2024:

> A close reading of the Constitution shows that these institutions enjoy a symbiotic relationship. Their roles are complementary and intertwined despite operating from different spheres of governance. The mentality of absolute autonomy of each organ of state is incongruous with the design of constitutionalism. Any State would be impossible to govern if the three arms of the State operated in antipathy. The principle of deference encourages the Judiciary to strike a balance between the scope of its judicial powers on the one hand and the executive and the legislative authority on the other in the mediation of disputes. The need to do so arises from the observance of the doctrine of separation of power as a mark of good governance. It is fundamental to democracy, as it exhorts the Judiciary to apply the Constitution in such a manner that the boundaries of the powers allocated in equal measure to each of the three arms of the State are not carelessly breached.[103]

Nevertheless, on the ground, separation-of-powers and rule-of-law issues regarding the judiciary have become contestable, polarised, and sometimes political. For instance, according to one perception, the Zimbabwean Judiciary suffers from a trust deficit. In other words, its function to deliver on constitutional promises, in turn, to engender transformation, has been questioned. This argument arises in the context of electoral adjudication or political questions broadly. On this aspect, the Chief Justice is on the record having expressed his displeasure with how the situation unfolded after disputed elections, as follows:

"Where a party does not agree with the outcome of litigation, he/she/it must do so with respect and in accordance with the legal processes and remedies provided

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103 Address by the Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe on the Occasion of the Official Opening of the 2024 Legal Year, the Role of the Judiciary in Entrenching Constitutionalism' (8 January 2024) 17.

by the law. During the course of the elections period, disparaging and damaging remarks were made against the judiciary in general and some Judges of the Supreme Court and the High Court. The unwarranted aspersions stemmed from decisions which the courts have made. Even more concern was the fact that the disparaging remarks were made by some members of the legal profession who are expected to have known better. The JSC engaged the Law Society. The engagement resulted in the matters being resolved amicably. There have been instances where litigants who lost cases went on a tirade, casting aspersions on the integrity of the courts and the Judges. They raised unfounded allegations of corruption, threatened, and attempted to intimidate judicial officers who would have made decisions against them. At the last count, seven judges had fallen victim to the vile misinformation and attempted intimidation. Constitutionalism discourages vexatious and unrelenting litigation by litigants whose conduct is directed at undermining public confidence in the independence and integrity of not the Judiciary by the entire administration of the justice system. The respect of the rule of law and for the independence of the courts demanded by constitutionalism requires that litigants should comply with court orders and legitimately use the remedies put in place by the law to challenge the unfavourable decisions of the courts. Appeal processes and complaints mechanisms are not intended to be abused by litigants for selfish ends. The designation of appeal courts by the Constitution arose out of a recognition of the fallibility of, and the possibility of error on the part of, judicial official officers and the need to put in place effective remedies for correcting such errors.[104]

In principle, the Chief Justice's views are compatible with those of the New Institutional Economics (NIE) and best practices on the rule of the judiciary to drive socio-economic transformation. Inherent in the constitutionalism discourse at the centre of the Chief Justice's delivery was the important realisation of the need for a strong and independent judiciary, free to make decisions without fear or favour. While compliance with court orders at the instance of litigants is an important facet, it cannot, however, be framed narrowly. To ensure compliance with the rule of law for economic development, it must be broadly construed to cover all players. There is a body of literature that reveals a culture of defiance within other branches, especially the executive branch. This aspect is integral to the analysis and qualifies the constitutionalism thesis that the Chief Justice held so dear, as seen in his multiple speeches, including the 2024 speech under review here. Therefore, in line with the article's aim to introduce a broader subject that cannot be exhausted here, the article admits that the legacy was also characterised by limited compliance and enforcement issues, particularly in politically laden matters. Methodologically, it is inconceivable that the legacy of

[104] Ibid 19-20.

the Judiciary head can be evaluated in isolation. Therefore, for completeness, an historical analysis is important. This entails, for example, referencing previous decisions to highlight the judicial culture. In a way, the excerpt indicates the convoluted and complex nature of justice. While the Judiciary is committed to what the Chief Justice has termed 'judicial constitutionalism,'[105] there is a sharp contrast with the phenomenon of countries with constitutions but without constitutionalism. While judges should uphold the rule of law, there might be concerns when there are incessant claims of partiality in adjudication. The judiciary must inspire confidence. And as such, if Mhodi and others' claims are considered, it would seem the criticisms levelled by legal practitioners referred to in the Chief Justice's speech are not an isolated incident, but a deep-rooted issue that characterises the Zimbabwean Judiciary. However, a qualifier is essential here. Effective compliance and implementation, as espoused in Law and Development, for instance, does not encapsulate baseless complaints and allegations. On the contrary, these concepts entail that the rule of law must be operationalised judiciously.

This is demonstrated in decisions such as *Delta Corporation Limited v Zimbabwe Revenue Authority*;[106] *ZIMRA v Packers International*;[107] cases on financial governance, regulatory oversight, labour law (post *Zuva Petroleum* decision) and socio-economic rights such as *City of Harare v Combined Harare Residents Association*; *Mushoriwa v City of Harare*) where the jurisprudence seems pro certainty, while the economic underpinning of its interventions is largely implied. The objective is to analyse the style of reasoning through which judicial outcomes are produced and the extent to which that approach coheres with the article's proposed framework of judicial economic mediation.

Moreover, in taxation matters, the courts have upheld statutory provisions. In disputes involving the interpretation of fiscal obligations and the Zimbabwe Revenue Authority (ZIMRA), it would seem that the jurisprudence favours certainty, administrative efficiency, and the consistent application of tax laws. According to the law and economics school, the court's approach may be said to reduce interpretive variance, lower compliance costs, and signal that fiscal burdens will be imposed through law rather than through discretion. Nevertheless, the reasoning has certain weaknesses. Foremost, it does not consider the distributive incidence of taxation, the behavioural responses of enterprises or the possibility that strict formalism may incentivise avoidance strategies at the margins. New Institutional Economics (NIE) would predict that credible and rule-bound tax systems will enhance investment by reducing uncertainty, but it would

[105] Ibid 21.
[106] [2024] ZWSC 62.
[107] SC 28/16.

also insist that the content of rules and their predictable effects on incentives matter as much as their formal certainty. In the main, the jurisprudence secures the former while leaving the latter underexplored. Under the article's framework, this is a strong instantiation of the stability pillar, but a weak articulation of mediation between efficiency and distribution. The result is that economic burdens are distributed through law without an accompanying justification for that distribution.

Furthermore, the strand is evident in financial and commercial cases concerning banking relationships, insolvency and the enforcement of obligations. The Court's insistence on contractual discipline and institutional regularity underwrites the credibility of credit markets and the enforceability of financial commitments, features indispensable to any functioning economy. The reasoning communicates that obligations will be honoured and that institutional actors cannot escape legal consequences through opportunistic behaviour. However, the analysis remains resolutely micro-legal. It does not grapple with systemic considerations such as liquidity constraints, contagion risk or the macroeconomic context within which financial distress arises. This is an observation that the communicative content of judgments could acknowledge the broader stakes without displacing doctrinal reasoning. As it stands, the jurisprudence contributes to micro-level certainty while leaving macro-level expectations to inference. The article's emphasis on predictability is therefore only partially satisfied since outcomes are more predictable, but rationales in economically sensitive contexts remain limited.

Moreover, regulatory jurisprudence in telecommunications and licensing sharpens the analysis. In cases involving sector regulators, the Court has drawn a clear line that it will enforce legality, rationality and procedural fairness, but it will not substitute its judgment for that of specialised bodies. This posture is frequently defended as institutionally appropriate, and it aligns with comparative theories of administrative law that caution against judicial overreach in polycentric policy domains. Within the proposed framework, this reflects a commitment to institutional competence and restraint and preserves the executive's primary role in economic policy. However, the economic implications of this approach are more ambivalent than the stability thesis suggests. Investors in regulated sectors require not only assurance that regulators will act lawfully, but also guidance about how courts will treat contested exercises of discretion over time. Where judicial review remains largely procedural, without a developed account of substantive standards (for example, proportionality calibrated to economic impact, or structured rationality in price-setting and licensing), the legal environment may be formally stable yet substantively indeterminate. The Court thereby produces what may be termed thin stability: rules are followed, but the economic meaning of those rules across cases is insufficiently specified to anchor

long-term expectations. This is precisely where the framework's flexibility pillar requires re-conceptualisation not as occasional deviation, but as a doctrinal tool capable of translating legality into economically intelligible standards.

Labour jurisprudence after the legislative response to *Zuva Petroleum* exposes the limits of a purely formalist orientation in a domain where law is unavoidably distributive. Subsequent cases have operated within the amended statutory landscape, restoring a measure of protection to employees while preserving elements of employer flexibility. The Court's reasoning in this period demonstrates a sensitivity to statutory purpose and an effort to stabilise the legal regime following the disruption occasioned by *Zuva*. However, the deeper tension remains unresolved. Law-and-economics accounts would emphasise the gains from flexibility in distressed economies; law-and-development scholarship would foreground vulnerability, informality, and asymmetry. The Court does not explicitly arbitrate between these frameworks. Instead, it resolves disputes through statutory interpretation, allowing the legislature to carry the distributive burden. This division of labour is defensible in separation-of-powers terms, but it also illustrates a structural feature of the jurisprudence. Therefore, conflicts between efficiency and protection are displaced rather than theorised. Without a close analysis that identifies how reasoning channels these competing imperatives, the analysis risks mischaracterising outcomes as balanced when they are, in fact, products of unspoken prioritisation.

Additionally, socio-economic rights cases involving municipal powers and residents' rights provide a different vantage point on economic adjudication. By insisting that local authorities act within statutory limits and honour procedural constraints, the Court reinforces accountability in service delivery and constrains arbitrary impositions on residents. These decisions have immediate economic salience. They affect access to water, billing practices and the fiscal behaviour of municipalities. Nevertheless, once again, the reasoning is framed in terms of legality rather than economic sustainability. There is no sustained engagement with the fiscal constraints of local authorities, the economics of cost recovery, or the trade-offs between affordability and service viability. The consequence is a jurisprudence that protects citizens against unlawful conduct but does not articulate how lawful governance should navigate resource scarcity. Within the framework, this may reveal a strong commitment to legitimacy. The rule of law is visibly enforced but a thin account of mediation, because the economic dilemmas that give rise to disputes are not brought into the reasoning itself.

Constitutional structure cases concerning public finance and the exercise of executive power further illuminate the Court's role as an institutional arbiter. By enforcing procedural requirements and constitutional boundaries in matters

touching on fiscal authority, the Court contributes to the credibility of governance arrangements. This has clear economic implications. It is that credible constraints on public power can lower sovereign risk and enhance confidence in the legal system. However, the Court's reasoning tends to stop at the point of procedural compliance, leaving questions about the economic rationality of decisions like budgetary trade-offs, prioritisation, and long-term sustainability, outside the judicial frame. The jurisprudence thus secures constitutional order without developing a vocabulary for economic evaluation within constitutional adjudication. The absence of such a vocabulary is a consistent feature of the Court's method. Taken together, these strands suggest that the Judicial Economic Mediation Framework captures an important truth but requires modification. The jurisprudence undeniably advances stability in the sense of rule-bound decision-making and institutional continuity. It also sustains legitimacy by visibly enforcing legality across domains. Where the framework is less convincing is in its treatment of flexibility and mediation. Flexibility is not simply the capacity to adjust outcomes; it is the availability of doctrinal instruments that allow courts to respond to economically complex disputes in a principled and intelligible way. Mediation requires the articulation of reasons that make explicit how competing economic and social considerations are balanced within the confines of law.

The strongest counterargument, which the article must now confront directly, is that doctrinal silence about economic consequences can itself generate uncertainty. Economic actors do not respond to holdings in the abstract; they respond to reasons that can be generalised across contexts. Where reasons are confined to formal legality, the extrapolation required to predict future outcomes becomes speculative. From a transaction-cost perspective, this raises the cost of planning and may dampen investment in precisely those sectors where judicial guidance is most needed. The paradox is acute. A jurisprudence oriented toward stability may, by withholding its economic logic, shift uncertainty from the rule to its application. This critique does not entail that courts should adopt an overtly economic methodology or displace legislative choice. It points instead to the need for a thin and disciplined articulation of economic context within legal reasoning. Such articulation would acknowledge foreseeable consequences, clarify the scope of judicial deference in economically sensitive domains, and provide structured standards beyond bare legality that can guide regulators, firms, and citizens. Comparative administrative law offers tools (calibrated reasonableness, structured proportionality in economic regulation, context-sensitive rationality) that can be adapted without collapsing the separation of powers. The jurisprudence already contains the seeds of such development in its careful attention to purpose and context; what is missing is the explicit integration of those considerations into a stable doctrinal grammar.

A refined account of contextual institutionalism would therefore recognise that, in volatile economic environments, restraint must be paired with transparency. Stability is not exhausted by consistency; it depends on the intelligibility of judicial reasoning to those who must organise their affairs around it. Legitimacy is not only a function of adherence to law; it is also a function of the Court's capacity to explain how its decisions bear on the lived economic realities that generate disputes. Flexibility is not the abandonment of doctrine; it is the development of doctrine capable of accommodating economic complexity without sacrificing legal discipline. The post-2017 jurisprudence associated with Chief Justice Malaba thus presents a mixed but instructive picture. It has strengthened the infrastructural conditions of the rule of law of predictability, enforceability, and institutional continuity across fiscal, regulatory, labour, and municipal domains. At the same time, it has left the economic logic of its interventions largely implicit, relying on external actors to reconstruct the connection between legal reasoning and economic effect. The contribution of this article lies in making that connection explicit and in demonstrating that the future development of Zimbabwean economic constitutionalism will turn on how they explain the economic consequences of those decisions within the discipline of law.

11. Conclusion

This article is unconventional and undogmatic as claimed in the above. This premise raises profound questions about the economic dimensions of superior court jurisprudence in Zimbabwe. While some themes were aptly captured, the analysis avoided wholesale conclusions. It, however, created a basis for further empirical legal analysis of the issues. As it stands, the analysis is neither right nor left wing but deliberately adopts a pragmatic approach to pave the way for increased jurisprudential problematisation in future works. As can be deduced above, the feeds into endogenous jurisprudence on the analysis of the economic dimensions of jurisprudence in Zimbabwe, with particular reference to the bound-to-retire Chief Justice Luke Malaba's jurisprudence. Given the time limitation, it would have been nearly impossible to analyse all decisions delivered during the Chief Justice's tenure. However, what was practicable in the circumstances was to try to situate certain judgements within the confines of theories and institutional frameworks used in this article. The raison d'être was to avoid orthodox, narrow evaluative judgments and lean in favour of a more nuanced examination of the judiciary's role in economic development. The analysis and findings are vast. There is evidence that jurisprudence can discharge several economic functions, as follows. In line with L&D discourse and practice, judicial reasoning promotes legal certainty, structures incentives and maintains institutional legitimacy. Moreover, while the issues are vast, the article was circumscribed to selected areas of administrative law, labour law and commercial law. Without being exhaustive, the analysis indicates an incremental approach to managing the

complex interactions between law and economic development. Equally, the analysis demonstrated the inherent paradoxes and discernible paradoxes that emanate in the legal reasoning process. These include, inter alia, striking a balance between stability and responsiveness, between intervention and restraint, and between efficiency and equity. Essentially, the germane argument advanced is that these inherent tensions are not deficiencies per se. Conversely, they should be conceptualised as systemic challenges inherent to legal adjudication in the Zimbabwean context. Consequently, it can be postulated that the jurisprudence of Chief Justice Malaba may provide useful signposts on how the judiciary should manage the extant challenges. The jurisprudence also offers a model of pragmatic and context-sensitive adjudication that is responsive to both legal and economic development considerations. As such, when analysed holistically, the article advances the idea that the courts' economic function in developing constitutional systems can best be understood not through singular theoretical lenses, whether efficiency, rights-based adjudication, or institutional formalism, but through a more integrated account of judicial function as a form of structured mediation. Therefore, a new analytical framework, the Judicial Economic Mediation Framework, is introduced, intended to provide one such account rather than a prescriptive model. The JEMF is an analytical approach or model that encapsulates the recurring patterns through which courts handle economically inclined disputes, particularly under conditions of institutional constraint.

The model conceptualises jurisprudence as a tripartite structure of stability, flexibility and legitimacy. The defensible claim is that this may enable a more precise analysis of how the judiciary can contribute to economic development beyond resolving individual matters. The positive contribution of judicial decisions cannot be gainsaid. These span immediate outcomes, cumulative ability to manage expectations, determine contours of institutional relationships and economic development outcomes generally. About this latter point, the proposed theory provides a means of integrating law and economics, L&D, and legal theory within a context-sensitive account of legal adjudication. Fundamentally, the theory clarifies the nature of the tensions identified throughout the analysis. The framework strikes a balance between certainty and responsiveness. Moreover, it spans issues of restraint and oversight, as well as the interaction between formal doctrine and underlying economic issues, which are not incidental features of judicial reasoning. These constitutive elements are causal to the independent dispute resolution function of the judiciary as enshrined in the Constitution. Therefore, an examination of the issues discussed here opens the space to dissect jurisprudence thorough to ensure that it is neither fragmented nor contextually contingent. Moreover, the article has a scaffolding function. It may become a base for further study in the economic analysis of judicial decisions. In

essence, it provides general considerations that should be considered when judicial decisions are analysed from an economic development angle.

Accordingly, the article proposes jurisprudential pathways as follows. Among others, the suggestion is that legal systems should develop suitable laws, legal frameworks and institutions (LFIs) that integrate non-legal (economic development) in adjudication; reform administrative law adjudication and importantly evaluate the interrelationship between law and socio-economic progress. It is hoped that taking these progressive non-exhaustive measures may lead to the achievement of ensure that economic development, as expressed in national, regional and international policies. Furthermore, it suffices that since the Special Issue seeks to honour the legacy of Chief Justice Malaba, it then becomes pertinent to acknowledge some decisions that have changed Zimbabwean society. Moreover, as part of honouring the Chief Justice's contribution to the rule of law, some authors in the Special Issue have examined the Chief Justice and in turn, the Judiciary's numerous institutional and legal milestones. As such, this article in an invitation to scholars to undertake further empirical evaluation of the function of the judiciary to spur socio-economic transformation. Importantly, honouring the Chief Justice's legacy would entail asking provoking questions including an analysis of how 'his' jurisprudence promoted economic growth, social justice, the rule of law, good governance, sustainability and constitutionalism to mention but a few. All in all, the argument is that realising positive economic development outcomes requires a judiciary that is committed to the cause or institutional reliability when called up to adjudicate on important disputes. Lastly, the article has opened prospects for further analysis on the judiciary's multifaceted role in economic development. The function spans the court's ability to influence or stabilise political or economic processes. Therefore, this is a profoundly enormous role upon which the contribution of judicial reasoning in Zimbabwe may be situated.

AN OVERVIEW OF THE PRACTICAL ENFORCEMENT OF CONSTITUTIONAL SUPREMACY IN THE PROTECTION OF CHILDREN'S RIGHTS AGAINST CHILD MARRIAGES AND SEXUAL EXPLOITATION.

NOZIPHO LETHOKUHLE NDEBELE[1]

"There can be no keener revelation of a society's soul than the way in which it treats its children." ~ Nelson Mandela.

Abstract

Constitutional supremacy reached its peak when the judiciary tested two statutes that had been in force for quite so long and both were found to be incongruent with the Constitution and invalid. In Mudzuru & Another v The Minister of Parliamentary Affairs, Justice and Legal Affairs & Others CCZ 12/2015, the constitutionality of child marriages as encapsulated in the Marriages Act [Chapter 5:11] was tested against section 78(1) of the Constitution and was found to be out of sync with the Constitution. Following this judgment, the Constitutional Court similarly found in the Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Others CCZ 3/2022, that the Criminal Law (Codification and Reform) Act [Chapter 9:23] 's definition of a 'young person' that excluded minors aged at least 16 years was unconstitutional insofar as the age of sexual consent was concerned. The practical application and enforcement of the Constitution to existing law consequently resulted in the promulgation of the new Marriages Act [Chapter 5:17] and an amendment to the Criminal Law Code to combat both child marriages and sexual exploitation of minors respectively. It is the aim of this article, through a desktop approach and in light of both primary and secondary sources, to highlight and discuss the positive role played by the judiciary in the Mudzuru and Kawenda cases, which has led to both, the transformation of family law and the protection of children's rights. This research further highlights the challenges that remain in the persistence of child marriages despite legal framework and recommendations are provided to curb the issues thereof.

Key words: *constitutional supremacy, children's rights, judicial activism, transformation, legislative reforms.*

1. Introduction

The constitutional supremacy clause encapsulated in Section 2 of the Constitution of Zimbabwe, 2013 provides that the Constitution trumps any law or

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conduct inconsistent with it. Constitutional supremacy implies the insubordinate nature of both the law and lawmaker, hence, the judiciary ought to have mechanisms that will ensure judicial control on legislative acts in the quest to persistently defend democracy.[2] The principle of constitutional supremacy does not solely require all laws to resonate with constitutional provisions, but it further mandate the judiciary as a servant and guardian of the Constitution of Zimbabwe, 2013, to ensure that it resonates with their interpretation and application of all laws without creating or deleting any rights or obligations imbedded in it.[3] The judiciary has a significant responsibility to fulfil in shaping and advancing the law to foster social change and sometimes change that promotes legal development is achieved speedily through the courts than by the legislature due to the judiciary's flexibility in the interpretation and application of the law.[4]

A child marriage is "any formal marriage or informal union where at least one spouse is a child under the age of 18."[5] In other words, a child marriage encapsulates both registered marriages and unregistered unions including unregistered customary law unions and civil partnerships. Undeniably, the term child marriage includes both girls and boys but notably, the practice is notorious against girls. Child marriages are often synonymously referred to as "early marriages" and or "forced marriages" since children seldom give "free, prior and informed consent" to their marriage given their immature age.[6] Walker affirms that an "early marriage" is also referred to as a "child marriage," and it is defined as "any marriage carried out below the age of 18 years, before the girl is physically, physiologically and psychologically ready to shoulder the responsibilities of marriage and childbearing."[7] A child marriage is abuse and "it is often rape, and by calling it marriage, we are sanitizing and giving a cloak of legality with social and moral acceptability to this crime and harmful practice of child sexual abuse and exploitation."[8]

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2 Jutta Limbach Source (2001).

3 A Moyo 'Sexual consent laws and the child's right to freedom from sexual exploitation in Zimbabwe: Unpacking the 'polarising' legacy of *Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs & Others*' (2024) *African Human Rights Law Journal 743-771.*

4 *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC).

5 Gambir 'Associations between child marriage and food insecurity in Zimbabwe: a participatory mixed methods study' (2024) *BMC Public Health* 2.

6 Goronga 'Partnerships: A Panacea to end Child Marriages in Bindura and Mount Darwin Districts of Mashonaland Central province, Zimbabwe' (2019) *American Journal of Humanities and Social Sciences Research* 2.

7 Walker 'Early Marriage in Africa -Trends, Harmful Effects and Interventions' (2012) *African Journal of Reproductive Health* 231.

8 Nyamadzawo '*Addressing child marriages through law reform: a case study of Zimbabwe'* LLM thesis, University of KwaZulu Natal, (2015).

Sexual exploitation encapsulates a wide description inclusive of "physical or non-physical sexual contact with another person or acts of inducing or coercing that other person to take part in exploitative sexual activities."[9] In the *Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 3/2022 case, the ordinary meaning of "exploitation" was said to mean "taking advantage of" and the term "sexual exploitation" was defined as "taking advantage of the child's consent to sexual conduct".[10] Simm as referenced by Mawodza (2017) defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the exploitation of another".[11] It is undeniable that children below 18 years engage in sexual relations and child sexual exploitation sometimes leads to child marriages. The legislatively prescribed minimum age of sexual consent shows the law's integral function in preventing child sexual exploitation and ensuring the prosecution of adult offenders.[12] Also, the presumption of a child's legal incompetence to give consent explicitly protects children, especially girls, from sexual exploitation and abuse sanitised as "consent".[13]

Harmful practices can be described as "all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity."[14] A cluster of these harmful practices includes "child and early marriages," "child betrothal," "virginity testing,"[15] and sexual exploitation. The implementation of these harmful practices is widespread across countries, cultures, religions, ethnicities, and socio-economic levels.[16]

In 2015, Sloth-Nielsen and Hove unveiled that Zimbabwe was regarded as a child marriage 'hotspot' as it was positioned at number 41 on the list of countries with child marriages and children estimated to formulate 47 percent of the population, 4 percent of girls got married before they turned 15 and 31 percent prior to

9 A Moyo (n 2 above).
10 *Kawenda v Minister of Justice, Legal and Parliamentary Affairs* CCZ 3/2022 para 22.
11 Mawodza 'Sexual Dalliance in Zimbabwe: A Constitutional and Human Rights Perspective' (2017) *International Journal of Humanities and Social Science*.
12 A Moyo (n 2 above).
13 A Moyo (n 2 above).
14 African Women's Protocol: art 1(g).
15 Sithole & Dziva 'Eliminating harmful practices against women in Zimbabwe: Implementing a article 5 of the African Women's Protocol' (2019) *African Human Rights Law Journal* 571.
16 https://upstreamjournal.org/childmarriages/ (accessed 2026-03-01).

attaining 18 years.[17] Child marriage is a global issue facing many countries. Each year, it is estimated that at least 15 million girls get married before they attain 18, sadly, some as young as five years old and more than 700 million women worldwide got married as minors and 1 in every 3 girls in the developing countries is already married by the age of 18.[18]

This research analytically discusses the radical impact of constitutional supremacy and the positive impact resulting from *Mudzuru* and *Kawenda* cases, which has jealously guarded children's rights in relation to child marriages and sexual exploitation. The discussion will also highlight the gaps that remain especially in reconciling the legal developments and the practical application of these legal reforms, highlighting recommendations that can be adopted to overcome the issues that remain.

2. Background of issues prior to judicial reform

The sad reality is that the Marriages Act [Chapter 5:11] had several provisions specifically regulating the marriage of minors. Section 20 of the Act stated that the marriage of minors will not be valid unless it was solemnised with the written consent of either both legal guardians or one legal guardian if the minor only had one guardian.[19] It further provided that should the legal guardian(s) refuse to grant such consent or their consent could not be obtained due to inaccessibility, disability or their absence, the High Court could grant such authority which would be at par with that of a legal guardian insofar as its legal effect was concerned.[20] One can deduct from these provisions that permitting the social ill of child marriages was sanitized by requiring the consent of legal guardian(s) as though this was a protective measure to children. The unfortunate thing about this Act is that although it permitted the harmful practice of child marriages, it had an oversight that most child marriages are forced marriages and children are forced by their legal guardians. Warner noted that the one universal practice about child marriages is that "the marriage of a girl child is almost always arranged by her parents or guardian whose desires take precedence over the wishes of the child."[21]

17 Sloth-Nielsen & Hove 'Recent developments Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' (2015) *African Human Rights Law Journal* 562.

18 https://reliefweb.int/report/zimbabwe/constitutional-court-ruling-child-marriages (accessed 2026-03-01).

19 Section 20 of the Marriages Act [Chapter 5:11].

20 Marriages Act [Chapter 5:17].

21 Warner 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2004) *American University Journal of Gender, Social Policy and the Law.*

In addition, section 20 (4) of the Act waived the requirement of consent from legal guardian(s) if the minor child had been married and divorced or became a widow and she wanted to marry again though a minor. If the required consent was not obtained in terms of section 20(i) and (ii), the marriage did not become null and void but it was recognised as voidable.[22] In other words, such a marriage was considered valid and having the force of law until it was set aside by the child's legal guardian in no more than 6 weeks from the date of knowing about the said marriage. If such a period lapsed without an application setting it aside, it was considered to be valid, with the full force of law as though it was concluded by parties of full age.

Having permitted child marriages in previous two sections, section 22 qualified the legality of child marriages by providing that no marriage would be valid if entered by a boy below 18 years and a girl below 16 years old unless there was permission obtained from the Minister if he considered the marriage desirable.[23] Notably, there was gender discrimination in the Act as boys should have attained the minimum age of majority to marry whereas girls should have been at least 16 years, which is generally considered as the age of puberty. Not only that, but the Act allowed marriages of boys below the age 18 and girls below the age of 16 provided it was desirable. It is unthinkable to have had an Act recognising the marriage of a girl below 16 years.[24]

The Customary Marriages Act [Chapter 5:07] (CMA) regulated customary law marriages and it defined a "customary marriage" as a marriage between Africans.[25] CMA provided that the marriage was to be solemnized by a customary marriage officer in the presence of the parties to the marriage, a witness,[26] and the guardian of the woman or a deputy appointed by such guardian.[27] If the customary marriage officer had consented to the marriage or there was evidence to prove that the guardian had consented to the marriage and had agreed to the form and amount of consideration, the marriage could validly be solemnised in their absence.[28] However, not knowing whether it was intentional or an omission, unlike the Marriages Act [Chapter 5:11], the CMA did not set the minimum age of marriage. Its silence was presumed to implicitly permit child marriages. After all, for purposes of uniformity, if child marriages were allowed in civil marriages, why

22 Marriages Act [Chapter 5:11].
23 Marriages Act [Chapter 5:11].
24 *Mudzuru & Another v The Minister of Parliamentary Affairs, Justice and Legal Affairs & Others* CCZ 12/2015.
25 Section 2 of the Customary Marriages Act [Chapter 5:07].
26 Sec 4(b) of the of the Customary Marriages Act [Chapter 5:07].
27 Sec 4(a) of the of the Customary Marriages Act [Chapter 5:07].
28 Sec 4(a) of the of the Customary Marriages Act [Chapter 5:07].

would they not be allowed in customary marriages. Some inferred that the attainment of puberty was the minimum age for marriage.[29]

The legal framework on child marriages in Zimbabwe before the Mudzuru judgment was that there were laws that seemed to encourage child marriages "either expressly or by omission, while others prohibited it but lacking adequate substantive details of the crime, thereby discouraging any possible litigation thereto."[30] Thus, there was little to no basis at law to object the permissibility of child marriages.

3. Progressive reforms in the protection of children

3.1. Constitution

The supreme law of the country commendably regulates children's rights, particularly their protection from child marriages. It is applauded in comparison to the previous Lancaster House Constitution, 1980 that did not incorporate provisions on children's rights, and it was described as an "invisible child Constitution" where children were not afforded adequate recognition and protection.[31] The enactment of children's rights is important as it sets the foundation and act as a starting point on enforcement of their rights.

The Constitution describes a child as a person below the age of 18.[32] Section 19 mandates the State to take measures in ensuring that the best interests of children are treated with paramountcy in all matters pertaining to children, and it is further obliged to protect children from maltreatment, neglect or any form of abuse. A child marriage is a form of abuse to children as it violates their rights, and one can therefore assert that this practice of child marriages is constitutionally prohibited.

Section 26 further obliges the State to take adequate steps in guarding the pledging of children into marriage. Significantly, Section 78 encapsulates marriage rights and expressly states that every person who has attained the age of eighteen years has "the right to found a family."[33]

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29 Sloth-Nielsen & Hove (n 16 above).

30 Mushohwe 'A Positive Step Towards Ending Child Marriages: A Review of the Loveness Mudzuru & Anor vs Minister of Justice, Legal & Parliamentary Affairs N.O & Others' (2017) *Midlands State University Law Review.*

31 Magaya & Fambasayi 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' 2021 *De Jure Law Journal* 22.

32 Section 81 of the Constitution of Zimbabwe, 2013.

33 Section 78 of the Constitution of Zimbabwe, 2013.

3.2.1, *Mudzuru* case

Constitutional supremacy reached its height in the hailed *Mudzuru* case which probed subsequent amendments eradicating child marriages. This case demonstrated the subordination of the legislator to the legal principles in the Constitution. The case involved applicants who challenged the constitutionality of the Customary Marriages Act which provided no minimum age of marriage and the Marriages Act that permitted the marriage of minors who had not attained the majority status. These two provisions particularly the Marriages Act had to be tested against the constitutional standard on marital rights, particularly against section 78(1) that enshrines the right to found a family to a person who has attained 18 years. The applicants sought a declaratory order to declare these two legislative provisions invalid for their inconsistency with the supreme law of the land, hence the court had to interpret section 78(1) of the Constitution of Zimbabwe, 2013.

Considering the court's mandate in interpreting rights in chapter 4 including marital rights, section 46(1)(c) insists that the judiciary "must" be cognisance of international law, treaties and conventions signed by Zimbabwe. As a result, the Constitutional Court had to turn to international conventions in order to interpret marriage rights enshrined in section 78(1) of the Constitution of Zimbabwe, 2013.

It is worth mentioning and discussing some of the key international conventions highlighted by the court in interpreting section 78(1) and in reaching a decision on the unconstitutionality of child marriages. Firstly, the court considered that Zimbabwe is a signatory to both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) and it had to enforce these conventions practically as adopted by Zimbabwe. Article 1 of the CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". As a result of this definition of a child, the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW Committee) prescribed the minimum age of marriage to be 18 years.

Article 16(1) of the Universal Declaration of Human Rights (UDHR), grant legal capacity to conclude a marriage to a person of full age and Article 16(2) decreed that "marriage shall be entered into only with free and full consent of the intending spouses." The court accepted that these two provisions implicitly intended that first, a child who has not attained the majority status is precluded from the right to marry and found a family, and secondly, the person who is not yet 18 years has no right to give "free and full consent to marriage."[34] Ngema also affirmed that

[34] Mudzuru (n23 above).

although the UDHR does not explicitly forbid child marriage, one can infer from the general reading of its provisions that it does not permit child marriages, particularly the provision requiring marriage to be entered into with free and full consent and by this requirement, it can be argued to have exclusively qualified parties who have reached the age of majority and sexual maturity.[35]

Similar to article 16(2) of the UDHR, article 16(1) of CEDAW speak the same language of requiring the parties intending to marry to give their "free and full consent". Article 16(2) of CEDAW further clarify the position on nullity of child marriages and engagement of minors and requiring measures to be adopted by state parties to set the minimum age of marriage. The court also accepted that article 16(2) of CEDAW implicitly reserve the "right to marry and found a family" exclusively to majors.[36] Sadly, with these glaringly commendable provisions eradicating child marriages, CEDAW does not define a child nor set the minimum age of marriage. However, the court highlighted that this shortcoming was cured by the definition in article 1 of the CRC, which set the minimum age of a child at 18.

Article 1 of the CRC describes a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." On one hand, the CRC was the "first international human rights treaty to adopt a comprehensive approach on the protection of children and has in fact, been hailed as a watershed in the history of children."[37] However, on the other hand, there have been calls for the CRC to make provisions addressing child marriages,[38] and by providing an exception that the age of majority may be attained earlier, it has been criticised by writers as implying that it did not intend to prohibit child marriages.[39] The critique against the CRC is valid as it the legal bedrock of children's rights and the principle of legality requires laws to be ascertainable.[40]

Article 2 of CRC protects children from all forms of abuse and Article 3 requires state parties to consider as of primary consideration, the best interest of the child.

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35 Ngema 'Persistence of child marriages in Zimbabwe: a time to treat the cause and not the symptoms' *(*2021) *Perspectives of Law and Public Administration* 76.

36 Mudzuru (n 23 above).

37 Goronga (n 5 above) 3.

38 Ladan 'The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages' (1998).

39 Nyamadzawo (n 7 above).

40 N Maphosa 'Putting an old head on a child's shoulders: a critical appraisal of child marriages in Zimbabwe through the lens of Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs' 2022 *Prolaw Student Journal of Rule of Law for Development*.

Article 24 clothes state parties with the responsibility to take measures in abolishing "traditional practices prejudicial to the health of children". Despite the critics levelled against the CRC for not setting the minimum age of marriage, the court acclaimed the convention to be a milestone in child and human rights, because it is only after its inception that several studies began defining a child marriage as marriage of "a child" as per the CRC's definition.[41] It is also after its child-centred provisions that child marriages were viewed as a social evil due to its consequences on the girl child.[42]

Article 21(1) of ACRWC expressly proscribes child marriages and obliges state parties to regulate the age of marriage at 18 years, without any exceptions. Elizabeth Warner applauds the ACRWC as "*the most explicit provision of any of the international treaties as it unequivocally sets the minimum age of marriage at eighteen and brooks no exception for local religious or other cultural practices, nor does it allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned*."[43] The court asserted that section 78(1) of the Constitution was passed to align and satisfy the country's obligations undertaken under Article 21(2) of the ACRWC, to prohibit child marriages and regulate the minimum age of marriage.[44]

The respondents in this case argued that the law permitting a child below 18 to marry was not unconstitutional because s 78(1) of the Constitution does not set eighteen years as the minimum legal age of marriage but gives a person who has attained the age of eighteen the "right to found a family" not the "right to marry".[45] The court admonished that respondents' literal interpretation of the "right to found a family" would result to absurdities of concluding that a marriage is not the bedrock of family in that those below 18 have a right to marry but not to start a family.[46] This interpretation would not resonate with section 78(1)'s objectives. Also, since the heading encapsulating section 78(1) in question is titled marriage rights, the court found this to have clearly intended to regulate the age of marriage.

The court pronounced that "section 78(1) of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe and its effect is that a person who has not attained the age of eighteen has no legal capacity to marry."[47] This judgment directly striked provisions of CMA and Marriages Act insofar as they permitted child marriages.

41 Mudzuru (n 23 above).
42 Mudzuru (n 23 above).
43 Warner (n 20 above).
44 Mudzuru (n 23 above).
45 Mudzuru (n 23 above).
46 Mudzuru (n 23 above).
47 Mudzuru (n 23 above).

The *Mudzuru* judgment has been hailed as "a legal victory for the development, promotion and protection of the entrenched best interests of the child."[48] The judgment is applauded for primarily upholding obligations voluntarily undertaken by a state in treaties and its application of international instruments, thus, setting a significant example to other state parties to the relevant treaties.[49]

3.2.2. Marriages Act [Chapter 5:17]

The Marriages Act [Chapter 5:17] came into effect in 2022, following the Mudzuru judgment that abolished child marriages. This Act repealed both the Customary Marriages Act that was silent on the minimum age of marriage and the Marriages Act [Chapter 5:11] that provided the minimum age of marriage to be 16 for girls and 18 for boys. The new Marriages Act sealed the matter on child marriages once and for all by expressly prohibiting any person below 18 years to contract a marriage, unregistered customary marriage or civil partnership.[50] This provision outlaws not only formal registered unions with minors (civil marriage, qualified civil marriage and customary marriage) but informal unregistered unions (betrothal, civil partnerships and unregistered customary law union). In addition, the Act does not recognise foreign marriages where either or both parties had not attained 18 years.[51] This is a progressive provision because there are certain jurisdictions that allow the marriage of minors with parental consent or subject to certain exceptions, so this provision prohibits child marriage in all its four corners because even if one would choose to marry elsewhere where a child marriage is allowed, such a marriage will not be recognised as a valid foreign marriage in Zimbabwe.

Section 3(2) further states that "for the avoidance of any doubt, child marriages are illegal and under no circumstances shall any person contract, solemnise, aid, promote, allow or coerce the marriage or partnership or betrothal of a person below the age of 18". This provision expressly states that "under no circumstances" is a child marriage allowed, so it outlaws such marriages even with parental consent, or Ministerial consent or judge's permission as was allowed by its predecessor. Notably, the Act also prohibits the engagement or betrothal of persons below the age of 18. Section 3(3) states that any violation of these provisions would be an offence with the penalty of a fine and/or imprisonment for no more than five years. This provision does not only do away with child marriages but it also criminalises the practice, which is a deterrent measure to those who may initiate and facilitate this harmful practice against minors. Also, the legislature was abreast to the fact that child marriage is often arranged and

48 Maphosa (n 39 above).
49 Sloth-Nielsen & Hove (n 16 above).
50 Sec 3(1) of the Marriages Act [Chapter 5:17].
51 Sec 4(1)(c) of the Marriages Act [Chapter 5:17].

facilitated by the child's parents, so it provides in section 3(4) that it would be an aggravating factor if the person violating these provisions is a parent or any guardian of the child concerned. This Act is sending a clear warning to everyone including parents, to desist from arranging child marriages for whatever reason or benefit.

In addition, the Act makes marriage registration mandatory for all marriages, customary marriages not solemnised in terms of the Act must be registered by the parties within three months of the date of the union otherwise such a marriage will be considered as an unregistered customary law union.[52] Section 29 of the Act instruct the marriage officer and Registrar not to solemnise and register a marriage respectively without satisfying themselves about the age and identity of the parties concerned and an identity document will be allowed as proof. The proof of age through a birth certificate, identity document or an affidavit prior to the solemnisation and registration of a marriage can assist to detect, prevent and combat child marriages.

The Marriages Act amended the relevant provisions in the Children's Act [Chapter 5:06] and the Child Abduction Act [Chapter 5:05] to uniformly define a child as a person below the age of 18 not 16. The Act further repealed section 11(1)(c) of the Maintenance Act which stated that child maintenance terminates when the child marries and further amended section 4 of the Guardianship of Minors Act [Chapter 5:08] by deleting the subsection permitting a child's guardian to consent to the child's marriage. The Act made admirable efforts to align all laws in the definition of a child to mean a person who is 18 years old not 16, and it repealed legislation that allowed child marriages. This commendable legislation brings hope to the fight against child marriage, but implementation and enforcement will play a critical role in pioneering change.[53] This progressive Act fortifies the assertion that sometimes reform is speedily attained through the courts not legislation, as this Act was inevitable following the Mudzuru judgment that declared the unconstitutionality and invalidity of this Act's predecessors that permitted child marriages. This Act now aligns with the Constitution insofar as the age of marriage is concerned.

3.2.3. Kawenda case

The Mudzuru judgment also positively influenced a subsequent decision in Kawenda case, that further afforded children protection from sexual exploitation which usually drives minors to child marriages due to unwanted pregnancies.

52 Sec 17(1)-(3) of the Marriages Act [Chapter 5:17].

53 Carrillo 'Reducing Child Marriage in Zimbabwe' 2022 https://borgenproject.org/reducing-child-marriage-in-zimbabwe/ (accessed 2026-03-01).

Following the Mudzuru case, the appellants in this case were young Zimbabwean feminists and human rights activists acting in the public's interest who approached the Constitutional Court to further protect the rights of children. They averred that the Criminal Law (Codification and Reform) Act [Chapter 9.23] (the Code)'s definition of a "young person" to exclusively refer to a person under the age of 16 years in section 61 as the age of sexual consent was unconstitutional. This was considered to be incongruent with section 81 of the Constitution which defines a "child" as anyone below the age of 18. Appellants affirmed that following the outlawing of child marriages in the Mudzuru case, any child sexual activity should also be similarly outlawed. Conversely, the respondents argued that children who are at least 16 years are able to give free and full consent to sexual conduct.

The court acknowledged that minor children in Zimbabwe are sexually active, with forty per cent of girls and twenty-four percent of boys being sexually active before they attain 18 years.[54] However, s 81(1)(e) of the Constitution affords every child the right to be protected from sexual exploitation, though the Code protected some (children below 16 years) and not every child (children below 18). Thus, there was discrimination and deprivation of equal protection of children before the law. The effect of this challenged provision was that it left children between 16-18 years in the cold, by failing to provide them the protection the Constitution demands.[55] The Constitutional Court found the impugned law to violate s 81(l)(e) of the Constitution and to infringe "the rights to protection from sexual exploitation of children between sixteen and eighteen years and of all children in child marriages."[56] The court found no justification in discriminating children between 16-18 years and it upheld that it would also not be a justifiable defence to anyone involved in any sexual activity with a child to aver that they are married to such a child, as such conduct would be unconstitutional.[57]

Moyo considers the Court's judgment as landmark for several reasons including the declaration that the Constitution protects all minors, not some (children below 16), from sexual exploitation, and declaring the Criminal Law Code unconstitutional in excluding children aged between 16 and 18 years from protection of the law.[58] Also, he further regards it as landmark in declaring that all children below 18 years lack both the legal and mental capacity to consent to sexual intercourse with adults, and this judgment breaks new ground in domestic

54 *Kawenda v Minister of Justice, Legal and Parliamentary Affairs* CCZ 3/2022.
55 Kawenda (n 53) 24.
56 Kawenda (n 53) 25.
57 Kawenda (n 53) 30.
58 A Moyo (n 2 above).

child law and sets normative standards from which many countries in Africa and beyond may draw inspiration.[59]

This judgment probed by the Mudzuru outcome also indirectly championed child marriages because the age of starting sex is said to be associated with early marriages and girls who have their first sexual experience before the age of 17 are more likely to marry at a young age as increased libido in young people around the world can possibly explain this issue.[60] In order to avoid pregnancy out of wedlock, some parents in African communities believe that it is better to marry off a daughter while she is between the ages of twelve and sixteen years,[61] so parents are pressurised to marry off their daughters as early as possible to save their kindred and themselves from shame that is associated with giving birth to extra-marital children.[62]

3.2.4. Criminal Laws Amendment (Protection of Children and Young Persons) Act 1 of 2024

This legislative reform was necessitated by the implementation of the Constitutional Court's judgment in the *Kawenda* case. The Act amends the Criminal Law Code by extending the Code's protection against extramarital sexual intercourse or indecent acts to all children up to the age of 18 years as required by the Constitution. The definition of a young person has been amended from 16 to 18 years, and that is the minimum age to consent to sexual intercourse.

With sexual intercourse being an invariable consequence of a marriage, the prohibition of sexual intercourse or physical indecent act with a person below 18 is also a step in the right direction in the fight to combat child marriages or unions. It would have been absurd to prohibit children below 18 years from getting married but permit them to indulge in sexual activities, because these two practices are interwoven and inseparable. It is sometimes out of wedlock pregnancies that result in a child marriage, so this statutory intervention jealously guard children's rights.

4. The practical application of the legal developments on child protection

Despite the reforms done through the judiciary and the legislature, the practice of child marriages and sexual exploitation of minors stubbornly persists in practice. Evidence based research also suggests that the following are some of the causes

59 A Moyo (n 2 above).

60 Pourtaheri 'Prevalence and factors associated with child marriage, a systematic review' (2023) *BMC Womens Health*.

61 Ngema (n 34 above) 75.

62 Ngema (n 34 above) 76.

of the continuance of these harmful practices against minors, particularly child marriages and there are recommendations proffered.

4.1. Eradication of poverty

Poverty has been identified by several researchers as the main driving factor causing child marriages. In the research and study done by Gambir *et al* in Masvingo Province, child marriages range between 41% and 50%, and their study conducted in areas with food insecurity including Chiredzi, it was established that "poverty and unmet basic needs, including household food insecurity, were among the key drivers of child marriages" because economic benefits from lobola for survival can influence parents' approval of child marriages.[63]

Research has shown that in a pool of 20% girls from poor households, they are more than four times likely to enter into a child marriage compared to girls from the 20% rich households.[64] This indicates the main cause of poverty to child marriages and highlights that the State ought to take measures in the alleviation of poverty.[65] Research has uncovered that the eradication of poverty can reduce child marriages because "countries with the highest rates of early marriages are also the countries with the highest rates of poverty,"[66] and data has shown that in countries where poverty has decreased, such as in Korea, Taiwan, and Thailand, child marriages have also declined.[67] To address the issue of poverty, the Model Law recommends that government can provide economic incentives to families and children in order to assist in the delay of marriage, this can be done by providing funds, scholarships or bursaries to a girl child to enable her to complete her studies.[68] This aligns with the responsibility bestowed on the State by the Constitution to undertake all practical measures in providing social security and care to the needy.[69]

4.2. Access to education

Lack of education usually result in ignorance about one's fundamental rights and the avenues to take in protection of the infringed rights thereof.[70] Education tend to promote girls' awareness on matters such as reproductive health, the negative

63 Gambir (n 4 above) 2.
64 Plan International, 2016.
65 (n 63 above)
66 Walker (n 6 above) 231.
67 Nour 'Child marriage: A silent health and human rights issue' (2009) *Reviews in Obstetrics and Gynecology* 52.
68 SADC Model Law 2018.
69 Section 30 of the Constitution of Zimbabwe, 2013.
70 Ngema (n 34 above) 76.

outcomes of pregnancy, and their rights, placing them in a better position to choose wisely and protect their rights.[71]

Education can aid in combating child marriages because remaining in school delays marriage as the child will find something to be pre-occupied with and the girl child will make informed decisions.[72] Compulsory education should be enforced in both "public and private learning institutions, including vocational, religious, non-formal and indigenous learning systems."[73]

The State ought to make more accessible programmes such as Basic Education Assistance Module (BEAM) to promote educational support, especially in the most affected provinces, to assist girls faced with risks of dropping from school and being subjected to early marriage.[74] The state can also consider reverting to the period of free and compulsory primary education, and this will require that more resources be apportioned in the education sector, and development partners can be approached for assistance. [75] The Constitution mandates the State to adopt practical measures in promoting free and compulsory basic education for children and higher and tertiary education.[76]

4.3. Media Storytelling

In the study done by Seta , the respondents expressed that child marriages are societally common and there is an existing opinion that a girl's real home is at her in-laws. The belief that marriage is the ultimate goal for young girls is still maintained by some communities and as a result exacerbated by tradition and the status accorded to being married, some rural communities still favour the practice of child marriages.[77]

Lekgeu affirms that thought-provoking storytelling has the power to raise awareness and awaken people to the reality of child marriage and its dire consequences on individuals, families and the broader community.[78] Mawodza admonishes that the police ought to work closely alongside the media to

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71 Pourtaheri (n 59 above).

72 Samkange "Education and the Scourge of Child Marriages in Chegutu urban and peri-urban clusters of Zimbabwe'' 2022 *East African Journal of Education and Social Sciences* 79.

73 (n 67 above).

74 (n 63 above).

75 (n 63 above).

76 Section 27 of the Constitution of Zimbabwe, 2013.

77 Pongweni T 'Child marriages in South Africa – when wedlock turns to padlock' (2023) < https://www.dailymaverick.co.za/article/2023-08-20-child-marriages-in-south-africa-when-wedlock-turns-to-padlock/> (accessed on 2 March 2026).

78 https://blogs.worldbank.org/en/youth-transforming-africa/end-child-marriage-leveraging-power-south-africas-media-and-storytelling (accessed 2026-03-01).

investigate such cases and making provision of toll free lines to report these cases will aid in policing against such practices.[79] Moreover, establishment of grants, fellowships and training for journalists who will report on instances of child marriage, the progress made and hold legislators accountable for enforcing existing laws is proposed.[80] Additionally, in this digital era, the government must "advantageously use social platforms such as WhatsApp, Facebook, Twitter and Instagram with the intention of educating people about the impact of child marriage on children and their rights."[81] The awareness raising campaigns will ensure that the child's best interests guaranteed in the Constitution are prioritised by calling the communities to action against any forms of abuse and exploitation against children.

4.4. Synergy by all stakeholders

Cultural and religious practices are other contributory factors to child marriages.[82] The reported death of a 14 year old Memory Machaya who died giving birth at an apostolic shrine in Manicaland sometime in 2021, uncovered one of the many cases of child marriages taking place within Zimbabwe's apostolic churches.[83] As a result of this sad incidence, the Matabeleland Institute for Human Rights (MIHR) expressed its displeasure in the persisting interferences of children's rights by religious institutions in Zimbabwe, and this case is just but one of the thousands unreported cases.[84]

Herald reported the death of a 14-year-old girl, Delight Masomeke (29 December 2022) of Johane Marange apostolic church who had given birth and a year later, a 13-year-old bride died during labour in a shrine who was married to a 41-year-old man.[85] All these are examples that show that in spite of the law prohibiting child marriages, the enforcement of such laws remain problematic because the practice of child marriages is deeply rooted in culture and religion, such that certain groups still consider the practice to be an acceptable norm.

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79 Mawodza (n 10 above).

80 Lekgeu D 'End child marriage: Leveraging the power of South Africa's media and storytelling to reshape the narrative' (2020) <https://blogs.worldbank.org/en/youth-transforming-africa/end-child-marriage-leveraging-power-south-africas-media-and-storytelling> (accessed on 2 March 2026).

81 Ndlovu & Olaborede 'The aftermath of Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others: Legal mechanisms as tools against child marriage in Z Zimbabwe' (2018) *Journal of Law Society and Development*.

82 Maphosa (n 39 above).

83 https://www.theguardian.com/world/2021/aug/08/uncondemns-child-marriage-zimbabwe-girl-dies-after-giving-birth (accessed 2026-03-01).

84 https://kubatana.net/2021/08/11/govturged-to-tighten-the-law-against-child-marriages/ (accessed 2026-03-01).

85 'Child marriages: A bane of Africa' *The Herald* 8 February, 2024.

Ndlovu and Olaborede assert that there is no single strategy to end child marriages and Zimbabwe must consider adopting a multi-faceted strategy.[86] Child marriage stubbornly persists in Zimbabwe largely because the Constitution is not widely publicised, especially in the rural areas and this supreme law of the land ought to be adopted in the curriculum to educate possible victims of child marriages about their rights.[87]

All the stakeholders, the civil society, Zimbabwe Human Rights Commission (ZHRC), the Zimbabwe Gender Commission (ZGC), traditional and church leaders are to coordinate in the elimination of child marriages by reporting child marriages and conducting awareness programmes to inform both rural and urban dwellers about the illegality and dangers of this practice.[88] The Gender Commission must promote legal knowledge among women and girls in rural communities, implement supporting initiatives and voluntary activities that promote a change of attitudes towards children's rights and the roles of girls in society.[89] Additionally, civic education on children's rights should also target men as they tend to be the dominant hindrance for girls to exercise and enjoy their rights.[90]

5. Conclusion

To sum up, the Constitution of Zimbabwe, 2013 remains the supreme law in Zimbabwe and any law inconsistent with it is invalid to the extent of its invalidity. The courts play a significant role in defending constitutionalism through the interpretation of the law. The current Marriages Act [*Chapter 5:17*] that prohibits and criminalises child marriages (as a result of *Mudzuru* case), and an amendment to the Criminal Law Codification and Reform Act [*Chapter 9:23*] (as a result of *Kawenda* case) extending the definition of a young person from 16 years to 18 in relation to the minimum age of consenting to sexual intercourse are all testimonies of the role that courts can play in safeguarding constitutional fundamental rights of children. The harmful practices of child marriages and sexual exploitation of minors remain problematic as a result of an array of reasons proffered above and recommendations proposed can alleviate these issues as these harmful practices are detrimental to children's well-being.

86 Ndlovu & Olaborede (n 80 above).
87 Ndlovu & Olaborede (n 80 above).
88 https://kubatana.net/2021/08/06/a-call-to-an-end-to-child-forced-and-early-marriages-in-zimbabwe/ (accessed 2025-03-01).
89 Mawodza (n 10 above).
90 Mawodza (n 10 above).

COMMUNAL LAND RIGHTS IN ZIMBABWE: AN ANALYSIS OF CHIKUTU & ORS V MINISTER OF LANDS, AGRICULTURE AND RURAL SETTLEMENT AND OTHERS CCZ 03/23

FIDELICY NYAMUKONDIWA[1]

Abstract

Following a series of Statutory Instruments published in terms of the Communal Land Act[2] (hereafter CLA), which effectively declared that a portion of communal land had ceased to be communal land and had been set aside for other purposes, the applicants, who are inhabitants of the affected area approached the High Court challenging the constitutionality of sections 4 and 6 (1) (b) of the CLA. The High Court invoked the political question doctrine and found that the impugned sections were not unconstitutional. Aggrieved by the decision, the applicants appealed to the Constitutional Court. The Constitutional Court bench led by the Honourable Chief Justice Luke Malaba correctly found that sections 4 and 6(1) (b) of the CLA were not unconstitutional and dismissed the application. This paper examines the case of Chikutu and others v Minister of Lands, Agriculture and Rural Settlement and Others[3] (hereafter Chikutu) and seeks to clarify the scope of communal land rights in Zimbabwe.

Key Words: *Communal Land, Constitutionality, Public Trust Doctrine, Property Rights, Political Question Doctrine*

1. Background and facts of the case

Between 26 February 2021 and 16 March 2021, the Government of Zimbabwe promulgated four statutory instruments that had the potential to directly affect the rights and interests of an ethnic community known as the Hlengwe-Shangaani. The community occupied communal land in Chiredzi district. On 26 February 2021, and in terms of section 10 of the CLA[4], the Minister of Local Government

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2 Communal Land Act [Chapter 20:04].

3 *Chikutu and others v Minister of Lands, Agriculture and Rural Settlement and others CCZ 03/23.*

4 Ibid.

and Public Works[5] gave notice through *Statutory Instrument 50 of 2021*[6] to the effect that a certain area of land in Chiredzi district measuring approximately 12 940 hectares had been set aside for lucerne production. The Hlengwe-Shangaani Community, otherwise known as the Chilonga community, had been in occupation of the identified land for hundreds of years.

Statutory Instrument 50 of 2021 also ordered persons occupying the identified land for residential and agricultural purposes to immediately and permanently depart therefrom with all of their property.[7] On the same date, the President simultaneously enacted *Statutory Instrument 51 of 2020*[8] which declared that the same piece of land had ceased to be part of communal land.[9] On 9 March 2021, *Statutory Instrument 63A of 2021*[10] was published to correct two errors contained in *Statutory Instrument 50 of 2021*. In the latter Statutory Instrument, the Minister of Local Government and Public Works had been incorrectly cited as Minister of Local Government, Rural and Urban Development. Secondly, *Statutory Instrument 63A of 2021* corrected the purpose of setting aside the land from 'lucerne production' to 'establishment of an irrigation scheme.'[11] The order to immediately vacate remained extant. On 16 March 2021,[12] *Statutory Instrument 73A of 2021*[13] was enacted to repeal *Statutory Instrument 51 of 2020.* Through *Statutory Instrument* 73A of 2021, the Minister of Local Government and Public Works acted in terms of Section 10 of the CLA and set aside the same piece of land for the establishment of an irrigation scheme.

The net effect of the Statutory Instruments was that some peasant farmers in the Chilonga community were supposed to immediately vacate their homes together with their livestock and other property to pave the way for the establishment of an irrigation scheme. This prompted appellants to approach the High Court seeking an order to have sections 4 and 6(1)(b) of the CLA declared unconstitutional. They argued that section 4, which vests land in the President and section 6(1)(b), and which allows the responsible Minister to declare that a certain piece of land had

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5 Erroneously cited as Minister of Local Government, rural and urban development.

6 *Communal Land (Setting Aside of Land) (Chiredzi) Notice,2021, Statutory Instrument 50 of 2021*.

7 As above, section 3.

8 *Communal Land (Excision of Land) Notice,2021*, *Statutory Instrument 51 of 2020.*

9 Acting in terms of section 6(1)(b) of the Communal Land Act [Chapter 20:04].

10 *Communal Land (Setting Aside of Land) (Chiredzi) Notice,2021, Correction of Errors, Statutory Instrument 63A of 2021.*

11 Ibid.

12 The Court erroneously captured that the SI was published on 9 March 2021.

13 Communal Land (Setting Aside of Land) (Chiredzi) Notice,2021, Statutory Instrument 73A of 2021.

ceased to be part of communal land, violated their fundamental rights enshrined in sections 48[14], 51[15], 56(1)[16], 63,[17] 68[18] and 71[19] of the Constitution of Zimbabwe, 2013. In dismissing the application, the High Court invoked the political question doctrine and held that the impugned sections in the CLA were not unconstitutional.[20] Aggrieved by the decision, the appellants appealed to the Constitutional Court in terms of section 175(4) of the Constitution of Zimbabwe, 2013.

1.1. Appellants' arguments

The appellants had three main grounds of appeal. Firstly, they argued that the High Court misdirected itself in failing to hold that sections 4 and 6(1)(b) of the CLA were unconstitutional in the sense that they violate the rights to life, dignity, equal protection of and benefit of the law, the right to property, the right to culture and language, the right to be heard and the right to property enshrined in the Constitution of Zimbabwe, 2013. The appellants also submitted that there was no prior consultation with the local community before the exercise of the prerogative under section 6(1) (b) of the CLA. The appellants claimed ownership of the land in question and alleged that their right of ownership is guaranteed in section 71(2) of the Constitution of Zimbabwe, 2013. They added that the setting aside of the land violates the right of ownership over the identified land. The appellants contended that section 4 of CLA, which vests land in the President, was a relic from the colonial error, denying indigenous people the right to own their land. They further asserted the right to ownership on the basis that they had occupied the land for hundreds of years. As a result, they averred that the vesting of land in the President was unconstitutional.

The appellants also argued that the impugned sections of the CLA are discriminatory in the sense that they treat people living in communal areas differently from those in urban areas. More specifically, they put forward that the law does not allow inhabitants of communal land to enjoy individual ownership rights over the land as it does for urban dwellers. They emphasized that an African urban dweller could acquire title to land in a township like Tshovani or Borrowdale, yet the same individual was unable to acquire a similar title to communal land in

14 Right to life.
15 Right to human dignity.
16 Right to equal protection of the law.
17 Language and culture.
18 Right to administrative justice.
19 Right to property.
20 *Chikutu and Ors v Minister of Lands, Agriculture, Water, Climate & Rural Resettlement and Ors* HH 02/22.

a place like Chilonga.[21] The appellants also argued that beneficiaries of the Land Reform Program have more favourable conditions and rights over the land allocated to them than those afforded to individuals occupying communal land.

The appellants added that section 6(1)(b) of the CLA, which allows the President to declare that any land has ceased to be communal land, deprived them of their ancestral land, thereby violating property rights. They premised their argument on section 71 of the Constitution of Zimbabwe, 2013.[22] They had argued in the *court a quo* that whilst the *Land Acquisition Act*[23] could be the law of general application, communal land was not subject to that statute. The appellants contended that displacement from their ancestral land without compensation is a violation of their right to human dignity, undermines their self-worth, leaves them homeless, exposes them to destitution and threatens their ability to meet the necessities of life. They tied the right to life to the right to human dignity on the basis that the latter is the foundational basis from which all other rights are derived.

The appellants also argued that the *court a quo* erred in invoking the political question doctrine and finding that the issues at hand were to be best determined by other arms of government, namely the executive and parliament, and not the judiciary. The appellants contended that the issue before the court was a legal question concerning infringement of their fundamental human rights, rather than a policy matter relating to the establishment of a new land tenure system for communal land. It was further argued that the court could declare the impugned provisions unconstitutional and suspend the order to allow the legislature to formulate a comprehensive land tenure system. To this end, reference was made to section 175(6) of the Constitution of Zimbabwe, 2013, which permits a court to make a just and equitable order "including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect."[24]

Lastly, the appellants argued that the High Court erred in concluding that sections 4 and 6(1)(b) of the CLA were reasonable and justifiable in a democratic society and therefore did not infringe upon fundamental human rights set out in the Constitution of Zimbabwe, 2013.

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21 *Chikutu* (above n 3).
22 Section 71(3) (a) of the Constitution of Zimbabwe, 2013.
23 Land Acquisition Act [Chapter 20:10].
24 Section 175(6)(b) of the Constitution of Zimbabwe, 2013.

1.2. Respondents' arguments

The Minister of Lands, Agriculture, Climate and Rural Settlement, the Minister of Local Government and Public Works, the President of the Republic of Zimbabwe and the Attorney General of Zimbabwe were cited as respondents. The latter deposited an affidavit on behalf of all respondents. The respondents rejected the appellants' claim that they owned the land in question. The Attorney General (AG) asserted that the appellants' community was only a beneficiary of communal land whose legal title was vested in the President. Respondents also argued that the proposed irrigation scheme would not compel the displacement of the Chilonga community, as much of the identified land was unoccupied. It was further put forward that, even if the community was to be relocated, section 12 of the CLA provides for compensation in instances where persons are displaced from communal land. The respondents further submitted that the issue at hand was a polycentric one falling exclusively within the domain of the executive and legislature and that the impugned provisions did not infringe upon the appellants' rights.

2. Decision of the court

2.1. Vesting of land in the President

The court discarded the argument that section 4 of the CLA is unconstitutional. The court observed that the President holds communal land as a trustee and that the land is excised, transferred or disposed of in terms of the relevant laws. Elaborating on the public trust doctrine, the court had this to say:

> Land is a national resource and its use and occupation must be regulated. It is, therefore, only logical that a central authority be vested with the power and the obligation to ensure that use and domain are held for the good and benefit of the country's inhabitants. Ownership and control are, as a result, therefore vested in a responsible party or authority in a nominal capacity.

The court was correct in making the finding that the President holds communal land in trust. The public trust doctrine can be traced back as early as 1690 through the works of *John Locke* in his *Second Treatise of Civil Government*, in which he states that governments do exercise a fiduciary trust on behalf of their people.[25] Describing the role of the state in regulating natural resources, Roscoe Pound argues that the state is "a sort of guardianship for social purpose."[26] In the same context, Sagarin and Turnipseed posit that the public trust doctrine is based on the notion that certain natural resources cannot be fairly and effectively managed

25 E van der Schyff 'The Public Trust Doctrine: A Journey into Foreign Territory' (2010) Vol 13 *Potchefstroom Electronic Law Journal*, 122.

26 R Pound *An Introduction to the Philosophy of Law* 1954.

by private persons but should instead be held in trust by the government.[27] The doctrine acknowledges that certain uses by the public need specific protection and distinguishes between private ownership and public right. It recognises that the state, in its sovereign capacity, holds certain natural resources in trust for the benefit of the public.[28]

Vesting of natural resources in the President in the spirit of the public trust doctrine is not uncommon in Zimbabwe. It is tied to state ownership and not the personal ownership of the President. Section 2 of the *Mines and Minerals Act* vests rights to minerals in Zimbabwe in the President. [29] In interpreting section 2 of the *Mines and Minerals Act*, the court in *African Consolidated Minerals Plc & 6 Others v Minister of Mines and Mineral Development & Others* stated that *"the* President holds these rights in trust and on behalf of the citizens." [30] Agricultural land in Zimbabwe is vested in the state. Section 72 (4) of Zimbabwe, 2013 as well as section 290 of the Constitution of Zimbabwe, 2013 provides that agricultural land which was itemised in schedule 7 to the former Constitution or which, before the effective date, was identified in terms of section 16B(2)(a)(ii) or (iii) of the former Constitution continues to be vested in the State. The *Parks and Wildlife Amendment Act, 2024*[31] which amended the Parks and Wildlife Act[32] also introduced a new section which vests specially protected animals on unalienated land in the President.[33]

2.2. Ownership of Communal Land

In response to the appellants' contention that their right to ownership of the land was guaranteed under section 71(2) of the Constitution of Zimbabwe, 2013, the court began by observing that in the case before it, section 71 of the Constitution of Zimbabwe, 2013 constitutes the foundation upon which all the other asserted rights must be based and therefore, it is the provision that determines the existence of the rest of the alleged rights.

The court held that a claim to ownership of communal land under section 71(2) of the Constitution of Zimbabwe, 2013 must be read together with section 72 of the Constitution of Zimbabwe, 2013. After an examination of the relevant

27 RD Sagarin and M Turnipseed 'The Public Trust Doctrine: Where Ecology meets natural resources management' (2012) Vol 27 *Annual Reviews of Environment and Resources*.
28 E van der Schyff (n 25 above) 126.
29 Mines and Minerals Act [Chapter 21:05].
30 *African Consolidated Minerals Plc & 6 Others v Minister of Mines and Mineral Development & Others* HH 205/2010.
31 Parks and Wildlife Amendment Act, 2024.
32 Parks and Wildlife Act [Chapter 20:14].
33 Parks and Wildlife Amendment Act, 2024, Section 2B (2) (a).

provisions, the court highlighted that land located within the boundaries of communal land is expressly excluded from the definition of agricultural land. In addition, the court found that section 72 of the Constitution of Zimbabwe, 2013 does not spell out any provisions relating to communal land rights and concluded that the Constitution does not provide for a right to own land under section 71 of Zimbabwe, 2013. The court correctly reasoned that the other rights asserted by the appellants are not provided for in section 71(2) of the Constitution of Zimbabwe, 2013 but are rather specified in the CLA. The court ultimately concluded that, since the alleged violations by the respondents were premised on a non-existent right to land under section 71 of the Constitution of Zimbabwe, 2013, it follows that all the other alleged rights could not be sustained. To sustain its reasoning, the court cited the case of *Mutasa and Anor v The Speaker of the National Assembly and Ors* in which it was held that one constitutional provision cannot be invoked to override another, instead, constitutional provisions must be interpreted in a manner that ensures they operate coherently and harmoniously to give effect to the overall objectives of the Constitution. [34]

As aptly observed by the Court, the appellants do not own the communal land as claimed. The *Regional Town and Country Planning Act* clarifies ownership of communal land. It provides that the Minister responsible for the CLA is the owner of any Communal land that is vested in the President. [35] It follows that the Minister of Local Government and Public Works is the owner of communal land in Zimbabwe. The assertion that the Hlengwe-Shangani community owns the communal land in question is therefore misplaced at law. To argue that the impugned sections of the CLA infringe upon the right to life and human dignity based on the right to own communal land under section 71 of the Constitution of Zimbabwe, 2013 is therefore a fallacy of *non sequitur.*

2.3. Whether communal land inhabitants have lesser rights than beneficiaries of the Land Reform Program

As hinted earlier, the appellants argued that beneficiaries of the Land Reform Program have better conditions and rights over the land allocated to them compared to those of individuals occupying communal land. They added that the Land Reform Program beneficiaries have private and individual ownership over the agricultural land allocated to them in terms of section 72 of the Constitution of Zimbabwe, 2013.

In dispelling the contention, the court first clarified that the right to occupy agricultural land is not found in section 72 of the Constitution of Zimbabwe, 2013

34 *Mutasa and Anor v The Speaker of the National Assembly and Ors* CCZ 9/15.
35 Regional Town and Country Planning Act [*Chapter 29:12*].

but is governed by the *Gazetted Land (Consequential Provisions) Act*.[36] Section 3 of this statute prohibits holding, use or occupation of gazetted land without lawful authority. The definition of gazetted land is to be found in section 2 of the *Gazetted Land (Consequential Provisions) Act* and section 72(4) of the Constitution of Zimbabwe, 2013. Simply put, gazetted land refers to agricultural land identified for resettlement purposes and most particularly under the Land Reform Program. Section 72(4) provides that gazetted land continues to be vested in the State and it is on this basis that the Court dismissed the appellants' argument that beneficiaries of the land reform program have private or individual ownership over the land allocated to them.

The Constitutional Court bench led by Chief Justice Malaba observed that beneficiaries of agricultural land under the Land Reform Program and inhabitants of Communal land both occupy State land and a statute grants them permission or authority to occupy such land. The court further elaborated that the law on occupation of state land which includes agricultural land and communal land, requires lawful authority under section 72 of the Constitution of Zimbabwe, 2013 or the consent of a Rural District Council in terms of section 8 or 9 of the CLA. As correctly observed by the Court, the occupation of agricultural land depends on whether a person has lawful authority. The Court, relying on authorities such as *Taylor-Freeme v The Senior Magistrate Chinhoyi & Anor*[37] and *Commercial Farmers' Union and Ors v The Minister of Lands and Rural Resettlement and Ors*[38] asserted that lawful authority means an offer letter, a permit, and a land settlement lease.

In the same manner, communal land is vested in the State, and a person requires permission from the local authority to occupy communal land. Section 8 of the CLA provides for the occupation of communal land. It provides that a person can occupy communal land for agricultural and residential purposes with the consent of the local authority. In addition, section 9 of the CLA provides that the Rural District Council, with the approval of the Minister, can issue permits for a person to occupy or use communal land for purposes other than agricultural or residential.

Section 72 (2) of the Constitution of Zimbabwe, 2013 allows the State to compulsorily acquire agricultural land for public purposes such as settlement for agricultural purposes or for land reorganisation, forestry, environmental conservation or the utilisation of wildlife or other natural resources. In addition,

36 *Gazetted Land (Consequential Provisions) Act* [*Chapter 20:28*].
37 *Taylor-Freeme v The Senior Magistrate Chinhoyi & Anor* CCZ 10/2014.
38 *Commercial Farmers' Union and Ors v The Minister of Lands and Rural Resettlement and Ors* 2000 (2) ZLR 469 (S).

land can be compulsorily acquired for the relocation of persons dispossessed as a result of the utilisation of land for different reasons.[39] Where the land is compulsorily acquired through notice in a gazette, the land, right or interest vests in the State with full title with effect from the date of publication of the notice. If 'their land' is compulsorily acquired by the State, beneficiaries of the Land Reform Program can only obtain compensation for improvements and not the land.[40]

On the contrary, and as explained by the court in *Chikutu*, if 'their land' is compulsorily acquired by the State, inhabitants of communal land are entitled to compensation for both the land and improvements. In terms of section 71(3)(e) of the Constitution of Zimbabwe, 2013, inhabitants of communal land whose rights or interests on land have been affected can approach a court for a determination of the existence, nature and value of their interest in the land, the legality of the deprivation and the amount of compensation to which they are entitled. This means that they can allege that a decision by an acquiring authority infringes upon their right to equality and non-discrimination, among other rights. Conversely, section 72(3)(c) of the Constitution expressly ousts the jurisdiction of the courts in hearing claims that allege that the acquisition of agricultural land is discriminatory in terms of section 56 of the Constitution of Zimbabwe, 2013. Unlike communal land occupiers, beneficiaries of the land reform program are therefore barred from approaching a court, alleging that there was discrimination in the manner in which their land was compulsorily acquired. The argument that beneficiaries of the land reform program have better rights is therefore misplaced at law.

2.4. Whether communal land inhabitants have lesser rights than urban dwellers

In response to the argument that there is no justification as to why the dwellers of communal areas should not be granted ownership rights over land in their personal rights as in the case of people in urban areas like Borrowdale, the court stated at paragraph 101 that "the critical distinction is that urban areas do not constitute agricultural land. As such, the allegation of unequal treatment of persons in a similar position cannot be sustained"[41] Whilst it is correct that the two may not be directly comparable, the Court's reasoning that urban areas do not constitute agricultural land appears misplaced. This is so because communal

39 Section 72(2)(c) of the Constitution of Zimbabwe, 2013.

40 Section 295(1) of the Constitution of Zimbabwe, 2013 provides for an exception for indigenous Zimbabweans whose agricultural land was acquired by the State before the effective date and Section 295(2) is an exception for land that was, before the effective date, protected under an agreement between the government and another country.

41 *Chikutu and others v Minister of Lands, Agriculture and Rural Settlement and others CCZ 03/23.*

areas such as the Chilonga area under consideration likewise do not constitute agricultural land. Although land in communal areas can be used for agricultural purposes, it is not, in legal terms, classified as agricultural land. Section 72(1) of the Constitution of Zimbabwe, 2013 expressly excludes communal land from the definition of agricultural land.

The court fittingly dismissed the contention that provisions of CLA violates the right to equality and non-discrimination encapsulated in section 56 of the Constitution. The court reiterated that the law governing security of tenure on both rural and urban land is consistent. The court referred to section 45 of the *Regional, Town, Country Planning Act,* which governs urban land, to demonstrate that the President can also exercise the same powers as exercised in terms of the CLA.[42] Since the appellants had argued that the law discriminates against them by not giving them the right to ownership of land as individuals, the Court turned to determine whether or not the law has provision for individual ownership of communal land. The bench, led by Malaba CJ, found that section 6(1)(b) of the CLA, which empowers the President to declare that any land within communal land has ceased to form part of communal land is not unconstitutional as alleged. Reference was made to section 6 (3) of CLA, which provides that when the President declares that any part of communal land has ceased to be communal land, such land becomes State land and therefore capable of being granted, sold or disposed of in any manner provided for in CLA or any other law. The court reiterated that the provision allows any person who so wishes, to become an individual owner of such land and therefore, such a law can never be said to be unconstitutional.

As correctly noted by the court, section 6 (3) of CLA allows individuals to own land that was previously communal land. The import of section 6(3) of CLA is that once a portion of communal land has been declared to be state land, such land can be disposed of in terms of the Land Commission Act. This entails that any person who so wishes can apply for a deed of grant for that land. Section 17 of the Land Commission Act allows the Minister[43] to consult with the Land Commission and seek approval from the President to sell, lease or otherwise dispose of state land for any suitable purpose. In turn, the Minister may issue an offer letter, lease, permit or deed of grant, as the case may be.[44]

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42 *Regional Town and Country Planning Act* [*Chapter 29:12*].

43 Ostensibly the Minister of Lands and Rural Development, following the division of the Ministry of Lands, Agriculture, Water and Fisheries and Rural Development into two separate portfolios on 10 April 2026.

44 Section 23 of the Land Commission Act [Chapter 20:29].

2.5. Whether the matter before the court was one of policy and a political issue

Despite having identified that one of the grounds of appeal was that the *court a quo* erred in determining that the matter before it was a legal issue for the declaration of the appellants' rights rather than a policy issue to be decided by the executive and legislature, the court omitted to make a proper ruling on the matter. In their quest to substantiate the ground, appellants had argued that the issue concerned alleged infringement of their fundamental rights and that the court was supposed to decide on the alleged infractions rather than conclude that it was a policy matter relating to the creation of a new land tenure system. They even motivated their argument by calling upon the court to invoke section 175(6) of the Constitution of Zimbabwe, 2013, which empowers a court to suspend an order of invalidity to allow the executive and legislature to step in and take corrective action. Instead of making a definitive determination on the issue, the court, while assessing whether the right to human dignity had been violated, merely observed in passing that the *court a quo* had not erred in characterising the matter as a policy and political question.

The court could have unpacked the political question doctrine and made a determination on the issue, particularly since it had been raised as a ground of appeal. The political question doctrine is a judicial restraint principle in which the courts are barred from making determinations on matters that are within the domain of the executive and legislature. The doctrine derives from the *trias politica* principle, which holds that certain constitutional issues are reserved for the determination by the elected branches of the government.[45] Arguably, the political question doctrine was first enunciated by the American courts in *Marbury v Madison*[46] and later followed in *Baker v Carr*[47] and *Gillian v Morgan*[48] among other cases. In *Gilligan*, the respondents who were students at Kent State University sued the Ohio National Guard, alleging that it had violated their rights of speech and assembly. The Supreme Court invoked the political question doctrine and dismissed the case on the basis that examining the training of the Ohio National Guard would be usurping the functions of the legislature and executive branches of government.[49] Mhango has similarly observed that the political question doctrine limits judicial intrusion into the functions of other branches of government and it assigns decision-making to the arms of government that possess expertise in particular areas.[50]

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45 MO Mhango 'Separation of powers in Ghana: the evolution of the political question doctrine' (2014) Vol 17 *Potchefstroom Electronic Law Journal, 2705.*

46 *Marbury v Madison* 5 US (1 Cranch) 137 (1803) 170.

47 *Baker v Carr* 369 US 186 (1962).

48 *Gilligan v Morgan* 413 US 1 (1973).

49 Ibid.

50 MO Mhango (n 45 above).

In Zimbabwe, the political question doctrine was enunciated in Commercial *Farmers Union v Minister of Lands and Others.*[51] Respondents had argued that the decision of when and where to enforce court orders was "not one for the courts, because it was a political affair falling outside the powers of the courts ...". They added that the rule of law must be looked at from a political point of view. The Commissioner of Police,[52] who was a respondent in the case, stated that the problem before the court could be solved politically and that "…the solution to the land issue lies in the political domain and not (in) the courts." The Supreme Court acknowledged that it was fundamentally true that the land issue was a political question and added that the political method of resolving that question was through enacting laws. However, the court observed that the government had already enacted the *Land Acquisition Act* and, on that basis, concluded that the respondents had gone astray'.[53] Nevertheless, the Supreme Court acknowledged that there was no land reform programme in place and invoked the political question doctrine. It held that it was unnecessary to determine the issue of compensation that had been argued before it.

Commenting on the political question doctrine in *Moven Kufa and Anor v the President of the Republic of Zimbabwe and Ors,*[54] the High Court observed that the merits and demerits of a legislative provision are matters of the Parliament and not the courts. Similarly, in the case of *United Democratic Movement v the President of the Republic of South Africa and Ors*,[55] the South African Constitutional Court declined to invoke the political question doctrine on the basis that the matter before the court concerned the interpretation and not the merits and demerits of the impugned legislation. The court remarked that the merits and demerits of a legislative provision are a political question that is of no concern to the court.

The Constitutional Court in *Chikutu* did not adequately make a definite determination on whether the case before it constituted a political question or a legal question. As hinted earlier on, the appellants had urged the court to suspend the declaration of unconstitutionality in terms of section 175(6) of the Constitution of Zimbabwe, 2013. In *Commercial Farmers Union* (*supra*), the Supreme Court granted an interdict and suspended it for a definite period to enable the

51 *Commercial Farmers Union v Minister of Lands and* Others 2000 (2) ZLR 469 (S).

52 Now the Commissioner General of Police.

53 *Commercial Farmers Union v Minister of Lands and Others* (n 54 above).

54 *United Democratic Movement v the President of the Republic of South Africa and Ors* HH 86/11.

55 *United Democratic Movement v the President of the Republic of South Africa and Ors* CCT 23/02.

government 'to produce a workable programme of land reform.' In the present case, the appellants particularly prayed for the order of unconstitutionality to be suspended to allow the Executive and Parliament to consult with the Land Commission in developing a new land tenure system consistent with the Constitution. Such a prayer by the appellants arguably required the court to make a definitive determination on the applicability of the political question doctrine in the case before it.

3. The extent of communal land Rights

As aptly observed by the Malaba, CJ bench in *Chikutu*, communal land rights are to be found in the CLA. The court noted that for individuals to enjoy rights under communal land, they must prove that they are members of a community that has traditionally and continuously been in occupation of such land.[56] However, the court omitted to acknowledge the definition of communal land as provided for in Section 332 of the Constitution of Zimbabwe, 2013. The Constitution defines communal land as "land set aside under an Act of Parliament and held in accordance with customary law by members of a community under the leadership of a Chief." The definition is important as it clearly recognises that the Constitution of Zimbabwe, 2013 acknowledges that individuals who reside in communal land derive their rights by virtue of their membership in a traditional community that holds land in accordance with customary law.

The CLA provides for the rights of occupation and use of communal land for agricultural and residential purposes to persons who would have occupied communal land traditionally and continuously for extended periods. In particular, section 8 (1) of CLA provides that the Rural District Council may give consent to use and occupy communal land for agricultural or residential purposes. The definition of 'use' in section 2 of CLA prescribes rights for communal land dwellers. The term use is defined as including "erection of any building or enclosure, ploughing, hoeing, the cutting of vegetation, the depasturing of animals or the taking of sand, stone or other materials therefrom." Therefore, the indigenous people occupying communal areas have the right to build houses or structures for residential purposes or to construct fowl runs, cattle pens, pig sties or any related structures for agricultural purposes. In this regard, the court correctly observed that section 8(1) of CLA is consistent with the right to property enshrined in section 71 of the Constitution and that it also serves to give effect to that right. The court observed that section 8(1) of the CLA gives effect to the right to property claimed by the appellants and added that the right is not restricted to ownership. The court further added that it includes the right to acquire, hold, occupy, use, transfer, hypothecate, lease, or dispose of all forms of property. As such, the rights

56 *Chikutu and Ors v Minister of Lands and Ors* at para 64.

of inhabitants or occupiers of communal land are protected under section 71 of the Constitution of Zimbabwe, 2013.

Section 71 of the Constitution of Zimbabwe, 2013 prescribes that a person cannot be compulsorily deprived of their property unless the deprivation is in terms of a law of general application[57] and unless the deprivation is necessary in furtherance of defence, public safety, public order, public morality, public health or town and country planning[58] or for the purpose of developing or using the property in a manner that benefits the community.[59] The Constitution also requires the acquiring authority to give reasonable notice of the intention to acquire property to all persons whose rights or interests in the property would be affected by the acquisition.[60] It therefore goes without saying that Statutory Instrument 50 of 2021, which ordered persons occupying the identified communal land for residential or agricultural purposes to immediately and permanently depart therefrom with all of their property, without giving them notice, violates section 71(3) (c) (i) of the Constitution. Possibly because the appellants did not challenge it, the court found it fit not to address the constitutionality of *Statutory Instrument 50 of 2021*.[61] Moreover, any determination on the Constitutionality of the Statutory Instrument would have been merely academic, as it was subsequently repealed by *Statutory Instrument 73A of 2021.*

In terms of section 71 of the Constitution, occupiers and inhabitants of communal land have a right to adequate compensation if they are deprived of their property.[62] The appellants had argued that section 6(1) (b) of CLA enabled expropriation of land without compensation, thus violating compensation rights envisioned in section 71 of the Constitution. They specified that their rights to life, dignity, equal protection of and benefit of the law, property, culture and language, and to be heard enshrined in sections 48, 51, 56(1), 71, 63 and 68 of the Constitution of Zimbabwe, 2013 respectively, had been violated. The court observed that the appellants had only advanced arguments to motivate the violation of the right to property, the right to human dignity, the right to life, the right to equality and non-discrimination and therefore it confined its consideration to the matters arising from these arguments. Be that as it may, the court omitted to address whether the impugned section 6(1) (b) of the CLA violates the right to adequate compensation, which forms an integral component of the right to property envisaged in section 71 of the Constitution of Zimbabwe, 2013.

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57 Section 71(3)(a) of the Constitution of Zimbabwe, 2013.
58 Section 71(3)(b)(i) of the Constitution of Zimbabwe, 2013.
59 Section 71(3)(b)(i) of the Constitution of Zimbabwe, 2013.
60 Section 73(c)(i) of the Constitution of Zimbabwe, 2013.
61 *Communal Land (Setting Aside of Land) (Chiredzi) Notice,2021,* (n6 above).
61 *Communal Land (Excision of Land) Notice,2021* (n 8 above)
62 Section 71(3) (c) (ii) of the Constitution of Zimbabwe, 2013.

As insisted by the Respondent, section 12 of the CLA provides for compensation in instances where occupiers of communal land are displaced. It specifies that a person who is dispossessed of or suffers any diminution of his right to occupy or use any land as a result of a declaration made in terms of section 6 of the CLA, is entitled to be given the right to occupy or use alternative land or to be afforded compensation as per agreement.[63] Where no agreement is reached, the CLA directs that "Parts V and VIII of the Land Acquisition Act [*Chapter 20:10*], shall apply mutatis mutandis in respect of such dispossession or diminution." The Land Acquisition Act, therefore, provides for the compensation framework. Section 16 of the Land Acquisition Act provides that the acquiring authority must pay fair compensation within a reasonable time to "…any other person who suffers loss or deprivation of rights as a result of any action taken by the acquiring authority in respect of the acquisition of that land in terms of this Act."[64]

Section 16 of the Land Acquisition Act mandates that compensation be paid for the loss of land[65] and for the actual expense or losses incurred, which have been or may be reasonably incurred or suffered directly as a result of the acquisition. This compensation also includes compensation for damage to any area of land or any building or structure. The Land Acquisition Act defines a 'structure' as including " any wall, fence, dam, earthwork, well, borehole or other permanent improvement on or to land."[66] The Land Acquisition Act is consistent with section 71(3)(c)(ii) of the Constitution of Zimbabwe, 2013 which requires the acquiring authority to pay fair and adequate compensation before acquiring property or within a reasonable time after acquiring. Dhlakama argues that although these compensation provisions appear progressive, their effectiveness is undermined by the absence of clear guidelines on how and when compensation is to be determined.[67] He further posits that the discretion to negotiate the form, type, and timing of compensation is left to the occupiers and the developers, or, in the event of a dispute, to the Administrative Court. This highlights a need to amend the CLA to establish a clear compensation framework to guarantee the rights of communal land occupiers.

In *Chikutu,* the Constitutional Court correctly observed that the definition of use in Section 2 of the CLA accords with the purposes or definition of agricultural land in section 72 of the Constitution. The court further posited that the occupation of communal land is consistent with the occupation of agricultural land under section

63 Section 12(1) (c) (ii) of CLA.
64 Section 16 (a) of the Land Acquisition Act.
65 Section 20(1) (a) of the Land Acquisition Act.
66 Section 2 of the Land Acquisition Act.
67 T Dhlakama 'Legal Policy and Institutional Frameworks for community land rights in the wake of developmental projects in Zimbabwe: Challenges and Way Forward' (2017) ZELA.

72 of the Constitution of Zimbabwe, 2013. Inhabitants of communal land have the right to till land and to rear livestock upon the land on which they inhabit. It is also clear from the definition of "use" in the CLA that individuals who live within communal land have rights to extract natural resources from the area under their jurisdiction. The definition is also consistent with section 4 of the Communal Land Forest Produce Act,[68] which prescribes rights of inhabitants and occupants of Communal Land to exploit forest produce for their own use.

Whilst the law, to a considerable extent, protects the rights of individuals residing within communal land, the reality is that these indigenous people continue to face challenges, which include forced relocations, inadequate compensation and disruption of livelihoods to pave the way for development projects.[69] In addition to section 10 of CLA, which permits the setting aside of communal land for development purposes, section 78 of the Rural District Council *[Chapter 29:13]* also provides for the compulsory acquisition of communal land or rights over such land. It has been argued that the power to compulsorily acquired land in the pretext of benefiting the community may lead to the establishment of developmental projects undermining or disregarding the land rights of the communities.[70]

As correctly observed by the Court in *Chikutu,* the foreign cases such as *Sawhoyamaxa Indigenous Community v. Paraguay*[71] *and* the *Endorois Community v Kenya*[72] are distinguishable from the appellants' case and were therefore not relevant in advancing their arguments. Whilst these decisions were found to be irrelevant in supporting the appellants' case, they remain important in highlighting the realities of the challenges faced by indigenous peoples in communal areas across the world. Their rights are often threatened by developmental projects.

The *Sawhoyamaxa* case is a landmark case decided by the Inter-American Court of Human Rights. The court found that Paraguay violated the American Convention on Human Rights when it sold land to cattle ranchers and displaced 146 Entex families, forcing them to live on the roadside for years. The court ordered restitution of over 1400 hectares of land and compensation for damages. In the Endorois Community case, the African Commission on Human and People's Rights found that the government of Kenya had violated the African

68 *Communal Land Forest Produce Act* [Chapter 19:04].
69 T Dhlakama (n 71 above).
70 T Dhlakama (n 71 above).
71 *Sawhoyamaxa Indigenous Community v. Paraguay (Judgement of March 29, 2006, Series C No.146)*.
72 *Centre for Minority Rights Development and others v Kenya* Communication 276/2003.

Charter by displacing the Endorois community from their ancestral land around Lake Bogoria to pave the way for the establishment of a game reserve. Similarly, *African Commission on Human and People's Rights v Kenya*[73] (*Ogiek* Case) is another landmark judgment in which the African Court held that the Kenyan government violated indigenous people's (the *Ogiek*) community rights by evicting them from their ancestral land in Mau Forest under the guise of nature conservation and environmental protection.

In Zimbabwe, the Green Fuel Ethanol Project affected the rights of indigenous communities in Chisumbanje, Manicaland through their displacement from communal land.[74] Hundreds of families in Matabelaland North face displacement as a result of the ongoing Gwayi-Shangani Dam Project.[75] In Masvingo Province, more than 3000 families were displaced and relocated to the Chingwizi area following the construction of the Tugwi-Murkosi dam.[76] These are just a few examples demonstrating the vulnerability of indigenous peoples occupying communal land.

4. Conclusion

The *Chikutu* case is a landmark judgment underscoring the constitutional and jurisprudential complexities surrounding the administration of communal land in the context of the CLA and most importantly, the Constitution of Zimbabwe, 2013. The judgment reinforces the idea that natural resources such as land are not held as private property, but are instead vested in the state in accordance with the Public Interest Doctrine. Although the judgment fell short of adequately determining the applicability of the political question doctrine, it nonetheless meaningfully contributes to the jurisprudence of Zimbabwe, more particularly by enunciating the scope and limits of communal land rights in the country. The Constitutional Court bench led by Honourable Chief Justice Malaba decided what can be described as the first case in which the constitutionality of the Communal Land Act was directly put to test.

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73 *African Commission on Human and Peoples' Rights v Kenya* (Application 006/2012).

74 T Dhlakama (n 71 above).

75 https://www.heraldonline.co.zw/mapping-to-relocate-gwayi-shangani-families-begins/ (accessed 28 March 2026).

76 E Mudefi and T Ndlovu 'The socio-hydrological dynamics of Zimbabwe's Tugwi-Mukosi community before and after displacement' (2025) Vol 1 *South African Geographical Journal*.

RETHINKING THE FOUNDATIONS OF LABOUR LAW: TRANSFORMATIVE CONSTITUTIONALISM AND CHIEF JUSTICE HON. MALABA'S JURISPRUDENCE IN ***GREATERMANS STORES (1979) (PVT) LTD & ANOR V MIN OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE & ANOR*** 2018 (1) ZLR 335 (CC)

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Abstract

This article critically examines the Constitutional Court's decision in Greatermans Stores (1979) (Pvt) Ltd & Anor v Min of Public Service, Labour and Social Welfare & Anor 2018 (1) ZLR 335 (CC), situating it within the evolving constitutional foundations of Zimbabwean labour law. The case arose from a constitutional challenge to the retrospective imposition of compensation obligations under the Labour (Amendment) Act No. 5 of 2015, enacted in response to mass dismissals following Nyamande & Anor v Zuva Petroleum (Pvt) Ltd 2015 (2) ZLR 186 (SC). Although formally concerned with retrospectivity and property rights, the dispute compelled the court to grapple with deeper questions about the relationship between contractual autonomy and constitutional regulation, as well as the role of labour law in mediating socio-economic inequality. The article argues that the judgment reflects a composite, though uneven, constitutional approach to labour law, integrating protective, balancing, and transformative elements. It shows that the court strongly affirms labour law's protective function and recognises the need to balance competing economic interests, while also invoking transformative constitutional values grounded in dignity and substantive equality. However, this transformative dimension remains only partially realised. In particular, the court's reliance on rationality review and its restrictive interpretation of the right to fair labour practices limit the independent normative force of constitutional labour rights. The article contends that the Greatermans case *is best understood not as a fully transformative decision, but as one that delineates the parameters within which constitutional labour law may develop in Zimbabwe, through deferential judicial review, legislatively driven reform, and cautious engagement with constitutional rights. In this respect, the judgment represents a significant, though incomplete, step in the constitutionalisation of labour law and offers a nuanced account of Chief Justice Malaba's jurisprudential legacy.*

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Key words: *transformative constitutionalism, protective approach, balancing approach, Labour Act*

1. Introduction

The development of labour law in Zimbabwe reflects an evolving dialogue between common-law contractual principles, legislative intervention, and constitutional transformation. Historically rooted in private-law notions of freedom of contract, the employment relationship was long conceived as a voluntary economic exchange between formally equal parties.[3] Over time, however, this conception proved increasingly inadequate to address the structural inequality inherent in employment relations. The adoption of the 2013 Constitution accelerated a decisive normative shift by embedding labour rights within a constitutional framework committed to dignity, substantive equality, and social justice. Within this transformed legal landscape, the Constitutional Court's decision in *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Anor v Minister of Public Service, Labour and Social Welfare & Anor*[4] represents a pivotal, though not unqualified, articulation of the constitutional foundations and purposes of labour law in Zimbabwe, delineating both the possibilities and limits of its development within a post-2013 constitutional order.

Delivered in a unanimous judgment authored by Deputy Chief Justice Luke Malaba (as he then was), the case arose from a constitutional challenge to retrospective compensation obligations introduced by the Labour (Amendment) Act No. 5 of 2015 (hereinafter referred to as "LAA, 2015"), [5] following widespread employment terminations triggered by the Supreme Court's decision in *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd*.[6] Although framed as a dispute concerning legislative retrospectivity and property rights, the matter required the Constitutional Court to confront deeper questions regarding the relationship between contract and the Constitution, private autonomy and democratic regulation, and economic freedom and social justice. This article argues that the judgment reflects a composite, though uneven, engagement with protective, balancing, and transformative conceptions of labour law. It develops this claim by analysing how each dimension manifests within the court's reasoning and by demonstrating both their interaction and the limits of their integration.

The article begins with an overview of the theoretical frameworks that have shaped labour law scholarship. It then examines the socio-economic context

3 R Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983) 18.
4 2018 (1) ZLR 335 (CC) (*Greatermans* case).
5 LAA, 2015.
6 2015 (2) ZLR 186 (SC) (the *Zuva Petroleum* case).

generated by the *Zuva Petroleum* case and the ensuing legislative response. This is followed by a doctrinal analysis of the court's reasoning on retrospective civil legislation, rationality review, and property rights. The discussion then turns to the Constitutional Court's reconceptualisation of employment relations through the lenses of substantive equality and human dignity, before analysing its interpretation of the Labour Act [Chapter 28:01] within a constitutional framework. The article thereafter evaluates how the *Greatermans* decision engages with protective, balancing, and transformative conceptions of labour law, highlighting both their interaction and the limits of their integration. It concludes by reflecting on the judgment's broader doctrinal and constitutional implications.

2. The Theoretical Foundations of Labour Law

The employment relationship constitutes the central institutional framework through which the labour market operates. Traditionally grounded in the common-law contract of employment, this relationship is premised on the assumption that the employer and employee engage as formally equal parties exercising free will.[7] This classical libertarian conception rests on the sanctity of contract, freedom of contract, and the notion that individuals may enter and terminate employment relationships on mutually agreed terms.[8] Yet this apparent equality is largely illusory. The assumption that parties bargain on equal footing represents what labour law scholars have long described as a legal fiction.[9] The employment relationship is not an ordinary commercial exchange but a structured relationship of authority and dependence.[10] Kahn-Freund famously captured this asymmetry in observing that:

> The relationship between an employer and an isolated employee is typically that of a bearer of power and one who is not. In its inception, it is an act of submission; in its operation, it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the contract of employment.[11]

Similarly, Brassey *et al* highlighted the limitations of the common law's commitment to contractual autonomy, noting that it affords minimal protection

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7 P Davies & M Freedland *Kahn-Freund's Labour and the Law* (1983) 18.
8 A Van Niekerk *et al Law@work* (2019) 6.
9 M Rakhimov 'The Principles of the Classical Theory of Labour Law' (2024) 2 *International Journal of Law and Policy* 1; AC Basson *et al Essential Labour Law* (2002) 38.
10 *Booi v Amathole District Municipality* (2022) *ILJ* (CC) 91.
11 O Kahn-Freund *Labour and the Law* (1972) 6.

against arbitrariness by permitting the stronger party to impose oppressive terms, so long as they remain lawful.[12] Labour law emerged precisely because this assumption proved empirically and morally untenable.[13] Across jurisdictions, Zimbabwe included, the State responded by enacting legislation to impose minimum employment standards, regulate dismissals, and facilitate collective organisation. From this evolution emerged three competing but complementary theoretical understandings of labour law's function, each of which will be used as an analytical lens for examining the *Greatermans* judgment.

The protective conception begins with the recognition that inequality is inherent in the employment relationship.[14] Because employees typically lack comparable bargaining power, labour law performs a corrective function by shielding workers from the full force of market dynamics. Its purpose is to establish a non-derogable floor of rights beneath which employment conditions may not fall, regardless of contractual agreement.[15] Under this model, labour law serves a social justice function by mitigating vulnerability and preventing exploitation.[16] Minimum wages, limits on working hours, leave entitlements, and protection against unfair dismissal represent statutory interventions designed to rebalance bargaining power and secure basic dignity in work.[17] This protective philosophy, rooted in pluralist and social justice traditions, strongly informs the Labour Act [Chapter 28:01].[18] The Constitution of Zimbabwe, 2013 and international labour standards reinforce this orientation by embedding labour protection within a broader normative commitment to dignity, equality, and social justice.[19]

The balancing conception conceives labour law as an institutional framework that regulates, supports, and restrains both capital and organised labour.[20] Rather than viewing labour regulation solely as worker protection, this approach seeks equilibrium between employers' managerial prerogatives and employees'

12 M Brassey *et al The New Labour Law: Strikes, Dismissals and Unfair Labour Practice in South African Law* (1987) 5.
13 B Creighton & A Stewart *Labour Law: An Introduction* (2002) 2; SR Van Jaarsveld *et al Principles and Practice of Labour Law* (2004) 51.
14 B Creighton & A Stewart (n11 above) 2-3.
15 L Madhuku *Labour Law in Zimbabwe* (2015) 3.
16 P Davies & M Freedland (n5 above) 12.
17 M Finnemore & R Van Rensburg *Contemporary Labour Relations* (2000) 9-10.
18 Section 2A (1) of the Labour Act [Chapter 28:01] expressly states that the Act seeks to advance social justice and workplace democracy by giving effect to fundamental employee rights, promoting collective bargaining, establishing fair labour standards, encouraging employee participation in workplace decision-making, and ensuring the effective resolution of labour disputes.
19 *Greatermans* case.
20 L Madhuku (n13 above) 3.

collective power.[21] Workplace conflict is regarded not as an aberration but as an inevitable feature of industrial relations, requiring structured management through collective bargaining and dispute-resolution mechanisms.[22] Equilibrium is primarily realised through collective labour rights alien to classical common law, including freedom of association, collective bargaining, and the right to collective job action. By enabling employees to organise collectively, the law counterbalances employer power and creates conditions for meaningful negotiation.[23]

The last approach is the transformative conception of labour law. Klare conceptualises transformative constitutionalism as a long-term project of constitutional enactment, interpretation, and enforcement aimed at fundamentally reshaping a society's political and social institutions and its underlying power relations, in a democratic, participatory, and egalitarian direction.[24] At its core, the project envisages law as a vehicle for large-scale, non-violent social change, grounded in constitutional norms and processes. It proceeds from the premise that legal frameworks, when properly interpreted and applied, can address and redress the enduring legacies of colonialism and structural inequality.[25] This transformative impulse is not external to the Constitution; it is inherent within it. A transformative Constitution, by design, is committed to reconfiguring social and political relations.[26] This normative commitment imposes a corresponding obligation on courts to adopt interpretive approaches that advance constitutional values when resolving legal disputes.[27] In this sense, adjudication is not merely a technical exercise but a purposive endeavour to realise a just, democratic, and egalitarian social order.

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21 A Rycroft & R Le Roux 'Decolonising the Labour Law Curriculum' (2017) *ILJ* 1473.

22 P Davies & M Freedland (n5 above) 12.

23 R Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (2014).

24 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; D Davis and K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26(3) *South African Journal on Human Rights* 412

25 S Sibanda 'Not Purpose-Made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty' in S Liebenberg & G Quinot (eds) *Law and Poverty* (2012) 44.

26 E Kibet and C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17(2) *African Human Rights Law Journal* 354.

27 TW Maseko and P Makama 'Transformative Constitutionalism and the Value of Human Dignity in Interpreting Legislation to Promote Workers' Right to Social Security: *Knötzke v Rand Mutual Assurance* [2022] ZAGPJHC 4 (2024) *Obiter* 77.

In Zimbabwe, this aspiration is grounded in the Constitution.[28] Section 46(1), for instance, requires that all legislation be interpreted in a manner consistent with the spirit, purport, and objects of the Declaration of Rights. The Declaration, in turn, must be construed to give full effect to the rights and freedoms it enshrines and to promote the foundational values of openness, justice, human dignity, equality, and freedom.[29] Human dignity is central, serving as both a substantive right and an interpretive lodestar in the pursuit of transformative constitutionalism.[30] Within this framework, labour law serves a distinctly transformative function. It is not merely a system of rules governing employment relations, but a normative instrument for restructuring social and economic relations in line with constitutional values.[31] On this view, labour regulation advances substantive equality, protects human dignity, and enhances democratic participation in economic life. This aligns with a human-rights-based conception of labour law, one of the most influential contemporary approaches, which recognises labour rights as fundamental human rights grounded in workers' inherent dignity, rather than as contingent statutory benefits or outcomes of collective bargaining.[32] Because work is intimately bound up with identity, social inclusion, and personal dignity, injustices in the workplace go beyond purely economic harm; they implicate fundamental human rights. Labour law thus operates within a broader domestic and international human rights architecture, with its purpose extending beyond protection to the active reconstruction of workplace relations in line with constitutional ideals.

Against this theoretical backdrop, the Constitutional Court, under the leadership of Chief Justice Malaba, was called upon to articulate the purpose and trajectory of labour law in the *Greatermans* case. As this article argues, the decision's enduring significance lies not in its preference for any single theoretical model, but in its effort to synthesise these perspectives into a coherent, constitutionally grounded approach to labour adjudication.

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28 For example, section 3 which sets out founding values and principles and chapter 2 on national objectives.

29 Section 46(1)(a)-(b) of the Constitution.

30 R Orton 'Dignity and the Purpose of Labour Law' (2024) 45(4) *ILJ* 2157-2186.

31 TW Maseko and P Makama 'Transformative Constitutionalism and the Value of Human Dignity in Interpreting Legislation to Promote Workers' Right to Social Security: *Knötzke v Rand Mutual Assurance* [2022] ZAGPJHC 4 (2024) *Obiter* 77.

32 V Mantouvalou 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 163; P Alston 'Labour Rights as Human Rights: The Unhappy State of the Art' in P Alston (ed) *Labour Rights as Human Rights* (2005) 3.

3. The Context: From the *Zuva Petroleum* Case to Legislative Response

The *Greatermans* case must be understood against the backdrop of profound developments that followed the Supreme Court's decision in the *Zuva Petroleum* judgment. That decision affirmed the employer's common law right to terminate a contract of employment on notice where the contract permitted such termination. The court held that termination on notice was not an unfair dismissal under section 12B of the Labour Act [Chapter 28:01]; the unfair dismissal provisions had not extinguished the employer's common law power to terminate on notice.[33] As a result, termination on notice remained lawful even in the absence of misconduct, incapacity, or operational requirements ordinarily associated with statutory dismissal.

The immediate aftermath revealed the practical implications of this doctrinal position. As later observed by Chief Justice Malaba, the judgment triggered 'a rush by employers, including the applicants, to terminate employment relationships on notice.'[34] Termination on notice became a widespread strategy to reduce labour costs amid economic difficulties. Employees whose contracts were terminated received cash in lieu of notice, irrespective of their length of service, and wages and benefits provided in section 13 of the Labour Act [Chapter 28:01].[35] No additional compensation for loss of employment or retrenchment benefits accrued to affected workers. Chief Justice Malaba described how the sudden loss of employment left many workers jobless and uncompensated for years of service, resulting in public outcry.[36] Most affected employees were sole breadwinners, and abrupt termination brought severe financial hardship to vulnerable households.

Parliament responded by amending section 12 of the Labour Act [Chapter 28:01] through section 4 of the LAA, 2015. The amendment introduced new statutory

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33 For a detailed discussion of the *Zuva Petroleum* case see TG Kasuso & G Manyatera 'Termination of the Contract of Employment on Notice: A Critique of *Don Nyamande and Kingstone Donga v Zuva Petroleum (Pvt) Ltd SC 43/*15' (2015) 2 *MSU Law Rev* 88; MG Gwanyanya 'Legal Formalism and the New Constitution: An Analysis of the Recent Zimbabwe Supreme Court Decision in *Nyamande & Anor v Zuva Petroleum*' (2016) 16(1) *African Human Rights Law Journal* 283-299.

34 The *Greatermans* case.

35 Section 13 provides that whenever an employment relationship ends, whether through dismissal, termination, resignation, incapacity, or death, the employee (or the employee's estate) is entitled to receive all wages and employment benefits accrued up to the date of termination. These entitlements include outstanding salary, leave benefits, notice pay, medical aid, social security contributions, and any pension benefits due.

36 The *Greatermans* case.

regulation of termination on notice and required employers to pay a minimum retrenchment package based on an employee's length of service.[37] Crucially, section 18 of the LAA, 2015 gave it retrospective effect, applying to every employee whose services were terminated on three months' notice on or after 17 July 2015, the date of delivery of the *Zuva Petroleum* judgment. The applicants, having terminated employees' contracts on notice following that judgment, challenged the constitutionality of this retrospective application. They argued that the transitional provision infringed constitutional guarantees of equality, fair labour practices, and protection against compulsory deprivation of property. The dispute thus presented the Constitutional Court with a fundamental question: whether legislative intervention designed to remedy a socio-economic crisis could constitutionally limit vested contractual expectations in pursuit of transformative labour protection.

4. Retrospectivity, Rationality and Property Rights

The constitutional challenge required the court to decide whether legislation designed to remedy socio-economic harm may justifiably alter contractual outcomes that were lawful when the contracts were concluded. The applicants argued that the impugned measures amounted to impermissible retrospectivity and unlawful deprivation of property. The court reframed the inquiry by assessing retrospectivity in light of fairness, rationality, and social justice.

4.1. Constitutional limits on retrospective civil legislation

Chief Justice Malaba rejected the assumption that retrospectivity is inherently suspect in constitutional law. The Constitution expressly prohibits retrospective criminal punishment, protecting personal liberty and ensuring predictability in the criminal justice system.[38] However, the Constitution of Zimbabwe, 2013, contains no equivalent categorical prohibition against retrospective civil legislation. The absence of such a prohibition indicates that the framers recognised the necessity, in certain circumstances, for the State to legislate with retrospective effect to address social or economic consequences that only become apparent after legal

37 Section 12C (2) of the Labour Act [Chapter 28:01] as amended, provided for a minimum retrenchment package of one month's salary for every two years of service or the equivalent lesser proportion of one month's salary for a lesser period of service.

38 Section 70(1)(k) of the Constitution of Zimbabwe, 2013 reflects the foundational rule-of-law principle *nullum crimen sine lege*, that individuals must not be punished for conduct that was lawful when performed. See also N Lutfiu & B Halimi 'The Principle of Legality in International Criminal Law' *Journal of Posthumanism* (2025) 5(2) 1470-1475.

events have unfolded.[39] Accordingly, retrospective civil legislation is not presumptively unconstitutional; its validity depends on whether it infringes protected rights, operates arbitrarily, or lacks a rational connection to a legitimate governmental purpose.

Central to the applicants' challenge was the argument that employers acquired vested rights following the *Zuva Petroleum* judgment, a settled entitlement to terminate employment contracts on notice without retrenchment obligations. The court rejected this argument by interrogating the constitutional status of vested rights. Section 3(2)(k) of the Constitution of Zimbabwe, 2013 recognises "due respect for vested rights" as a principle of good governance, but it does not elevate those rights into independently enforceable constitutional guarantees.[40] Rather, it operates as a normative value informing constitutional interpretation. To hold otherwise would freeze legal relations at a particular historical moment and unduly restrict Parliament's ability to respond to evolving social realities.[41] Constitutionalism does not protect expectations merely because they arise under existing law; protection depends on whether interference violates a specific substantive right.

The court distinguished between two forms of retrospectivity. First, legislation that renders lawful conduct unlawful when performed undermines legal certainty and is prohibited in criminal law. Second, legislation attaching new civil consequences or obligations to completed events is a recognised feature of modern regulatory governance. The LAA, 2015, as the court held, fell within the second category: it did not invalidate employers' past conduct but introduced a new financial obligation arising from the social consequences of lawful acts. This framing, therefore, preserved legal certainty while recognising the State's regulatory authority.[42]

4.2. Rationality review and legislative purpose

At the centre of the court's reasoning in the *Greatermans* case is its reliance on rationality review as the governing standard. The court emphasised that Parliament did not legislate in a vacuum; rather, the LAA, 2015 was a direct response to a clearly identifiable national crisis precipitated by the decision in the

39 The *Greatermans* case.

40 A Moyo 'Zimbabwe's Constitutional Values, National Objectives and the Declaration of Rights' in A Moyo (eds) *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 32.

41 The *Greatermans* case.

42 O Shcherbannyuk *et al* 'Legal Nature of the Principle of Legal Certainty as a Component Element of the Rule of Law (2023) *Juridical Tribune* 21-31.

Zuva Petroleum case. Within this framework, the constitutional inquiry was narrowly framed: not whether the legislation represented the optimal policy response, but whether there was a logical connection between the means adopted and a legitimate governmental objective.[43] Applying this deferential standard, the court identified several interrelated legislative purposes underpinning the LAA, 2015. First, the Act sought to mitigate acute economic hardship arising from the sudden, large-scale loss of employment. The court accepted that the dismissals went beyond private contractual disputes, creating broader social and economic instability that justified legislative intervention. Secondly, the amendment aimed to restore fairness in employment relations by aligning legal outcomes with the protective ethos of labour law. The *Zuva Petroleum* decision had exposed a disjunction between the formal legality of termination on notice and the normative commitment within Zimbabwe's labour framework to safeguard employees against uncompensated job loss. By introducing mandatory retrenchment compensation, the LAA, 2015, sought to reconcile this divergence and give effect to the constitutional guarantee of fair labour practices.

Thirdly, the legislation was designed to prevent employers from deriving disproportionate benefit from what the court characterised as a regulatory lacuna. The *Zuva Petroleum* interpretation revealed an unintended gap between common-law contractual rights and statutory protections, enabling employers to avoid retrenchment obligations. Parliament, the court held, was entitled to correct this imbalance and prevent inequitable enrichment arising from a temporary misalignment in the legal framework. Finally, the amendment aligned domestic labour law with international standards, particularly those reflected in the ILO Termination of Employment Convention, 1982 (No. 158), by introducing minimum compensation norms consistent with widely accepted principles governing termination of employment.[44] Having articulated these purposes, the court concluded that the retrospective application of the LAA was rationally connected to achieving them.[45] A purely prospective approach would have undermined the legislative objectives, as the harm had already materialised. Limiting the amendment to future dismissals would have excluded the very class of employees most severely affected, those dismissed in the immediate aftermath

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43 T Nachbar 'The Rationality of Rational Basis Review' (2016) *Virginia Law Rev* 1627.

44 Section 46(1)(c) of the Constitution of Zimbabwe, 2013, read with the preamble to the Labour Act [Chapter 28:01].

45 T Skolnik 'Two Cultures of Justification in Constitutional Law' (2026) *International Journal of Constitutional Law* accessed at https://doi.org/10.1093/icon/moag004 on 31 March 2026; F Procaccini 'The End of Means-End Scrutiny' (2026) *Duke Law Journal* 877-950.

of the *Zuva Petroleum* case. Retrospectivity was thus integral to the remedial design: the means adopted were logically connected to the ends pursued.

However, the court's reliance on rationality review invites critical scrutiny. Rationality is a minimal threshold: it requires only a conceivable link between means and ends and does not require an interrogation of the necessity, proportionality, or distributive consequences of the legislative measure. A more rigorous standard, such as proportionality, would have required the court to engage more deeply with the extent of the infringement of employers' rights, particularly with respect to retrospectivity and its impact on vested contractual expectations. Under a proportionality analysis, the inquiry would not have ended with the identification of a legitimate purpose and a rational connection. The court would have been required to assess whether the retrospective imposition of financial obligations was necessary to achieve the stated objectives, whether less restrictive means was available, and whether a fair balance had been struck between the competing interests of employers and employees. Such an analysis might have foregrounded questions that rationality review largely leaves untouched: for instance, whether the blanket retrospective application of compensation obligations imposed an excessive burden on employers who had acted in accordance with the law as it stood, or whether a more calibrated remedy could have achieved the same social objectives with less disruption to legal certainty. It is therefore plausible that adopting a proportionality standard could have produced a more nuanced outcome, if not a different one. At the very least, it would have compelled a more transparent balancing of interests and a fuller justification of retrospectivity as the least restrictive means available.

In this light, the court's preference for rationality review appears less accidental than deliberate. By adopting a deferential standard, the court effectively constrained the scope of judicial intervention, signalling institutional restraint in the face of socio-economic policy choices made by the legislature. This approach aligns with a posture that prioritises legislative supremacy in economic regulation, particularly in times of crisis. Yet it also raises questions about the extent to which the court fulfilled the Constitution's transformative mandate, which arguably calls for a more searching, value-laden form of review, especially where legislation reshapes the balance of rights and obligations in the labour market.

4.3. Property rights within a regulatory order

The applicants further contended that the obligation imposed by the LAA, 2015, to pay retrenchment compensation constituted an unconstitutional deprivation of property in violation of section 71(3) of the Constitution. Their argument rested on the premise that compelling employers to make payments in respect of

employment relationships already terminated effectively stripped them of lawfully acquired financial resources without justification. The court rejected this characterisation, situating property rights within the broader framework of a regulatory constitutional order. Chief Justice Malaba emphasised that constitutional protection of property does not establish an absolute or immunity-based right against legislative intervention.[46] Rather, property rights exist alongside, and are necessarily limited by, the State's authority to enact laws that pursue legitimate social and economic objectives.[47] In interpreting section 71(3) of the Constitution of Zimbabwe, 2013, the court drew an important distinction between arbitrary deprivation and lawful regulatory limitation. A deprivation becomes constitutionally impermissible only where it is irrational, disproportionate, or unsupported by a legitimate public purpose.[48] By contrast, legislation of general application that imposes financial obligations as part of social or economic regulation does not amount to unconstitutional deprivation merely because it affects private economic interests.

The retrenchment compensation requirement was characterised not as expropriation but as a regulatory consequence flowing from Parliament's effort to correct systemic imbalance. The obligation applied generally to a defined class of employers, pursued a clear public interest, and did not confiscate property for State acquisition but redistributed economic burdens within a private legal relationship. Financial liabilities imposed through labour and social welfare legislation are a common feature of modern constitutional democracies. The court thus affirmed that the demands of social justice and democratic governance inherently condition property rights.

4.4. Inequality, Dignity and the Constitutionalisation of Employment Relations

A defining feature of the *Greatermans* judgment lies in its reconceptualisation of inequality within employment relations. Rather than treating employment disputes as matters governed solely by private contractual autonomy, the court situated labour relations within the constitutional order, moving beyond formal legal symmetry toward a substantive understanding of equality grounded in social and economic realities.

46 The *Greatermans* case.
47 See role of Parliament in section 119(1)-(3) of the Constitution of Zimbabwe, 2013.
48 The *Greatermans* case.

5. Substantive equality in labour law

The applicants' equality challenge rested on a formal conception of contractual freedom: employers and employees possessed equal legal capacity and therefore should bear equal consequences arising from termination on notice. The court decisively rejected this formalistic reasoning. It affirmed that constitutional equality does not require identical treatment of all parties; rather, it prohibits differentiation that entrenches disadvantage or lacks reasonable justification. Equality analysis must therefore consider the actual social position of the parties concerned, not merely their abstract legal status. In practical terms, employers and employees affected by termination on notice were not similarly situated. Employers retained productive assets, organisational continuity, and access to alternative economic opportunities. Employees, by contrast, experienced immediate losses in income, security, and prospects. For many workers, dismissal meant not simply contractual termination but economic dislocation with cascading social consequences. Treating these materially unequal parties identically would therefore reproduce inequality under the guise of neutrality.[49] The court's reasoning, therefore, reflects a substantive equality framework in which differential treatment may be constitutionally required to correct structural imbalance. Legislative measures designed to cushion workers from abrupt economic harm, such as the LAA, 2015, are equality-enhancing rather than discriminatory. This embrace of substantive equality represents a significant development in Zimbabwean constitutional jurisprudence, aligning labour law with the transformative objectives of the Constitution of Zimbabwe, 2013 and affirming the State's responsibility to address entrenched socio-economic disparities through legislation.

Closely linked to the court's equality analysis was its sustained recognition of worker vulnerability as a constitutionally relevant fact. The judgment acknowledged that many dismissed workers were sole breadwinners whose sudden unemployment had consequences that extended beyond individual hardship, affecting families and communities. Loss of employment disrupted access to housing, education, healthcare, and social participation, thereby transforming dismissal into a broader socio-economic crisis. By foregrounding vulnerability, the court reframed termination of employment as more than a private contractual occurrence. Instead, it becomes a matter of legitimate public concern engaging constitutional values of social protection and human dignity. Labour regulation is thus justified not only on grounds of fairness between contracting parties, but also in light of society's interest in economic stability and

49 *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase*, International Court of Justice (ICJ) 18 July 1966 cited extensively in the *Greatermans* case.

social cohesion. This reasoning signals an important doctrinal shift: labour law performs a protective constitutional function. Legislative intervention is not an exceptional intrusion into private autonomy, but an ordinary and legitimate mechanism through which the Constitution addresses and mediates structural power imbalances within the labour market.

5.1. Employment and human dignity

The most philosophically significant aspect of the judgment lies in its treatment of employment as a foundation of human dignity, a right entrenched in section 51 of the Constitution of Zimbabwe, 2013. The court observed that long-serving employees "become what they are in society because of their work," recognising labour as integral to personal identity and social belonging.[50] This insight marks a departure from purely economic conceptions of employment. Work is not merely an exchange of labour for wages, but a source of meaning, status, and participation in communal life. The loss of employment undermines dignity by disrupting an individual's capacity to sustain self-worth and social recognition. By grounding labour protections in dignity, the court constitutionalised the moral foundations of employment regulation, elevating employment protections from statutory policy choices to expressions of constitutional principle. The judgment thus situates Zimbabwean labour jurisprudence within a growing comparative tradition that treats dignity as the normative centre of labour law. Courts increasingly recognise that safeguarding workers against abrupt and destabilising dismissal protects not only economic interests but the conditions necessary for human flourishing.

6. The Labour Act [Chapter 28:01] within a Constitutional Framework

The judgment also provided an important interpretive account of the Labour Act [Chapter 28:01]'s objectives, demonstrating how ordinary legislation must be read through the normative lens of the Constitution. Rather than approaching the statute through narrow textualism or purely technical labour law reasoning, the court adopted a purposive, value-oriented method of interpretation grounded in constitutional principles. It emphasised that legislation enacted within a constitutional democracy cannot be interpreted in isolation from the broader constitutional order. The Labour Act [Chapter 28:01], as social legislation regulating employment relationships, must therefore be understood as an instrument designed to give practical effect to constitutional commitments to

50 *Greatermans* case.

dignity, equality, and social justice.[51] This approach reflects the broader principle of constitutional supremacy; legislation derives meaning and legitimacy from its alignment with constitutional values.

6.1. Fair labour practices as a constitutional standard

Section 65(1) of the Constitution of Zimbabwe, 2013 provided the central normative anchor for the court's analysis in the *Greatermans* case. The court affirmed that the right to fair labour practices is not confined to procedural compliance but operates as a substantive constitutional standard governing the entire employment relationship. Fairness, it held, cannot be reduced to the formal validity of contractual terms or common-law doctrines; it must instead be assessed against the broader constitutional values of dignity, equality, and social justice. On this basis, contractual autonomy is necessarily circumscribed by constitutional imperatives. Employment relationships are typically marked by structural inequalities in bargaining power, and the constitutionalisation of labour rights serves to mitigate these imbalances. Fairness, therefore, requires attention to the lived realities and consequences of employment practices, rather than to their formal legality alone. Within this framework, the court attributed constitutional significance to compensation based on length of service. Long service, it reasoned, generates legitimate expectations of stability, recognition, and security. Termination without compensation disregards the relational and enduring nature of employment, effectively reducing labour to a disposable commodity. Compensation thus operates not as a penalty imposed on employers, but as a mechanism for realising substantive fairness by distributing the economic risks of termination more equitably.

In these respects, the judgment gestures towards a transformative understanding of labour rights. However, this transformative potential is not fully realised in the court's treatment of the scope of section 65(1) of the Constitution of Zimbabwe, 2013. The court adopted a notably conservative interpretive approach, holding that claims grounded in the constitutional right to fair labour practices must be anchored in conduct already recognised as an unfair labour practice under Part III of the Labour Act [Chapter 28:01]. This position reflects clear deference to legislative specification, effectively treating the statute as exhaustive of the constitutional right's content. Such an approach constrains the independent normative force of section 65(1) of the Constitution of Zimbabwe, 2013. By declining to develop the right beyond the confines of the Labour Act, the court

51 TG Kasuso 'Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe' in J Tsabora (ed) *The Judiciary and the Zimbabwean Constitution* (2022) 186.

limited its capacity to function as a dynamic, evolving constitutional guarantee.[52] The likely motivations, concerns about institutional overreach, fidelity to the constitutional text, and respect for legislative authority, are understandable. Yet the consequence is a formalist posture that renders the right's transformative promise more aspirational than fully realised.

A more robustly transformative approach would treat section 65(1) of the Constitution of Zimbabwe, 2013 as an overarching constitutional guarantee whose content is not exhausted by statutory codification.[53] On this view, the Labour Act provides an important, but non-exhaustive, articulation of unfair labour practices. Where conduct falls outside the statute yet infringes constitutional values of fairness, dignity, and equality, litigants should be entitled to rely directly on the Constitution as an independent source of protection.[54] This would position the judiciary as an active participant in the incremental development of labour standards, informed by domestic jurisprudence, international labour norms, and comparative law.

This more expansive interpretive methodology finds clear expression in the jurisprudence of South Africa. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[55] the Constitutional Court invoked section 23(1) of the Constitution to reject the deferential "reasonable employer" test, reasoning that it privileged employer interests at the expense of employees. Similarly, in *South African National Defence Union v Minister of Defence and Another*,[56] statutory restrictions on trade union membership were invalidated for violating the constitutional guarantee of fair labour practices. South African courts have also relied on this right to extend protection to particularly vulnerable groups, including undocumented migrant workers[57] and individuals engaged in atypical or even unlawful forms of work,[58] thereby demonstrating a willingness to allow constitutional values to drive the evolution of labour law beyond legislative text.

Against this comparative backdrop, the Zimbabwean approach in the Greatermans case appears restrained. While the judgment is significant for

52 TG Kasuso 'Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe' in J Tsabora (ed) *The Judiciary and the Zimbabwean Constitution* (2022) 186.

53 L Madhuku *Labour Law in Zimbabwe* (2015) 78.

54 C Cooper 'Right to Fair Labour Practices' (2004-2005) *Comparative Labour Law & Policy Journal* 216; H Cheadle 'Labour Relations' in H Cheadle *et al South African Constitutional Law: The Bill of Rights* (2006) 6-11.

55 [2007] 12 BLLR 1097 (CC).

56 (1999) 20 *ILJ* 2265 (CC).

57 *Discovery Health v CCMA & Others* (2008) 29 ILJ 1480 (LC).

58 *Kylie v CCMA & Others* (2010) 31 *ILJ* 1600 (LAC).

elevating fair labour practices from a statutory aspiration to a constitutional benchmark that informs the interpretation of labour legislation, it stops short of recognising the right as an autonomous and generative source of legal norms. The decision's transformative dimension, at least in this respect, remains nascent, articulated in principle but only partially realised in doctrine.

6.2. Balancing competing interests

Despite its strong emphasis on worker protection, the court avoided an absolutist pro-employee stance. A central theme in the judgment is the need to balance competing constitutional and economic interests within the employment relationship. The court reaffirmed that employers retain the managerial prerogative to terminate employment on notice and to organise business operations in response to legitimate economic needs. The LAA, 2015 , did not abolish this authority; it regulated the consequences of its exercise. Employers, therefore, remain free to restructure, reduce staff, or respond to market pressures, provided that terminations occur within a framework consistent with constitutional fairness, which is inherently contextual and involves a value judgment.[59] It requires a careful balancing of the interests of employers, employees, and society.[60] This understanding reflects what has been described as the equivalence of interests approach, which demands that fairness accommodate the legitimate concerns of all parties.[61] Under this approach, fairness cannot exist where the interests of one party are advanced at the expense of another. It also acknowledges that legality does not necessarily equate to fairness, reinforcing the need to interpret both section 65(1) of the Constitution of Zimbabwe, 2013 and the Labour Act [Chapter 28:01] in a manner that best promotes substantive justice.[62] Accordingly, courts are required to apply a principled value judgment to the facts of each case, guided by the objectives of labour legislation. This involves recognising the role of equity in mediating the inherent tensions between employer prerogative and employee protection, while remaining responsive to the evolving nature of workplace relations.[63]

Significantly, the statutory framework includes mechanisms for relief that allow employers to demonstrate genuine financial incapacity. The court viewed these

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59 *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC).

60 T Cohen 'Understanding Fair Labour Practices: *NEWU v CCMA* – Notes and Comments' (2004) *South African Journal of Human Rights* 483.

61 C Cooper 'Right to Fair Labour Practices' (2004-2005) *Comparative Labour Law & Policy Journal* 216.

62 T Poolman *Principles of Unfair Labour Practices* (1985) 11.

63 TG Kasuso 'Revisiting the Zimbabwean Unfair Labour Practice Concept' (2021) 24 *PER/PELJ* – DOI http://dx.doi.org/10.17159/1727-3781/2021/v24i0a9016 accessed on 31 March 2026.

safeguards as evidence that the legislation seeks equilibrium rather than redistribution for its own sake. Labour regulation, in this sense, reallocates social and economic burdens more fairly without extinguishing managerial autonomy. This balancing exercise reflects labour law's dual constitutional function: protecting workers from vulnerability while preserving the conditions necessary for economic productivity and the sustainability of enterprise.

7. Protective, Balancing and Transformative Constitutionalism: A Synthetic Jurisprudence

The central analytical question in this article is whether the Greatermans case reflects a protective, balancing, or transformative conception of labour law. While traditional scholarship often treats these models as competing paradigms, the judgment suggests a more integrated approach. Rather than operating in isolation, these frameworks are interdependent dimensions of a broader constitutional vision. At its most immediate level, the judgment is anchored in the protective function of labour law, which remains the dominant strand. The court explicitly recognised the structural inequality inherent in employment relationships and workers' vulnerability to abrupt termination. Legislative intervention was therefore justified as a corrective to the harsh consequences of unregulated contractual freedom. By acknowledging that employees typically lack equal bargaining power, financial resilience, and institutional support, the court reaffirmed that formal equality in contract does not translate into substantive equality in practice. Within this logic, the requirement of retrenchment compensation serves as a protective device, cushioning workers against economic dislocation and reflecting the State's obligation to ensure that market relations are consistent with human dignity.

At the same time, the court resisted reducing labour law to a purely worker-centric model. It expressly recognised the legitimacy of employer interests, including operational flexibility, efficiency, and business sustainability. The LAA, 2015, did not abolish termination on notice but instead regulated its consequences. Employers retained managerial prerogatives, while statutory exemption mechanisms acknowledged that excessive financial burdens could threaten enterprise viability. These features point to a secondary but important balancing function: labour law as a mediating framework through which competing interests, capital investment, job security, and broader economic stability are reconciled.

At a deeper level, the reasoning reflects the influence of transformative constitutionalism, albeit in a form that is, in certain respects, more aspirational than fully realised. The court approached labour legislation not merely as a system for regulating existing relationships, but as an instrument for reshaping

socio-economic structures in line with constitutional values. The Constitution of Zimbabwe is treated as a normative project aimed at reconfiguring power relations and advancing a more equitable social order. Within this framework, labour law assumes particular significance as a site of transformation, given that employment relations remain one of the most pervasive arenas of structural inequality. By grounding concepts such as compensation, fairness, and equality in the constitutional values of dignity and social justice, the court signalled that labour regulation must contribute to democratic transformation and that constitutional rights have horizontal application in shaping private relationships. Nevertheless, as argued in earlier sections, this transformative impulse is not consistently applied in the court's doctrinal choices, particularly in its restrained interpretation of the right to fair labour practices. This tension underscores the judgment's dual character: normatively ambitious yet institutionally cautious.

Ultimately, the developed jurisprudence synthesises protective, balancing, and transformative approaches into a coherent, if not unproblematic, constitutional theory of labour law. These elements are best understood not as competing objectives but as mutually reinforcing components of a single interpretive framework. Protection without balance risks undermining economic viability; balance without transformation risks entrenching existing inequalities; and transformation without protection risks remaining purely rhetorical. The significance of the *Greatermans* case lies in its attempt to integrate these dimensions into a unified methodology, offering one of the most conceptually sophisticated, though not fully realised, articulations of labour law's constitutional purpose in Zimbabwean jurisprudence.

8. Conclusion

The *Greatermans'* case is more than a dispute over retrospective legislation; it is a foundational statement on the constitutionalisation of labour law in post-2013 Zimbabwe. Across issues of retrospectivity, property, equality, and fair labour practices, the Constitutional Court articulated a framework for reconciling contractual autonomy with constitutionally mandated social protection. The *Zuva Petroleum* case exposed the fragility of a labour regime overly reliant on common-law principles. Parliament's intervention, in turn, required the court to determine whether corrective economic regulation could be sustained within constitutional limits. Under the leadership of Chief Justice Malaba, the court confirmed that it could: constitutionalism does not preclude legislative responses to socio-economic dislocation but subjects them to structured judicial scrutiny grounded in rationality. The judgment's lasting doctrinal contribution lies in two related moves. First, it affirms the constitutional permissibility of retrospective civil legislation when rationally connected to a legitimate public purpose, thereby clarifying the

relationship between legal certainty and remedial state action. Secondly, it situates labour regulation within a constitutional matrix shaped by dignity and equality, while simultaneously limiting the independent scope of section 65(1) by tethering it to the Labour Act's statutory framework. This dual posture, normatively expansive yet doctrinally cautious, captures the court's broader approach.

In synthesising protective, balancing, and transformative elements, the judgment advances a composite model of labour law: one that recognises worker vulnerability as a basis for legislative protection, accommodates employer interests within a regulated framework, and situates both within a constitutional order oriented towards substantive equality. Its significance, however, lies less in the full realisation of transformative constitutionalism than in establishing the parameters within which such transformation may occur, namely, through rationally justified legislation, mediated by a judiciary that remains attentive to, but not fully generative of, the evolving content of constitutional labour rights.

THE COURT CANNOT ACT AS THE EXECUTIVE: JUDICIAL RESTRAINT, SEPARATION OF POWERS, AND THE ENDURING JURISPRUDENCE OF CHIEF JUSTICE HON. MR. LUKE MALABA

LUCKY JONASI[1] & DR. WILLARD MUGADZA[2]

Abstract

This article examines the jurisprudential themes of judicial restraint and separation of powers as they are embodied throughout Chief Justice Luke Malaba's remarkable judicial career, with particular and sustained reference to his dissenting opinion in Mawarire v Mugabe NO & Others 2013 (1) ZLR 469 (CC). Delivered when Justice Malaba was still Deputy Chief Justice, that dissent constitutes one of the most intellectually rigorous articulations of the principle that courts must not usurp the constitutional prerogatives of the executive branch, a principle that resonates with and is illuminated by the jurisprudential philosophies of Lord Devlin, H.L.A. Hart, Lon Fuller, O.W. Holmes, John Finnis, and Ronald Dworkin. The article argues, based on close textual and philosophical analysis, that Justice Malaba was correct in his minority judgment and that the constitutional philosophy he articulated in dissent in 2013 anticipated the direction that the law would ultimately take. Drawing on eleven post-2013 judgments delivered under Malaba CJ's presidency of the Constitutional Court, the article demonstrates a consistent, coherent, and philosophically anchored doctrine of judicial minimalism, in which deference to constitutionally designated decision-makers is not timidity but a structural imperative of constitutional democracy. The article concludes that what Malaba DCJ (as he then was) defended in the minority in 2013, he subsequently authored as the authoritative jurisprudence of the Constitutional Court of Zimbabwe.

Keywords: *Judicial restraint; separation of powers; Chief Justice Malaba; constitutional interpretation; executive discretion; dissenting opinions; constitutionalism; Zimbabwe; Devlin; Hart; Fuller; Dworkin; Finnis*

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1. Introduction

On 17 January 2026, the Judicial Service Commission (JSC) announced the retirement of Chief Justice Luke Malaba (Malaba CJ), effective 15 May 2026.[3] This retirement marks the conclusion of a judicial career spanning more than four decades, a career that has traversed the full institutional arc of the Zimbabwean legal system, from the magistracy through to the High Court bench, the Supreme Court of Appeal, the office of Deputy Chief Justice and ultimately the apex position of Chief Justice.[4] Few figures in the history of Zimbabwe's constitutional jurisprudence have brought to their office the combination of textual precision, philosophical depth and institutional consistency that has characterised the judgments of Malaba CJ. His legacy is, as the legacy of all great jurists must be, complex and contested, but it is above all coherent. His jurisprudence has been grounded in a single organising principle at every level of the judicial hierarchy, through times of political unrest and constitutional transition: that each branch of government must carry out its constitutionally assigned function within its constitutionally prescribed sphere, and that courts, no matter how significant their role, are not authorised to replace the judgment of institutions that the Constitution has designated as the repositories of particular powers.

This article examines that principle as it manifests, with particular clarity and intellectual force, in Malaba CJ's dissenting opinion in the landmark constitutional case of *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC) ("*Mawarire*").[5] The dissent delivered when Justice Malaba was Deputy Chief Justice presents one of the most philosophically accomplished statements of the principle of judicial restraint in the history of Zimbabwean constitutional adjudication. It is a judgment that rewards careful analysis both for its own doctrinal contribution and for the light it casts on the broader constitutional philosophy that Malaba CJ would

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3 Judicial Service Commission, Announcement Regarding the Retirement of Chief Justice Luke Malaba (17 January 2026) https://jsc.org.zw:8222/media/uploads/CJs_retirement.pdf; "Chief Justice Malaba retirement date announced" The Herald 18 January 2026.

4 The Chief Justice served across multiple judicial appointments, from the magistracy through to the apex court, accumulating over forty years of judicial service to the Republic of Zimbabwe. Judicial Service Commission, Announcement Regarding the Retirement of Chief Justice Luke Malaba (17 January 2026) https://jsc.org.zw:8222/media/uploads/CJs_retirement.pdf.

5 G Manyatera, "Mawarire v Mugabe and the Architecture of Electoral Constitutionalism in Zimbabwe" (2014) 2 *Zimbabwe Journal of Law and Society* 1; G Manyatera, "Judicial Power, Constitutional Interpretation and the Separation of Powers in Zimbabwe: Revisiting Mawarire" (2016) 5 *African Journal of Comparative Constitutional Law* 44. This article builds upon and departs from those contributions in the manner described in section 1.3 below.

subsequently develop across eleven further judgments over the decade following *Mawarire*.

1.1. The Significance of Malaba's Judicial Philosophy

The jurisprudence of the Chief Justice holds a unique place in the African constitutional thought heritage. Malaba CJ has continuously argued that the Constitution's distribution of institutional functions is not a default position subject to judicial revision but rather a foundational design that conditions the legitimacy of every branch of government, including the judiciary itself, at a time when many postcolonial constitutional courts have struggled with conflict between an activist judicial role and the structural demands of separation of powers. This viewpoint has philosophical significance for several of the predominant traditions of contemporary jurisprudence.

From the perspective of legal positivism, H.L.A. Hart's identification of a "rule of recognition" as the foundation of any legal system provides an illuminating frame.[6] For Hart, the authority of legal rules derives from their pedigree under the constitutional order's master rule of recognition. A court that departs from clear constitutional text in pursuit of values it considers superior to that text undermines the very rule of recognition that gives its decisions their authority. Malaba CJ's insistence on textual fidelity, his refusal, as he memorably put it in *Mawarire*, to "have wool cast over the inner eye of my mind" by arguments that required the plain words of the Constitution to be read away, reflects this positivist commitment to law as it is rather than law as one might wish it to be. Lon Fuller's account of the "inner morality of law" adds a complementary dimension.[7] Fuller argued that legal systems derive their moral legitimacy in part from a commitment to fidelity, the practice of applying law as publicly promulgated, without retrospective alteration or covert departure. A judiciary that routinely overrides constitutional text in the name of constitutional values engages in a form of covert legislative activity that undermines the fidelity requirement on which law's claim to obedience rests. Justice Malaba's insistence in *Mawarire* that section 58(1) of the

6 *Mawarire v Mugabe NO & Ors* 2013 (1) ZLR 469, Malaba DCJ dissent, 498 at para A. The phrase "wool cast over the inner eye of my mind" evokes the classical common law insistence on textual clarity. For the philosophical underpinning, see H.L.A. Hart, *The Concept of Law* (1994)124–136 (the "open texture" of legal rules, within which, however, a core of plain meaning controls).

7 *Mawarire v Mugabe NO & Ors* 2013 (1) ZLR 469, Malaba DCJ dissent. This statement captures a principle with deep roots in administrative and constitutional law across common law systems. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) (Lord Diplock's formulation of the grounds of judicial review); *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). See also L L. Fuller, *The Morality of Law* (1969)33–94, on the internal morality of law and the imperative that legal rules be applied as promulgated.

Constitution of Zimbabwe Amendment (No. 19) Act, 2009 (the "former Constitution") meant what it said is, at one level, an expression of precisely this Fullerian commitment.

Lord Devlin's account of the proper limits of judicial authority is perhaps the most directly opposite of the canonical jurisprudential frameworks.[8] In *The Judge*, Devlin argued that judges must resist the temptation to act as if their personal assessment of the justice of an outcome were a valid ground for departing from established legal rules and must equally resist the institutional temptation to expand judicial power into spaces the law assigns to other branches. His warning that judicial overreach, however well-intentioned, carries systemic costs to the legitimacy of the constitutional order is a theme that runs, with striking consistency, throughout Malaba CJ's jurisprudence. Ronald Dworkin's principle of "integrity" in law offers a further dimension.[9] Dworkin argued that adjudication must be not merely rule-bound but principled, that the law must be understood as a coherent whole, and that judicial decisions must be consistent with that whole rather than ad hoc responses to the political pressures of particular moments. The consistency with which Malaba CJ has applied the same structural principles across vastly different legal contexts, electoral law, labour law, criminal procedure, and constitutional jurisdiction is itself a form of Dworkinian integrity in action. The principle is not altered to suit the case; the case is decided according to the principle.

John Finnis's account of the relationship between natural law, positive law, and the common good provides yet another illuminating lens.[10] Finnis argued that

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8 Malaba DCJ in *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC): "As he is vested with the power to fix the date of the first elections in his capacity as the President of the Republic, he is expected to take into account relevant factors relating to the proper conduct of the elections in the national interest. He does not, in that capacity, act as a leader of a political party." See also P Devlin, *The Judge* (1979) 3–24, on the institutional limits of judicial authority in matters entrusted by the constitutional order to other branches.

9 Malaba DCJ in *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC). This critique is reminiscent of the principle in South African constitutional law that a court may not grant a remedy that is itself constitutionally impermissible: see *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC). See also R Dworkin, *Law's Empire* (1986) 225–258, on the principle of integrity, which demands that judicial decisions be consistent with the broader framework of legal principle.

10 This statement draws a clear line between constitutional review and executive substitution, a line recognised across common law systems. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 42 (Moseneke J). For the philosophical basis of this institutional demarcation, see J Finnis, *Natural Law and Natural Rights* (2011)245–252, on the authority of the constitution as the highest positive law establishing institutional competences; O.W. Holmes, "The

the authority of positive law derives ultimately from its orientation towards the common good, and that the constitutional allocation of governmental functions is itself a specification of how the common good is to be pursued within a particular political community. When Malaba CJ insists that courts must not substitute their judgment for that of constitutionally designated decision makers, he is giving expression to the Finnisian principle that the constitutional order embodies a particular, authoritative answer to the question of how governmental authority is to be distributed in the service of the common good, an answer that individual actors, including judges, have an obligation to respect. O.W. Holmes's legal pragmatism completes the philosophical picture.[11] Holmes's famous observation that "the life of the law has not been logic; it has been experience" was not an invitation to judicial legislation but a reminder that legal reasoning must be sensitive to institutional realities, to the actual capacities of courts and to the proper division of labour between legal and political institutions.[12] Malaba CJ's attention to institutional competence, his repeated identification of functions that are "peculiarly within the competence" of the executive authority and must not be second-guessed by courts, reflects a Holmesian sensitivity to the practical dimensions of constitutional adjudication.

1.2. Scope and Structure of this Article

The article is organised around its central argument. Section 2 provides the factual and legal context of the Mawarire case. Section 3 examines the majority judgment and its interpretive methodology. Section 4 undertakes a sustained analysis of Malaba DCJ's dissenting opinion, organised around its three principal contributions: its textual analysis of the nature of presidential power (section 4.1), its articulation of the limits of judicial competence (section 4.2), and its application of separation of powers principles (section 4.3). Section 5 situates the dissent within the broader jurisprudential literature on the function of dissenting opinions in constitutional adjudication. Section 6 traces the restraintist philosophy of the Mawarire dissent across eleven post 2013 judgments delivered under Malaba CJ's presidency of the Constitutional Court. Section 7 concludes by assessing his overall jurisprudential legacy.

1.3. Situating this Article within the Existing Scholarship

The scholarly literature on *Mawarire* is not extensive, but it is growing. Notably, Manyatera and Hamadziripi have contributed important analyses of the case,

Path of the Law" (1897) 10 *Harvard Law Review* 457, on the distinction between law as it is and law as judges might wish it to be.

11 OW Holmes *The Common Law* (1881) 1.

12 OW Holmes *The Common Law* (1881) 1.

examining the majority's teleological approach to constitutional interpretation and the broader implications of the judgment for electoral constitutionalism and the separation of powers in Zimbabwe.[13] Those contributions are valuable, and this article acknowledges the intellectual debt it owes to them. However, the present article is distinguished from Manyatera's analyses in two fundamental respects. First, whereas Manyatera's contributions engage primarily with the majority judgment and its constitutional implications, this article focuses sustained analytical attention on the dissenting opinion of Malaba DCJ, an opinion that, as the article argues, is not only more technically accomplished than the majority's but anticipates the direction in which Zimbabwean constitutional law has subsequently developed. Manyatera's analysis does not undertake the philosophical grounding of Malaba DCJ's dissent in the traditions of Hart, Fuller, Devlin, Dworkin, Finnis and Holmes; this article does.

Moreover, neither of Manyatera's contributions traces the post-Mawarire development of the restraintist philosophy across the subsequent decade of Malaba CJ's tenure as Chief Justice. This article does precisely that, identifying, in eleven post-2013 judgments, the consistent institutional expression of the constitutional philosophy that Malaba DCJ articulated alone in the minority in 2013. The gap in the existing literature that this article addresses is therefore both philosophical, the grounding of the dissent in canonical jurisprudential theory and developmental, tracing the dissent's philosophy through to its eventual triumph as the authoritative doctrine of the Constitutional Court of Zimbabwe under Malaba CJ's presidency.

In addition, Linington's election briefing on the 2013 Zimbabwe elections offers an invaluable introduction to the constitutional issues that attended the Mawarire case.[14] In a typically clear-eyed analysis, Linington pinpoints and dissects the two key constitutional irregularities that marred the elections: the misinterpretation of section 58(1) of the former Constitution by the Constitutional Court in setting the date of the elections, and the president's illegal recourse to the Presidential Powers (Temporary) Measures Act [Chapter 10:20] to amend the Electoral Act [Chapter 2:13]. Linington's analysis of the text of section 58(1) of the former Constitution is especially instructive. In his discussion of the dissenting judgements, however, the limitations of the briefing format are evident. Linington comments, favourably, that Deputy Chief Justice Malaba penned a strong dissent, and quotes from it effectively. It does not, however, provide a sustained philosophical analysis of that dissent, nor does it explore its doctrinal significance

13 G Manyatera & C Hamadziripi 'Electoral Law, the Constitution and Democracy in Zimbabwe: A Critique of *Jealousy Mbizvo Mawarire v Robert Mugabe N.O. and 4 Others* CCZ 1/13' (2014) Vol 1 *Midlands State University Law Review* 72.

14 G Linington 'Zimbabwe's 2013 Elections: Two Constitutional Controversies and Comments on Some Structural Matters' (2014) Issue 13(2) *Journal of African Elections* 1.

further than the instant case. This is where the present article seeks to fill in the gaps.

2. The Case Background: Mawarire v Mugabe NO & Others 2013 (1) ZLR 469 (CC)

The case *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC) arose in May 2013 against a backdrop of profound constitutional transition. Zimbabwe was at that moment emerging from the arrangements of the 2008 Global Political Agreement (GPA),[15] which had established a Government of National Unity (GNU) and set in motion the process that culminated in the adoption and Gazettal of the Constitution of Zimbabwe, 2013 on 22 May 2013. The *Mawarire* case was the first major constitutional matter to be decided by the newly constituted Constitutional Court under the new constitutional order, and the context of its decision, the imminent dissolution of Parliament, the uncertain timing of the first elections, and the politically charged atmosphere of a country in mid-transition gave to the legal questions before the court a significance that extended well beyond their technical dimensions.

Parliament's five-year term was approaching its natural expiry, with automatic dissolution due at midnight on 29 June 2013. The applicant, Jealousy Mbizvo Mawarire, a registered voter and civil society actor, approached the Constitutional Court under section 24(1) of the former Constitution,[16] alleging that the President had failed to fulfil his constitutional duty by not fixing a date for elections in compliance with section 58(1) of that instrument. The applicant contended that this omission violated his rights under sections 18(1) and 18(1a) of the former Constitution, which guaranteed protection of the law and imposed a duty on public officers to exercise their functions lawfully.

The central legal question was whether section 58(1) of the former Constitution required elections to be held within the life of Parliament, that is, before or on 29 June 2013 or whether the President possessed a discretionary power to fix election dates within a four-month window following parliamentary dissolution. The provision read as follows:

> A general election and elections for members of governing bodies of local authorities shall be held on such day or days within a period not exceeding

15 The Global Political Agreement was concluded between ZANUPF and the two formations of the Movement for Democratic Change on 15 September 2008, following the disputed presidential election of that year. It produced the Government of National Unity (GNU) and was incorporated into the then Constitution as Schedule 8.

16 The Constitution of Zimbabwe Amendment (No. 19) Act, 2009, was the operative constitutional instrument at the relevant time. The new Constitution was published on 22 May 2013, but certain provisions were suspended pending the first elections.

> four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

The matter was heard on 24 May 2013, and judgment was handed down on 31 May 2013. The court was constituted by nine judges and was not unanimous. Chief Justice Chidyausiku wrote for a majority of seven. Malaba DCJ and Patel JA each delivered separate minority opinions, both concluding that the application should have been dismissed. The bench comprised Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA, Chiweshe AJA and Guvava AJA.[17]

3. The Majority Judgment and its Interpretive Methodology

Chief Justice Chidyausiku, writing for seven judges, adopted a teleological and purposive approach to interpreting section 58(1).[18] The majority reasoned that the proper construction of the section, read in context and in light of constitutional principle, required elections to be held within the life of Parliament or, at the very latest, immediately upon its dissolution. This was, in the majority's view, the only interpretation consistent with constitutionalism, the principle that Zimbabwe must at all times have a functioning Parliament. To permit a period of parliamentary absence following dissolution would be, in the majority's striking phrase, to produce "a deformed State" incompatible with the constitutional imperative that "there shall be a Parliament."

The majority relied heavily on the canon that constitutional interpretation must avoid absurdity. It also drew support from section 158(1)(a) of the Constitution of Zimbabwe, 2013, which expressly required elections to be held within Parliament's five-year term as evidence of what the constitutional framers had intended, even under the former Constitution. The methodological manoeuvre of using a provision of the new Constitution that was not yet operative for the purposes of the transitional elections to illuminate the meaning of the former Constitution's election timing provisions was, as the minority judgments demonstrated, not without its difficulties.

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17 *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC) (Constitutional Court of Zimbabwe, decided 31 May 2013).

18 The majority quoted with approval both the narrow and wide approaches to avoiding absurdity articulated in *The Queen v Judge of the City of London Court* [1892] 1 QB 273 (Lord Esher MR) and *Venter v Rex* 1906 TS 910 at 914–915 (Innes CJ) respectively. It also cited the schematic and teleological method of interpretation endorsed by Lord Denning in *Buchanan & Co v Babco Ltd (CA)* [1977] QB 208 at 213. For a canonical statement of purposive constitutional interpretation, see *S v Zuma* 1995 (2) SA 642 (CC) para 15 (Kentridge AJ): "We must heed Lord Wilberforce's reminder that a constitution is a document sui generis, calling for principles of interpretation of its own."

On remedies, the majority acknowledged the President's "legal quandary" arising from his failure to act timeously and granted the applicant's alternative relief, directing the President to proclaim election dates to ensure that elections were held no later than 31 July 2013. The order was notably direct: it did not merely declare the President's failure to act unconstitutional; it directed the President to exercise his constitutional function in a specific manner by a specific date. This remedial dimension became the focal point of Justice Malaba's dissent.

The majority's conception of the judicial role was implicit but unmistakable. The court was understood as possessing broad remedial authority to correct constitutional violations and to ensure the proper functioning of the constitutional order, an authority that, on this view, extended to directing the executive in the exercise of functions the Constitution had assigned to it. This conception of judicial power, while grounded in a genuine commitment to constitutionalism and the rule of law, raised fundamental questions about the separation of powers and the proper limits of judicial intervention, questions that Justice Malaba's dissent would address with characteristic rigour and philosophical depth.

4. Justice Malaba's Dissent: Structure, Method, and Philosophical Significance

The dissenting opinion of Malaba DCJ is a model of analytical precision. It moves with logical coherence from preliminary observations about the applicable constitutional framework, through a structured analysis of the nature and content of the presidential power under section 58(1), to conclusions about the proper institutional response, conclusions that, this article argues, are philosophically correct and constitutionally well-founded. The dissent repays sustained examination both as a contribution to Zimbabwean constitutional law and as an expression of a deeper jurisprudential philosophy whose antecedents in the work of Hart, Fuller, Devlin, Dworkin, Finnis, and Holmes are traced in what follows.

A foundational observation in the dissent establishes the interpretive framework: the case fell to be decided under the former Constitution, not the Constitution of Zimbabwe, 2013, which had come into effect during the pendency of the litigation. This was not a technical nicety; it was a jurisdictional and methodological precondition for the entire analysis. The first elections under the new constitutional order were governed by the transitional provisions of the Sixth Schedule to the Constitution of Zimbabwe, 2013, which incorporated the provisions of the former Constitution regarding the life of Parliament. Justice Malaba's insistence on this point directed attention to the specific textual provisions that controlled the dispute rather than to general constitutional values that the court might derive from the new order and was thus, from the outset, more textually disciplined than the majority's approach. In Hart's terms, Malaba DCJ was insisting that the "rule of recognition" for the election timing provision was the former Constitution, not the new one, and that the court had no authority

to displace that rule of recognition by appeal to values the new Constitution expressed but had not yet operationalised for the purposes of the transitional elections.

4.1. The Nature of the Power: Discretion, Not Duty

The anchor of the dissent was a strict textual and grammatical analysis of section 58(1) of the former Constitution. Malaba DCJ characterised the language of the section as "clear and unambiguous," and refused, as he put it with characteristic directness, to "have wool cast over the inner eye of my mind on this matter." The word "after," appearing in relation to both triggering dissolution events, admitted of only one reading in ordinary English and in established constitutional usage: elections were to follow dissolution, not precede it. This was not merely a linguistic observation; it reflected the received understanding in constitutional practice, and the plain meaning rule that Hart identified as operative at the core of any legal concept whatever "open texture" might attend its penumbral applications.

Crucially, Malaba DCJ characterised the President's power under section 58(1) of the former Constitution as discretionary rather than obligatory. The use of the word "fix" implied a choice: the President was entitled to determine, within the prescribed four-month window, the day or days on which elections would be held. No legal duty to fix any particular date arose from the provision, and, in consequence, no constitutional violation occurred because the President had not designated 29 June 2013 as the election date. The argument that such a duty existed was, on this analysis, not supported by the constitutional text; and courts on Holmes's account of the nature of legal obligations may not impose duties the law does not impose, however much the judicial conscience might suggest that the outcome would be salutary.

Justice Malaba's understanding of discretionary power was philosophically sophisticated. He emphasised that in matters in which the President has discretion, he may seek advice from any quarter but must discharge his duties to the best of his own judgment. The power was vested in the President, not the court, and the President retained "the freedom to decide when to act provided he observes all the requisite conditions of the exercise of the power." This reasoning resonates directly with Finnis's principle that the constitutional allocation of authority represents a deliberate, authoritative determination of how the common good is to be pursued, a determination that the judiciary undermines when it substitutes its own judgment for that of the designated decision maker, however well-intentioned that substitution might be.

The practical significance of this characterisation was decisive. If the President bore a legal duty to fix election dates in a particular manner, then a court could enforce that duty through an order of mandamus. But if the President held a

discretionary power to be exercised according to his own constitutionally guided judgment, the court's role was confined to reviewing the legality of any actual exercise of that power, not directing how it should be exercised. Malaba DCJ's insistence on this distinction was a direct application of Lord Devlin's principle: the judge may review; the judge may not govern.

4.2. Judicial Restraint and the Limits of Judicial Competence

The most intellectually significant passage in the Malaba dissent is the foundational statement: "It is not the function of a court of law to substitute its own wisdom and discretion for that of the person to whose judgment a matter is entrusted by the law." This sentence encapsulates a constitutional philosophy about the proper limits of judicial power that, upon careful analysis, is one of the most significant doctrinal contributions of the *Mawarire* litigation to Zimbabwean jurisprudence. It is a sentence that deserves to stand alongside the great statements of judicial restraint in the common law tradition, and whose resonance with the jurisprudential philosophies of Devlin, Hart, and Fuller is profound.

Malaba DCJ's analytical framework for examining the nature of presidential power, its repository, its content, and the conditions and restrictions on its exercise is structurally reminiscent of Dworkin's account of the distinction between rules and principles in legal reasoning.[19] Where Dworkin would distinguish between rule-bound determination and the weighing of competing principles, Malaba DCJ's framework asks, with equal philosophical discipline, who does the Constitution entrust with this power, and what kind of power is it? These questions are not merely technical; they go to the heart of constitutional design. The answer, in Malaba DCJ's analysis, was grounded in institutional competence of the most fundamental kind. The fixing of election dates involves judgments that are "peculiarly within the competence" of the executive authority, judgments about electoral preparedness, voter registration timelines, legislative conformity, and the conditions for credible elections. As he observed, the President, in fixing election dates, acts in his constitutional capacity, taking "*into account relevant factors relating to the proper conduct of the elections in the national interest*."

The Fullerian dimension of this restraint is equally apparent.[20] Fuller argued that the inner morality of law requires not only that legal rules be publicly promulgated and non-retroactive, but that they be administered with fidelity, that those entrusted with legal authority discharge it in accordance with the rules as promulgated rather than substituting their personal views for the law's.[21] A court that directs the President on the exercise of a discretionary power does not

19 R. Dworkin, (n 9 above) (1986) 225–258.
20 LL Fuller (n 7 above) page 49-62.
21 LL Fuller (n 7 above) 39,49-62,81-91.

administer the Constitution with fidelity; it replaces the Constitution's allocation of authority with the court's own assessment of what the Constitution should have provided. This is precisely the error Malaba DCJ identified in the majority's approach: it allowed the court's sense of constitutional value to override the constitutional text, substituting judicial legislation for constitutional interpretation.

There is also a textualist dimension to the restraint demonstrated in the Malaba dissent that merits specific attention. At the time of the judgment, Zimbabwe was in the midst of a constitutional transition. The new Constitution had suspended the operation of its own provisions on election timing section 158 for the purposes of the first elections, a suspension that Malaba DCJ argued was a deliberate legislative choice reflecting awareness of the conflict between the old and new frameworks. The majority's invocation of section 158 of the Constitution of Zimbabwe, 2013 to interpret section 58(1) of the former Constitution was, in this analysis, a methodological error: it allowed the court's sense of what the Constitution ought to say to override what it actually said. This textualist instinct, the refusal to allow constitutional values to override constitutional text, is, as Holmes warned, the essential discipline that separates genuine constitutional adjudication from covert judicial legislation.

4.3. Separation of Powers Principles in the Malaba Dissent

The separation of powers, as a structural principle of constitutional governance, operates on multiple levels. At its most basic, it requires that the legislative, executive and judicial functions of government be exercised by distinct institutions, each within the sphere assigned to it by the Constitution. At a more sophisticated level, and it is this level that is most philosophically interesting for the purposes of this article, it demands that each institution respect the boundaries of its own authority not merely as a matter of formal compliance, but out of a principled recognition that the integrity of the constitutional order depends on each branch performing its assigned function with fidelity to the constitutional design. This is the Finnisian point in its most concrete constitutional application: the common good the Constitution serves is secured only when its allocation of governmental functions is honoured by all three branches.

Malaba DCJ's dissent in *Mawarire* is a sustained reflection on this deeper dimension of separation of powers. The majority's conclusion that the President had violated the Constitution, accompanied by a mandatory order directing the President to proclaim election dates, raised for Malaba DCJ a fundamental logical difficulty. If the President possessed discretionary power under section 58(1) of the former Constitution, then no constitutional violation could arise merely from the fact that he had not exercised it in a particular manner by a particular date.

And if no violation had occurred, the court lacked a legal basis to issue a mandatory order. The majority's approach was, on this analysis, internally contradictory: it "defeats logic," Malaba DCJ observed, "for the majority to find that the President has broken the supreme law of the land and at the same time authorise him to continue acting unlawfully."

This concern about institutional overreach was reinforced by Malaba DCJ's comparative constitutional analysis. Surveying constitutional arrangements in Malaysia, Ireland, Andorra, Bulgaria, Croatia and Canada, he demonstrated that the possibility of a transitional period without an active Parliament following its automatic dissolution was a recognised feature of constitutional democracies, not the constitutional horror the majority supposed.[22] This comparative dimension is important. It situates the Malaba dissent not as an eccentric or locally peculiar constitutional position but as one entirely consistent with the comparative practice of democratic states, a point that Dworkin would characterise as supporting the "integrity" of the legal reasoning, understood as the requirement that legal decisions cohere with the best interpretation of the law as a principled whole.[23]

The most pointed articulation of the separation-of-powers concern in the dissent is the foundational statement that a court "can review a public officer's action for legality" but "cannot act as if it were the Executive."[24] By issuing an order directing the President to exercise his constitutional discretion in a specific direction by a specific date, the majority had, in substance, appropriated executive power, performing the function the Constitution assigned to the President rather than simply determining whether that function had been performed unlawfully. This was not a constitutional review; it was constitutional substitution. It is important to note that constitutional substitution, whatever its short-term attractions, is, as Devlin consistently warned, a corrosive force in the long-term health of any constitutional democracy.

4.4. The Dissent's Conclusion and Its Jurisprudential Legacy

Patel JA, in a separate concurring minority judgment, arrived at the same conclusion by a somewhat different route. He accepted the constitutional importance of the principle of constitutionalism endorsed by the majority but concluded that the plain reading of section 58(1) of the former Constitution was

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22 Malaba DCJ referred to: section 55(3)(4) of the Federal Constitution of Malaysia; Article 16.3 of the Constitution of Ireland; Article 15(2) of the Constitution of Andorra; Article 64.3 of the Constitution of Bulgaria; Article 73(1) of the Constitution of Croatia; and the Canada Elections Act in relation to dissolution and election timing in Canada.

23 R Dworkin, *Law's Empire* (1986) 166, 225, 243.

24 *Mawarire v Mugabe NO & Ors 2013 (1) ZLR 469*, Malaba DCJ dissent, 498 at para A.

unambiguous and did not entail the absurdity the majority supposed.[25] He further identified section 31E(2) of the former Constitution, which expressly contemplated the continuation of Ministers without parliamentary membership. Further, Patel JA opined that, during a period of parliamentary dissolution, the Constitution itself, as a powerful textual argument, recognised the possibility of governance without Parliament for a period following dissolution.[26]

Justice Malaba's dissent concluded with the disposition that followed inexorably from its analysis: the application should be dismissed. The conclusion was not reluctant; it was principled. Justice Malaba acknowledged that elections are crucial to democracy and that choosing the precise date to hold elections is a matter of utmost importance, but he insisted that this importance did not transform the executive's discretion into a judicially enforceable duty. The Constitution had entrusted the decision to the President; the court's role was to ensure that the President acted within the constitutional framework, not to assume that role itself.

The subsequent constitutional development lends retrospective support to Malaba DCJ's position. Section 158(1)(a) of the Constitution of Zimbabwe, 2013, which the majority cited in support of its reading of section 58(1) of the former Constitution, is now fully operative and governs all subsequent elections. Elections in Zimbabwe have been held since 2013, before the expiry of Parliament's five-year term. The fact that it was necessary to enact an express provision to achieve this outcome strongly suggests that the former framework genuinely permitted elections after dissolution, precisely what Malaba DCJ argued. The enactment of section 158 of the Constitution of Zimbabwe, 2013 was not a clarification of the position under the old Constitution; it was a change from it. The legislative history thus vindicates the dissent. What the minority said in 2013, the Constitution now expressly provides.

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25 Patel JA concurring dissent in *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC). Patel JA further noted that section 31E (2) of the former Constitution, which expressly contemplated the continuation of Ministers without parliamentary membership during a period of parliamentary dissolution, constituted clear recognition by Parliament itself of the possibility of governance without Parliament for at least three months.

26 Section 31E(2) of the former Constitution provided that no person could hold office as Vice-President, Minister or Deputy Minister for longer than three months unless a member of Parliament, with a proviso that, if during that period Parliament was dissolved, the person could continue in office without parliamentary membership until Parliament next met. Patel JA read this as an express legislative recognition of the possibility of governance without Parliament for at least three months.

5. Broader Jurisprudential Significance: The Nature and Constitutional Function of Dissenting Opinions

5.1. Defining Judicial Dissent

A dissenting opinion is a judgment delivered by one or more members of a collegiate court who cannot concur in the reasoning or outcome adopted by the majority.[27] It is, by definition, a judgment that does not command the force of law, it binds no parties, resolves no legal dispute, and creates no precedent that future courts are obliged to follow.[28] Paradoxically, the dissent has come to occupy a position of enduring significance in the constitutional jurisprudence of common law systems, a significance that derives precisely from its non-binding character. The intellectual freedom that character affords the dissenting judge to reason without the institutional pressures that attend majority writing.[29]

The distinction between a majority judgment and a dissent is not merely formal. A judge writing for the majority carries the full weight of institutional responsibility. The majority judgment settles a legal dispute, creates or extends a binding precedent and shapes the future conduct of litigants, administrators, and legislators. These consequences impose on the majority judge a discipline that is simultaneously legal and reputational. The judgment must be defensible on its own terms, must cohere with established doctrine and must withstand the scrutiny of those who are governed by it. As Ferejohn and Kramer have observed, this scrutiny is a potent constraint on the exercise of judicial power precisely because

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27 Dube F "Judicial Collegiality and Tolerance of Difference: Insights from Justice Johan Froneman's Dissents" (2024) (27) *PER/PELJ* 7; *W. Fire Ins. Co. v. Moss*, 298 N.E.2d 304, 312 (Ill. App. Ct. 1973); N Duxbury, *The Intricacies of Dicta and Dissent* (2021) 232–250.

28 *Hale v. Comm. on Character & Fitness for Ill.*, 335 F.3d 678, 683 (7th Cir. 2003); Ba A. Garner et al, *The Law of Judicial Precedent* (2016) 192, 239–240.

29 Justice Sebutinde dissenting opinion (I.C.J Reports 2024) “In my view, the Court does not have before it accurate, balanced and reliable information to enable it to judiciously arrive at a fair conclusion upon disputed questions of fact, in a manner compatible with its judicial character. Due to the one-sided formulation of the questions posed in resolution 77/247, coupled with the one-sided narrative in the statements of many participants in these proceedings, some of whom do not even recognise the existence or legitimacy of the State of Israel, the Court does not have before it the accurate and reliable information that it needs to render a balanced opinion on those questions. Most of the participants in these advisory proceedings have, regrettably, presented the Court with a one-sided narrative that fails to take account of the complexity of the conflict and that misrepresents its legal, cultural, historical and political context” (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, I.C.J. Reports 2024.)

the judiciary's capital is intellectual and reputational, and susceptible to depletion by sustained, well-founded criticism.[30]

A dissenting judge operates within a fundamentally different institutional space. Freed from the imperative to build collegial consensus, the dissenting judge may reason with a candour and precision that the pressures of institutional agreement sometimes make difficult in majority writing. The dissent need not be the last word; it need only be honest to signal to a specific constituency that the majority's position is contestable, that an alternative legal framework exists, and that a future court may yet reconsider.[31]

5.2. The Constitutional and Jurisprudential Functions of Dissent

The importance of dissenting opinions in a court of final jurisdiction is not merely academic. Dissent performs three distinct and irreplaceable functions in any legal system committed to the rule of law, democratic accountability and the progressive development of constitutional doctrine.

The first is a democratic function. The publication of a dissenting opinion signals to the public, the legal community and the political branches that the court's conclusions are the product of genuine deliberation rather than institutional conformity.[32] As Justice William Douglas argued, the ability to dissent is a safeguard of democracy, evidence that judges exercise their functions independently, subject only to their own understanding of the law and not to the gravitational pull of collegiality or hierarchy.[33] In the words of John Alder, the practice of dissent helps to offset the democratic deficit inherent in judicial power

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30 J Ferejohn & L Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint" (2002) 77(4) *NYU Law Review* 962, 977.

31 A recent, poignant example of such signalling can be seen in Justice Kagan's dissent in Rucho v. Common Cause (2019) 139 S. Ct. 2484. See also R Dworkin, (n 9 above) 401–413, on the role of dissent in preserving alternative principles of legal integrity.

32 As narrated in Part III of this dissenting opinion, Israel and Palestine painstakingly concluded a series of agreements known collectively as the Oslo Accords in 1993 and 1995, signifying their intention to “put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights”59. The thrust of the Oslo Accords and the Quartet Roadmap is mutual performance and good-faith negotiations, leading to a consensual outcome. To that end, the parties thereto agreed upon a wide range of interim measures, pending the achievement of a final agreement through good-faith negotiations (Justice Sebutinde, Dissenting Opinion, I.C.J. Reports 2024).

33 W Douglas, "The Dissent: A Safeguard of Democracy" (1948) 32 *Journal of the American Judicature Society* 104, 105. Similar sentiments were expressed by Judge S Fuld, "The Voices of Dissent" (1962) 62 *Columbia Law Review* 923, 926; K Stack, "The Practice of Dissent in the Supreme Court" (1996) 105 *Yale Law Journal* 2235.

by demonstrating that a court of final resort is not a monolithic institutional voice but a site of competing constitutional values, honestly engaged.[34]

The second is an adjudicative function. A well-constructed dissent clarifies the majority's holding by defining its limits, identifying the arguments the majority has not addressed, the cases it has not distinguished, and the principles its reasoning cannot accommodate. As Sir Hersch Lauterpacht observed, dissent is "a powerful stimulus to the maximum effort of which a tribunal is capable."[35] Read together, the majority judgment and the dissent produce a richer and more complete account of the legal question at issue than either would provide in isolation.

The third, and for the purposes of this article, the most significant is a developmental or evolutionary function. The dissent operates across time in a way that the majority judgment, fixed to the facts and the constitutional moment of a particular case, cannot. Chief Justice Hughes captured this function in what has become the canonical formulation: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[36] Mason CJ expressed the same insight with characteristic directness in the High Court of Australia: *"[a] dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom*."[37] The ability to dissent therefore enables the law to admit new ideas and adapt old doctrines, facilitating legal progression in a manner that is open, reasoned and gradual rather than abrupt.[38]

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34 J Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 *Oxford Journal of Legal Studies* 221: "the practice of dissent helps to offset the democratic deficit in the common law. The judges represent not a constituency of electors but one of competing societal values." See also LL Fuller, (n 7 above) 39–41, on fidelity to law as a condition of the legitimacy of any legal system.

35 H Lauterpacht, The Development of International Law by the International Court (1958) 66–67. See also John Alder, (n33 above) 221, 240; Justice A Scalia, "The Dissenting Opinion" (1994) *Journal of Supreme Court History* 33, 41.

36 C Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* (1928) 67–68. See also P Devlin, (n 8 above) 16: "the law advances not always through settled consensus but through the honest expression of minority views that dare to name what is legally correct even when institutionally powerless."

37 C Hughes, (n35 above) 67–68.

38 *Federation Insurance Ltd v Wasson* [1987] HCA 34; (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson and Toohey JJ). The developmental function of dissent is also recognised by R Dworkin, (n 9 above) 228–232: integrity in legal reasoning requires that the law be understood as a principled whole, and dissents contribute to that understanding by identifying inconsistencies the majority overlooks.

The most celebrated illustration of this developmental function in the common law tradition is the lone dissent of Justice John Marshall Harlan in *Plessy v. Ferguson,* 163 U.S. 537 (1896), in which the Supreme Court upheld racial segregation by a majority of seven to one. Harlan J, the sole dissenter, insisted that "our Constitution is colour-blind and neither knows nor tolerates classes among citizens." That dissent commanded no authority and bound no court. Yet fifty-eight years later, in *Brown v. Board of Education,* 347 U.S. 483 (1954), the Supreme Court overruled *Plessy* unanimously, vindicating the constitutional vision that Harlan J. had articulated alone. This example is instructive for the analysis of the *Mawarire* dissent; minority opinions that are philosophically correct do not disappear; they wait.

5.3. The Mawarire Dissent as an Embodiment of These Functions

It is against this jurisprudential framework that Justice Malaba's dissent in *Mawarire* must be assessed. In its democratic dimension, the dissent demonstrates that the newly constituted constitutional court, deciding the first major constitutional case under the 2013 constitutional order, was not a body that spoke with a single, unexamined institutional voice. Seven judges took one view, and two took a carefully reasoned, philosophically grounded contrary view. The dissenters did so with a precision that demanded engagement from any scholar or practitioner seeking to fully understand the constitutional questions the case raised. This is what a functioning constitutional court looks like.

In its adjudicative dimension, the dissent clarifies the limits of the majority's holding by identifying the textual arguments the purposive approach subordinated. Exposing the internal logical tension in an order that simultaneously declared the President in constitutional breach and authorised him to continue acting and providing future courts with the structured analytical framework, nature repository, content, conditions and restrictions of constitutional powers that the majority's more impressionistic reasoning did not supply. The dissent is, on any measure, the more technically accomplished judgment in the case.

In its developmental dimension, the dissent's position that section 58(1) of the former Constitution unambiguously permitted the fixing of election dates after parliamentary dissolution was vindicated. In substance, by the enactment of section 158(1)(a) of the Constitution of Zimbabwe, 2013, the provision was necessary precisely because the pre-existing framework had not required what the majority claimed it required. This article demonstrates in detail that the constitutional philosophy articulated by Malaba DCJ in the minority in 2013 became, across the subsequent decade of his tenure as Chief Justice, the settled doctrine of the Constitutional Court delivered under his presidency. That which he argued in dissent, he authored as the law of the land, confirming, in the phrase of

Chief Justice Hughes, that the *Mawarire* dissent was speaking to the future and that the future was indeed listening.[39]

6. The dissent in context: malaba's jurisprudence before and after Mawarire

6.1. Pre-Mawarire Antecedents: The Development of a Constitutional Philosophy

The *Mawarire* dissent did not emerge from an intellectual vacuum. It represented the application of methodological principles that Justice Malaba had developed and refined throughout his judicial career. These principles are *inter alia*, rooted in textual fidelity, institutional restraint and a sophisticated understanding of the proper distribution of constitutional authority. A review of his pre-*Mawarire* jurisprudence reveals these themes in nascent form, anticipating the fully articulated philosophy of the 2013 dissent.

In *Mike Campbell (Pvt) Ltd and Another v Minister of Lands and Another* 2008 (1) ZLR 17 (S), Justice Malaba (as he then was) demonstrated a characteristic attention to the specific provisions of the Constitution and their relationship to executive action and international law.[40] The case arose from Zimbabwe's FastTrack Land Reform Programme and concerned, among other issues, the constitutional validity of Amendment 17 to the former Constitution. Amendment 17 purported to exclude compensation claims for compulsorily acquired agricultural land and to oust the jurisdiction of courts to entertain such claims. Writing as Malaba JA, Justice Malaba employed strong language to capture the constitutional stakes, warning against the "annihilation" of the Constitution by executive or legislative overreach.

The *Campbell* case illuminates a complementary and equally important dimension of Justice Malaba's constitutional philosophy. While he would insist in *Mawarire* that courts must not act as executives, he was equally clear in *Campbell* that constitutional rights cannot be "annihilated" by executive or legislative overreach. The separation of powers on this understanding cuts both ways. Courts must respect the executive and legislative domains. Executives and legislatures must equally respect constitutional limits. Judicial restraint does not mean judicial abdication. It means courts acting within their proper sphere with appropriate fidelity to the constitutional text, while insisting with equal firmness

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39 C (n35 above) 67–68.

40 *Mike Campbell (Pvt) Ltd and Another v Minister of Lands and Another* 2008 (1) ZLR 17 (S). The case was also taken to the SADC Tribunal, which issued the landmark ruling in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

that all other branches do the same. This is the Dworkinian principle of integrity, the requirement of consistency across institutions applied at the level of constitutional governance.

The early development of Malaba's restraintist philosophy demonstrates a jurist who, long before *Mawarire*, had formed a clear, principled and philosophically grounded view of the proper institutional role of the court. A view that would find its fullest pre-Chief Justice expression in the *Mawarire* dissent and its most authoritative post-Chief Justice expression in the eleven judgments examined in section 6.2 below.

6.2. Post 2013 Implementation: The Mawarire Philosophy as Court Doctrine

Following his elevation to the office of the Chief Justice in 2017, his appointment succeeded the retirement of the late Chief Justice Chidyausiku. Malaba CJ presided over a Constitutional Court that confronted an extensive range of constitutional challenges arising from Zimbabwe's post transition environment.[41] During his tenure, his leadership of the court was characterised by an institutional emphasis on constitutional discipline, fidelity to constitutional text and the imperative of clear institutional boundaries. The *Mawarire* philosophy articulated in the minority, vindicated in the legislative and constitutional record, now embodied in the author of the dissent himself as head of the apex court, became the organising principle of a decade of constitutional jurisprudence.

6.2.1. Zimbabwe Development Party v President of the Republic of Zimbabwe CCZ 3/2018 *("ZDP"): Mandatory Constitutional Duties and the Limits of Interdicts*

This case confronted Malaba CJ with a direct attempt to deploy judicial power against the President's constitutional obligation to proclaim election dates. The court was asked to suspend the legislation pending its repeal. Writing for the court, Malaba CJ rejected both limbs of the application with an exactness that cuts to the heart of this article's central thesis. On the interdict, he held that the Constitution imposes a mandatory obligation on the President to call elections and that "no one, including the courts, has power to alter what is mandated by

41 Chief Justice Chidyausiku retired in February 2017, and Justice Malaba was appointed as Chief Justice with effect from March 2017. He thus presided over the Constitutional Court during the critical period following the constitutional transition and the 2018 elections.

the Constitution."[42] It would, on this analysis, be "unconstitutional for a Court or Judge to order the President not to call and set dates."[43]

The proposition that an interdict could restrain the President from performing a constitutionally compelled duty was rejected as a fundamental category error: "an interim interdict is not a remedy for prohibiting lawful conduct."[44] On the second limb, the demand that the court orders the repeal of the funding legislation, the line drawn is as analytically crisp as anything in the *Mawarire* dissent: "repeal of legislation is a legislative act and not a judicial act. The declaration of constitutional invalidity of legislation is the judicial act."[45] Each branch does what the Constitution assigns to it. The court does not perform legislative functions under the guise of granting relief.

The significance of *ZDP* for the argument of this article is that it demonstrates Malaba CJ applying the restraintist philosophy simultaneously against two distinct forms of judicial overreach, namely executive substitution and legislative usurpation, in a single judgment. The *Mawarire* dissent was directed primarily at the court acting as the Executive, while the *ZDP* shows that the same logic applies with equal force to the court acting as Parliament. The constitutional allocation of functions is not selective; it is, in Fuller's terms, a systematic requirement of fidelity that applies to every institutional actor in the legal order.

6.2.2. Greatermans Stores (1979) (Pvt) Ltd & Another v Minister of Public Service, Labour and Social Welfare 2018 (1) ZLR 336 (CC): Legislative Prerogative and the Limits of Judicial Policy Review

In this case, the Constitutional Court applied a restraintist judicial philosophy to social and labour legislation. The case involved employers challenging a law that retrospectively required them to pay severance packages to employees who had already been dismissed. Malaba CJ upheld the legislative competence to enact retrospective civil legislation for the "peace, order and good governance" of the country and declined the invitation to interfere with the Legislature's policy choices on the ground that the law imposed heavy financial burdens on employers.[46] Two statements in the judgment are of particular doctrinal value.

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42 *Zimbabwe Development Party v President of the Republic of Zimbabwe* CCZ 3/2018, 15.

43 *Zimbabwe Development Party v President of the Republic of Zimbabwe* CCZ 3/2018, 15.

44 *Zimbabwe Development Party v President of the Republic of Zimbabwe* CCZ 3/2018, 15; *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement and Others* 2004 (1) ZLR 511 (S) 518B-E.

45 *Zimbabwe Development Party v President of the Republic of Zimbabwe* CCZ 3/2018, 26.

46 *Greatermans Stores (1979) (Pvt) Ltd & Another v Minister of Public Service, Labour and Social Welfare* 2018 (1) ZLR 336 (CC) 335G–H, 341A.

First, on the Legislature's power to create statutory classifications, "it is for the Legislature, not the Court, to decide who is comparable and in what regard." Second, with respect to the selection of regulatory means, the choice of the most effective mechanism for achieving a legitimate legislative purpose is the prerogative of the Legislature, not the Judiciary. These propositions reflect a coherent account of institutional competence that runs directly from the *Mawarire* dissent and finds its most complete philosophical expression in Finnis's account of the constitutional allocation of authority as a specification of how the common good is to be pursued.

6.2.3. Liberal Democrats & Others v President of the Republic of Zimbabwe & Others 2018 (2) ZLR 47 (CC)("Liberal Democrats"): Constitutional Mechanisms and the Rejection of Judicial Political Engineering

This case, arising from the political upheaval of November 2017, presented the Constitutional Court with one of its most politically sensitive invitations to reshape the structure of executive power. The applicants asked the court to declare former President Mugabe's resignation invalid and to establish a "Transitional Authority" to govern the country until a political resolution was reached. Malaba CJ rejected both requests with the disciplined precision characteristic of his judicial approach. On the resignation, he held that even if invalidity were established, the legal consequence could only be restoration of the constitutional position, not the creation of a new governmental structure that existed nowhere in the constitutional text.[47] On the Transitional Authority, he was equally direct: "The Constitution of Zimbabwe, 2013 has specific provisions on how a vacancy in the office of President created by resignation must be filled." The remedy, if any, lay in those provisions, not in a judicial invention of an executive arrangement the Constitution did not authorise.[48]

The *Liberal Democrats'* judgment is the *Mawarire* philosophy tested at its most extreme. In *Mawarire*, the court was asked to direct the President on the exercise of a constitutional discretion. The objection by DCJ Malaba was that this crossed the line between judicial review and executive substitution. In the *Liberal Democrats*, the court was asked to create an entirely new form of government to act not merely as an alternative Executive but as a constitutional drafter. Malaba CJ's refusal reflects the same foundational principle expressed with a force that would have appealed even to Devlin's most exacting standards that (i) courts give

47 *Liberal Democrats & Others v President of the Republic of Zimbabwe & Others* 2018 (2) ZLR 47 (CC) 58A–F.

48 *Liberal Democrats & Others v President of the Republic of Zimbabwe & Others* 2018 (2) ZLR 47 (CC) 58A–F.

effect to the Constitution as written and (ii) they do not supplement it with solutions that the constitutional text, properly read, does not contain.[49]

6.2.4. Lytton Investments (Pvt) Ltd v Standard Chartered Bank & Another 2018 (2) ZLR 743 (CC)("Lyton Investments"): Jurisdictional Finality and the Refusal of Jurisdictional Creep

This case required Malaba CJ to apply the restraintist philosophy inward against the Constitutional Court's own jurisdictional temptations. The applicant sought to challenge a Supreme Court decision on a non-constitutional commercial matter before the Constitutional Court. In the main, the contention was that the Supreme Court's judgment was so plainly wrong as to constitute a violation of the fundamental right to equal protection. The applicants argued that this resulted in converting an ordinary error of law into a constitutional matter within the apex court's jurisdiction. Malaba CJ rejected the argument categorically. The Constitution makes the Supreme Court the final authority on non-constitutional matters. That finality is not qualified by the degree of the alleged error. A decision declared by the Constitution to be final and binding cannot at the same time be open to challenge on the ground that it violates the fundamental right to the equal protection of the law.[50] To entertain the application would be to do "what it has no power to do" using the language of constitutional rights to achieve a jurisdictional expansion the Constitution did not authorise.[51]

Lytton Investments is jurisprudentially significant precisely because the institutional overreach it resists is the Constitutional Court's own. The restraintist disposition in Malaba CJ's jurisprudence is not a tool selectively deployed against the executive or the legislature while the court expands its own authority. It applies with equal rigour to the court's own jurisdictional limits. This is, in Holmes's terms, the pragmatic wisdom of a judge who understands that judicial power, like all governmental power, must be bounded by constitutional design if it is to remain legitimate.

6.2.5. Chamisa v Mnangagwa & Ors (CCZ 21/2019) ("Chamisa"): Judicial Restraint, Evidentiary Discipline and the Sovereignty of the Electoral Will

In the unanimous judgment in *Chamisa v Mnangagwa & Ors* (CCZ 21/2019), arising from the challenge to the validity of the 2018 presidential election, Malaba CJ distilled the restraintist philosophy to its most democratic formulation. Writing

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49 P Devlin, 'Judges and Lawmakers' (Fourth Chorley Lecture) (1976) 39 *Modern Law Review* 1, 4–5, 13; Patrick Devlin, *The Judge* (1979) 14.

50 *Lytton Investments (Pvt) Ltd v Standard Chartered Bank & Another* 2018 (2) ZLR 743 (CC) 758F.

51 *Lytton Investments (Pvt) Ltd v Standard Chartered Bank & Another* 2018 (2) ZLR 743 (CC) 758F.

for a nine-member bench, he held that the applicant had failed to produce sufficient, clear, direct and credible evidence to prove the alleged electoral irregularities and dismissed the application accordingly. The most arresting passage and the one that most directly connects to the *Mawarire* philosophy is the conclusion when he emphatically ruled that "It is not for a court to decide elections; it is the people who do so. It is the duty of the courts to strive in the public interest to sustain that which the people have expressed as their will." This formulation is not rhetoric; it is a deliberate institutional statement. Just as *Mawarire* held that the fixing of election dates is an executive prerogative that courts must not supervise, *Chamisa* holds that the outcome of elections is an expression of democratic will that courts must not override on insufficient evidence. The restraint principle remains the same; only the constitutional context shifts from executive timing to popular sovereignty.

6.2.6. Mutasa & Another v Speaker of the National Assembly and Madzimure v President of the Senate (2019): Institutional Boundaries and the Refusal to Imply Constitutional Duties

Mutasa v Speaker of the National Assembly (CCZ 18/2019) and its companion case *Madzimure v President of the Senate* (CCZ 8/2019) raised the question of whether the Speaker and the President of the Senate were constitutionally obliged to investigate the legality of a political party's expulsion of its members before declaring their parliamentary seats vacant under section 129(1)(k) of the Constitution. Malaba CJ answered with a characteristically precise delineation of institutional function. The role of the Speaker under section 129(1)(k) is purely facilitative; the provision confers no quasi-judicial investigative power and imposes no duty to inquire into the internal affairs of political parties.[52] To read such a duty into the text would be to import into the legislative branch a function the Constitution assigns exclusively to the courts, precisely the form of institutional boundary-crossing that the *Mawarire* dissent identified as the central structural error of the majority's approach.

6.2.7. Denhere v Denhere & Another 2019 (1) ZLR 554 (CC): Finality, Jurisdictional Discipline and the Court's Self-restraint

Denhere v Denhere arose from an attempt to use a constitutional application to reopen a final Supreme Court decision on matrimonial property, a purely non-constitutional matter, by recasting the Supreme Court's alleged error as a violation of the right to equal protection. Malaba CJ rejected the application in

52 *Mutasa & Another v Speaker of the National Assembly & Another* 2019 (3) ZLR 744 (CC) 751A–B. See J Finnis, (n 10above) 247, on the principle that constitutional allocations of authority must be respected as conditions of the common good.

terms that directly echo *Lytton Investments* while deepening the analysis. The Constitutional Court "cannot inquire into the correctness of the decision of the Supreme Court on a non-constitutional matter,"[53] and crucially "no judicial authority can pronounce on the correctness or otherwise of decisions of the Supreme Court on non-constitutional matters."[54] The proposition that a wrong judicial decision automatically violates the right to the protection of the law was firmly repudiated. The finality that the Constitution confers on the Supreme Court is not qualified by the magnitude of the alleged error. The language of constitutional rights may not be deployed as a vehicle for disguised appeals against decisions the Constitutional Court has no jurisdiction to review.

6.2.8. The State v Chokuramba CCZ 10/2019 ("Chokuramba"): Confirmation Jurisdiction and the Protection of Coordinate Branches

While primarily known for its holding on the unconstitutionality of judicial corporal punishment, *The State v Chokuramba contains* a passage of considerable significance for this article's argument. Malaba CJ explained the constitutional rationale for the requirement that orders of constitutional invalidity made by lower courts must be confirmed by the Constitutional Court before they have final effect. The confirmation jurisdiction exists, he reasoned, to ensure that judicial review by lower courts "does not have the effect of unduly frustrating the activities of the President in the performance of his or her duties or the activities of Parliament." The constitutional design concentrates the power to issue final declarations of invalidity in the apex court precisely to protect the coordinate branches from scattered, uncoordinated judicial interference across the broader court system.

This reasoning provides a direct conceptual bridge to the *Mawarire* dissent. Where *Mawarire* was concerned with a single court crossing the line from constitutional review into executive substitution, *Chokuramba* addresses the structural risk of an uncoordinated multiplicity of courts producing the same effect through the accumulation of lower court invalidations. The confirmation jurisdiction is the constitutional mechanism that channels that risk. Malaba CJ's explanation of it reflects the systemic awareness of a jurist who understands that judicial restraint is not merely a virtue of individual judges. It is a structural imperative embedded in the court system itself.

53 *Denhere v Denhere & Another* 2019 (1) ZLR 554 (CC) 568F.
54 *Denhere v Denhere & Another* 2019 (1) ZLR 554 (CC) 569A.

6.2.9. Nyagura v Ncube CCZ 7/2019 ("Nyagura") & Nyathi v The State CCZ 16/2019("Nyathi"): Procedural Integrity and the Refusal to Usurp Lower Court Functions

These cases address the Constitutional Court's jurisdictional boundaries in the context of the referral procedure. In *Nyathi*, a referral reached the Constitutional Court without the referring Magistrate having first determined whether the constitutional question raised was frivolous. Malaba CJ declined to undertake that determination on behalf of the referring court, holding that the question of whether a referral is frivolous "is an exercise that must be carried out by the presiding magistrate." In *Nyagura*, the applicant sought direct access to the Constitutional Court to bypass an ordinary appeal, contending that the matter raised constitutional issues. Malaba CJ refused, holding that the court "can only exercise its jurisdiction in respect of matters that reach it from lower courts through the procedures prescribed by the Constitution."

The significance of these cases lies in what they reveal about the depth at which the restraintist philosophy operates. A court that polices its own jurisdictional boundaries only in high-profile cases, while permitting procedural shortcuts in routine matters, is not genuinely committed to institutional restraint. The consistency with which Malaba CJ applied the same logic of procedural regularity and jurisdictional fidelity across both landmark and routine cases is, as Fuller would recognise, itself a condition of the inner morality of law, evidence that the principle is not situationally applied but constitutively embedded in his understanding of the judicial function.[55]

6.2.10. Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Another 2020 (1) ZLR 138 (S) ("Zambezi Gas"): Textual Discipline, Statutory Interpretation and the Limits of Judicial Initiative

Zambezi Gas involved a contested interpretation of section 4(1)(d) of Statutory Instrument 33 of 2019, which introduced the RTGS dollar. The introduction of the RTGS resulted in the pegging of pre-existing United States dollar-denominated assets and liabilities to the new currency at a one-to-one rate. The central dispute was whether the pegging provision applied to judgment debts. Malaba CJ reversed the court a quo's decision on a straightforward application of the golden rule of statutory interpretation, holding that the language of section 4(1)(d) was clear and unambiguous. It applied to all assets and liabilities valued and expressed in United States Dollars immediately before the effective date. The origin of the liability in a court order was expressly not among the statutory

55 LL Fuller, *The Morality of Law* (1969) 39, 41–42, 81.

grounds of exclusion.[56] This interpretive move, returning the court to the text and refusing to read in conditions the Legislature had not enacted, reflects the same methodological commitment that animates the *Mawarire* dissent.

The more pointed jurisprudential moment in *Zambezi Gas* lies in Malaba CJ's treatment of the court a quo's separation-of-powers observation. The court below, on its own initiative and without either party raising the constitutionality of S.I. 33/19, suggested that allowing the statutory instrument to affect pre-existing court orders would violate the principle of the separation of powers. Malaba CJ dismissed this with characteristic precision. It was the opinion of the court that "There was no basis on which the court a quo found it necessary to allude to the suggested violation by the Legislature of the fundamental constitutional principle of separation of powers."[57] This rebuke is institutionally significant. A court that raises constitutional issues not presented to it by the parties commits judicial overreach, using its own constitutional anxieties to redraw the boundaries of legislative competence without the discipline of adversarial argument. The correction in *Zambezi Gas* is a direct expression of the Holmesian principle that courts must adjudicate the case before them, within the issues the parties have framed and based on the law as written.[58]

6.2.11. Sogolani v Minister of Primary and Secondary Education & Others 2020 (2) ZLR 1313 (CC)("Sogolani"): Restraint, Legality and the Maturation of a Constitutional Philosophy

Sogolani was concerned about a challenge to the compulsory recitation of a national school pledge requiring all schoolchildren to salute the national flag and affirm the words "Almighty God, in whose hands our future lies." This was done irrespective of religious persuasion. The court held that the element of compulsion, not the pledge itself, was the constitutional defect. It is in the reasoning towards that conclusion that the *Mawarire* themes resurface with clarity. On the legality question, Malaba CJ held that the pledge introduced by ministerial directive without legislative authorisation could not constitute a "law of

56 *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Another* 2020 (1) ZLR 138 (S) 143F–144D.

57 *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Another* 2020 (1) ZLR 138 (S) 143D–E.

58 *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Another* 2020 (1) ZLR 138 (S) 143D–F. Holmes, (n 16 above) 464–465, famously cautioned that "[t]he life of the law has not been logic; it has been experience", but that aphorism does not license courts to depart from unambiguous statutory text by appeal to notions of what the law "ought" to say.

general application" capable of limiting fundamental rights under section 86(2) of the Constitution of Zimbabwe, 2013.[59]

The respondents' attempt to justify the pledge by reference to the Preamble to the Constitution was rejected through a comparative taxonomic analysis that classified Zimbabwe's current Preamble as ceremonial and therefore incapable of serving as a source of authority for limiting Chapter 4 rights.[60] This is the *Mawarire* logic restated in a new context. Constitutional outcomes must be grounded in the operative provisions of the constitutional text, not in its aspirational framing, however nobly expressed. As Fuller would note, the rule of law requires that the law invoked to limit rights must be genuinely a "law," publicly promulgated, clearly authorised, and operative, not a ministerial directive elevated to legal status by judicial indulgence.

On the question of religious belief, Malaba CJ applied an equally disciplined restraint, holding that it is not for a court to assess the correctness of a religious belief or to second-guess the believer's understanding of the doctrines of his or her faith. Further, Malaba CJ argued that "to do so would be tantamount to the substitution of the court's conscience for that of the individual."[61] The structural parallel with *Mawarire* is unmistakable. Whether the primary decision maker is the President of the Republic or the individual human conscience, courts are not authorised to substitute their judgment for that of the designated repository of the power or right in question. This is the Finnis principle applied at the level of fundamental human dignity. The individual's practical reasonableness in matters of religious conscience is, within the constitutional framework, as inviolable as the President's constitutional discretion in matters of electoral timing.

The remedy crafted in *Sogolani* is itself an expression of judicial minimalism consistent with the restraintist philosophy traced throughout this article.[62] Rather than striking down the pledge in its entirety, the broad relief the applicant sought, the court ordered only that the education authorities reformulate the pledge. This reasoning by Malaba CJ was that this would permit conscientious objectors to be exempted from the specific acts of flag salutation and affirmation of God's

59 *Sogolani v Minister of Primary and Secondary Education & Others* 2020 (2) ZLR 1313 (CC) 1352.

60 *Sogolani v Minister of Primary and Secondary Education & Others* 2020 (2) ZLR 1313 (CC) 1346B–1351E.

61 *Sogolani v Minister of Primary and Secondary Education & Ors* 2020 (2) ZLR 1313 (CC). The court drew support from *Bijoe Emmanuel and Ors v State of Kerala and Ors* 1986 SCR (3) 518; *United States v Ballard* 322 US 78 (1944); and *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* 2012 (2) ZLR 392 (S). For the philosophical grounding of this restraint in respect of individual conscience, see J Finnis, (n 10) 85–90, on the inviolability of the individual's practical reasonableness.

62 *Sogolani v Minister of Primary and Secondary Education & Others* 2020 (2) ZLR 1313 (CC) 1351F–1352C.

existence. To have eliminated the pledge wholesale would have infringed the positive religious freedom of schoolchildren who embraced its terms, trading one constitutional wrong for another. The court intervened only to the extent necessary to vindicate the right, in a remedial economy that mirrors the institutional temperament of the *Mawarire* dissent. This reflects the Dworkinian commitment to law as integrity. The remedy, like the holding, must be consistent with the constitutional framework as a principled whole.

7. Conclusion: The Brooding Spirit Fulfilled

Chief Justice Malaba's retirement in May 2026 marks the conclusion of a judicial career of exceptional intellectual distinction and constitutional significance. Across more than four decades on the bench. From the magistracy to the apex court of the Republic, he brought to the judicial function a combination of textual precision, institutional clarity and philosophical depth. This has enriched Zimbabwe's constitutional jurisprudence in ways that will endure long after the specific cases he decided have been absorbed into the fabric of the legal order. The central argument of this article is that this contribution is most fully visible in the consistent, coherent and philosophically grounded doctrine of judicial restraint that he articulated, developed and applied across the whole of his judicial career. A doctrine that found its most celebrated and jurisprudentially important expression in his dissenting opinion in *Mawarire v Mugabe NO & Others* 2013 (1) ZLR 469 (CC).

This article has argued on the basis of a close analysis of the dissent in its philosophical context that Justice Malaba was correct in the *Mawarire* minority. The constitutional text of section 58(1) of the former Constitution, on any disciplined reading, was unambiguous in conferring a discretionary power on the President. The majority's purposive approach, whatever its attractions as a response to the immediate constitutional dilemma, involved reading into the text a mandatory duty it did not contain and granting a remedy that crossed the fundamental constitutional boundary between judicial review and executive substitution. Hart's account of legal validity, Fuller's requirement of fidelity, Devlin's principle of judicial restraint, Dworkin's demand for integrity, Finnis's insistence on the authority of constitutional allocations and Holmes's pragmatic sensitivity to institutional competence all these canonical jurisprudential frameworks, properly applied, support the Malaba dissent and challenge the majority.

The article has further argued that the correctness of the *Mawarire* dissent is not merely a matter of abstract jurisprudential analysis but is demonstrated by the subsequent history of the law. Eleven post-2013 judgments, examined in detail in section 6, reveal a Constitutional Court under Malaba CJ's presidency that applied the same structural principles of fidelity to constitutional text, respect for institutional boundaries, and judicial minimalism in the exercise of remedial

authority across vastly different legal contexts. The consistency of this application is itself philosophically significant. It is the consistency that Dworkin identified as a condition of law as integrity and that Fuller identified as a condition of the inner morality of law. What Justice Malaba argued in dissent in 2013, he authored as the doctrine of a unanimous Court in the years that followed. In Chief Justice Hughes's phrase, the *Mawarire* dissent was an appeal to the brooding spirit of the law, and the brooding spirit answered.[63]

As Zimbabwe's judiciary enters a new era, the questions that *Mawarire* raised remain live and contested. How far may courts review executive discretion before they become parallel executives? When does purposive constitutional interpretation become judicial legislation? What are the conditions under which judicial intervention in politically charged contexts enhances rather than undermines constitutional legitimacy? Malaba CJ's jurisprudence does not answer these questions with finality. No jurisprudence could, but it provides an enduring and philosophically sophisticated resource for navigating them. His legacy is not merely the decisions he delivered. It is the method he modelled, the discipline he maintained and the principle he defended. Malaba CJ demonstrated this, in the majority and in the minority, in landmark and in routine cases, across a judicial career of remarkable coherence and constitutional commitment. This Special Issue, honouring four decades of judicial service, is a fitting occasion to recognise that contribution in full.

63 C Hughes, (n35 above) 67–68.

AN ANALYSIS OF THE REALISATION OF ACCESS TO JUSTICE FOR CHILDREN UNDER CHIEF JUSTICE HON. MR. MALABA'S JURISPRUDENCE

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Chief Justice Malaba's jurisprudence is characterised by a careful balance between the exigencies of law and circumstance, in which both restraint and resolve were required. As he transitions into the next phase, a review of his tenure should neither be an uncritical acclaim nor a surface-level dismissal. Conversely, reviews should dissect a tenure that was tremendously shaped by, and in turn shaped, the evolving demands of justice.

Abstract

In 2016, the Constitutional Court delivered a judgment that annulled child marriages. In another decision, the Court banned judicially sanctioned corporal punishment. Moreover, the jurisprudence has considered 'hard cases' such as the one involving the legal age of sexual consent. These non-exhaustive cases, though not systematically presented, nonetheless create a jurisprudential tipping point worth an evaluation. Cognisant of this, the article is our modest contribution in honour of the Chief Justice's legacy. Specifically, it analyses jurisprudential components of the right to access to justice for children enunciated under the Constitution of Zimbabwe, 2013. The article evaluates the 'internal logic' of the jurisprudence and, respectively, the judiciary's institutional practices over the years. Our conceptualisation of the jurisprudence is that it consolidates constitutional supremacy, clarifies the scope of children's (human) rights enforcement, and upholds their justiciability. Specifically, this article opines that courts have bolstered children's rights on several occasions. However, the jurisprudence has not yet metamorphosed into a comprehensive, child-centred conceptualisation of access to justice. Arguably, there is a visible apparent disjuncture between fidelity to the law and its (un)responsiveness to children's lived circumstances. Essentially, while courts have recognised children as

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bearers of universal and inalienable rights and freedoms, their participation in the justice system has reportedly remained largely mediated through representatives, thereby limiting procedural adaptations. Moreover, access to justice has often been secured through formal ways without corresponding substantive justice. Furthermore, using doctrinal, critical and comparative methods, the contribution evaluates key precedents, the constitution and institutional reforms, inter alia, introduced during Chief Justice Hon. Malaba's tenure. The article demonstrates the disjuncture between legal recognition (law in books) and procedural implementation (law in action). The contribution argues that Malaba CJ's jurisprudence favoured a model of principled judicial restraint which potentially stabilised constitutional interpretation while cautiously engaging with transformative imperatives. The article concludes modestly that Chief Justice Hon. Malaba's legacy, in part, is characterised by the consolidation of normative and institutional foundations of children's access to justice. This foundation is significant. It creates conditions for a deeper phase of transformation in which child-centred procedural justice can be more fully realised. In this sense, conceptually, the jurisprudence is not an endpoint, but a critical stage in the evolution of children's rights in Zimbabwe.

Keywords: *Access to justice, children, fair trial, institutional reform, jurisprudence*

1. Introduction

The enactment of the Constitution of Zimbabwe, 2013, herein referred to as the Constitution, marked an important moment in children's rights.[5] Moyo rightly postulates that "the new Constitution…calls for a change of perspective as it portrays children as being entitled to protection, provision and participation rights. It also constitutionalises several children's socio-economic rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct result of recent legal developments at the international level".[6] The Constitution shifted the focus; children are no longer passive subjects of welfare but bearers of a myriad of justifiable rights and freedoms.[7] Section 81 of the Constitution,

5 A Moyo *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2022) 243; L Sloth-Nielsen & B Mushohwe 'Access to justice for children in Zimbabwe' in *Gender, Poverty and Access to Justice* (2020) 15-33; W Maraire, *Enhancing access to justice in Zimbabwe: an empirical exploration of integrating socially appropriate dispute resolution to overcome barriers within the formal justice system* (2024), Unpublished PhD Thesis, University of Cape Town, Faculty of Law, Department of Private Law. http://hdl.handle.net/11427/40726.

6 Ibid. See also, A Moyo 'The Judiciary and Children's Rights' in J Tsabora *The Judiciary and the Zimbabwean Constitution* (2022) 230.

7 I Magaya &R Fambasayi 'Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe' (2021) *De Jure Law Journal* 17 http://dx.doi.org/10.17159/2225-7160/2021/v54a2.

analysed in its context, enjoins that children are entitled to protection, participation, and remedies.[8] This constitutional shift creates a corresponding duty on the courts since rights must be translated into practice.[9] Therefore, access to justice is the most practicable and appropriate vehicle for protecting human (children's) rights.[10] For the most part, Chief Justice Hon. Malaba's

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8 The non-exhaustive list of constitutional provisions includes s 19 (under the National Objectives though unbinding, requires the State to adopt policies ensuring children's welfare and emphasises family care, protection from abuse and access to education and health services); s 7 & 75 (reinforces children's right to education); s 27 requires the State to protect and support the family. It is important because children's rights are often exercised within family structures); s 48 as read with the Death Penalty Abolition Act, Act No. 4 of 2024 (right to life); s 50 (children must be treated differently from adults in detention and must be released or detained only as a last resort); s51: right to human dignity (protects children from degrading treatment); s52: right to personal security (protects against violence, abuse and exploitation); s53: freedom from torture or cruel, inhuman or degrading treatment (critical safeguard against abuse of children). Section 56 on equality and non-discrimination (ensures children are not discriminated against; ss 58 & 59: freedom of assembly and association (applies to older children, especially in civic participation); ss 60 & 61: freedom of conscience and expression (relevant to children's evolving capacities and participation rights); s76: right to health care (includes access to basic health services); s80: rights of women (important for the protection of girl children. For example, against forced marriage); s83: rights of persons with disabilities (protects children with disabilities from neglect and exclusion); s85: enforcement of fundamental rights (allows children (or those acting on their behalf) to approach courts); s243: Zimbabwe Human Rights Commission (ZHRC) (mandated to protect and promote human rights, including children's rights); s252: Zimbabwe Gender Commission (indirectly supports girl children's rights).

9 Section 2 declares the Constitution the supreme law meaning any law or conduct inconsistent with it is invalid. This mandates courts to actively enforce constitutional rights and not treat them as symbolic. Section 44 imposes a duty on the State and every person, including the judiciary, to respect, protect, promote and fulfil rights. This provision expressly turns rights into enforceable obligations. Section 46 requires courts to give full effect to rights, interpret rights in light of international law and treaties and adopt interpretations that promote democratic values. The Constitution directly instructs judges how to translate rights into practice. Section 85 gives courts power to hear rights violations, grant appropriate relief, allows actions to be brought by the affected person, anyone acting in their interest and public interest litigants. The Constitution ensures courts are able to provide remedies and make children's rights real. In terms of s165 Courts must safeguard human rights and freedoms, ensure justice is done to all and be independent and impartial. This provision ties judicial function directly to rights protection. Section 167 gives the Constitutional Court the authority to determine constitutional matters, ensure laws and conduct comply with the Constitution and establishes the institutional mechanism to enforce (children's) rights and freedoms at the highest level. Section 69 guarantees access to courts and justice, In the absence of the right to a fair hearing, fundamental rights and freedoms cannot be meaningfully enforced.

10 Maraire (n 1 above).

leadership exemplifies this strand.[11] The defensible argument is that children's rights jurisprudence contains evidence of constitutional transformation.[12] Therefore, in light of the foregoing, the sub-jurisprudential theme of children's access to justice becomes pivotal, especially if discussed under the aegis of the rule of law as framed by the Chief Justice.[13] As mentioned above, access to justice is a mechanism through which children's rights can be realised.[14] Therefore, if absent, then the fundamental freedoms and rights enshrined in laws become hollow and unrealisable.[15] The article examines how the judiciary under the Chief Justice's leadership discharged this important responsibility. To accomplish this, superior court jurisprudence, procedural doctrine, and institutional practice are analysed to ascertain whether they facilitated or limited access to justice for children during the period under review. While the question of whether children's rights have been recognised is relevant, the intent here is to evaluate whether the laws are designed to enable children to effectively realise those rights.

The main argument advanced in this contribution is that while the jurisprudence of Chief Justice Hon. Malaba has strengthened the legal and institutional foundations of access to justice, it has not consistently translated these foundations into a fully child-centred framework.[16] The Court has teased out constitutional principles, expanded formal access through standing provisions and affirmed the justiciability of rights.[17] Nevertheless, the judiciary has been more cautious in developing procedural innovations and doctrinal approaches that directly address children's position within the legal system. As a result, a gap

11 V Chenzi 'Silent victims of the law: Children and the legal system in postcolonial Zimbabwe' in *Discrimination and Access to Justice in Africa* (2025) 44-59.

12 C Dziva & D Mazambani 'The constitutional Court ruling against child marriages in Zimbabwe: a landmark decision for advancing the rights of the girl child' (2017) Vol 33 (1) *Eastern Africa Social Science Research Review* 73-87.

13 J Sloth-Nielsen 'Child Marriage in Zimbabwe: The Constitutional Court Rules No' (2016) *Int'l Surv. Fam.* L. 537; 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) Vol 20 (1) *African Human Rights Law Journal* 181-205.

14 See generally, R Fambasayi 'The constitutional protection of child witnesses in Zimbabwe's criminal justice system' (2019) Vol 32 (1) *South African journal of criminal justice* 52-75.

15 A Grandjean 'No rights without accountability: Promoting access to justice for children' (2010) *Legal empowerment: Practitioners' perspectives* 265.

16 Magaya & Fambasayi (n 3 above).

17 A Moyo 'Limitable and Non-Derogable Rights, Judicially Sanctioned Whipping and the Future of Punishment in All Setting in Zimbabwe' (2020). R Fambasayi & A Moyo 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' (2020) Vol 36 (1) *South African Journal on Human Rights* 36 25-48.

persists between constitutional recognition and practical realisation.[18] This gap is most demonstrated in the systemic reliance on adult-mediated participation, the limited development of child-sensitive procedures and the uneven application of the best interests principle as a determinative standard.[19] While children are constitutionally recognised as rights holders, their ability to engage with and benefit from the justice system remains constrained by structural and procedural limitations.[20] The article proceeds on the basis that access to justice must be understood in both procedural and substantive terms.[21] Procedural access concerns the ability to approach the courts and to participate in legal processes.[22] Substantive access concerns the effectiveness of outcomes in vindicating rights.[23] For children, these dimensions are inseparable.[24] A system that allows formal entry but fails to accommodate their vulnerability, dependency and evolving capacities does not achieve meaningful justice.

True to the vision of this Special Issue, it is fitting to doctrinally analyse selected legal provisions and precedents, supported by critical and comparative approaches. The article dissects themes such as standing, fair trial rights and the interpretation of children's rights *inter alia*. In some respects, aspects of the comparative method are invoked. Structurally, the article proceeds as follows. The subsequent section provides the conceptual and theoretical scaffolding that underpins access to justice for children. That section is followed by an analysis of the normative legal framework on children's rights in Zimbabwe. The methodology identifies and analyses selected key themes as the mainstays of Chief Justice Malaba's jurisprudence. The scope of analysis spans procedural justice and institutional practice. Having conducted a comparative analysis, the jurisprudence is then synthesised to inform the Chief Justice's rule-of-law legacy. Importantly, we conclude by examining the probable consequences of the

18 A Moyo 'Sexual consent laws and the child's right to freedom from sexual exploitation in Zimbabwe: Unpacking the 'polarising' legacy of Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs & Others' (2024) Vol 24 *African Human Rights Law Journal* 743-771.

19 A Moyo 'Reconceptualising the 'paramountcy principle': beyond the individualistic construction of the best interests of the child' (2012) Vol 12 (1) *African Human Rights Law Journal* 142-177.

20 Magaya & Fambasayi (n 3 above). S Vengesai *'Juvenile Justice in Zimbabwe: A Contradiction between Theory and Practice: An Analysis of Zimbabwe's Compliance with Article 37 and 40 CRC and Article 17 ACRWC*' Unpublished LLM Thesis, Tilburg University (2014).

21 P Stancil 'Substantive equality and procedural justice' (2016) *Iowa L. Rev*. 102 1633.

22 LB Solum 'Procedural justice' (2004) 78 S. *CAl. I. reV*.181.

23 DL Rhode 'Access to justice: Connecting principles to practice' (2003) Vol 17 *Geo. J. Legal Ethics* 369.

24 Maraire (n 1 above).

jurisprudence and leadership specifically for the future development of child-centred access to justice.

2. Framework for analysis

What then is access to justice? While several definitions have been proffered, access to justice is generally conceptualised as the ability to approach courts for redress.[25] However, this definition is incomplete.[26] The root of the problem is that while it rightly captures entry into the legal system, it is silent on the quality of justice delivered.[27] This omission is serious since the distinction between formal entry and actual justice realised is critical. For example, court processes that allow children[28] represented by guardians or representatives may be exclusionary. The implication is that children may not be able to participate meaningfully. Access to justice must therefore be understood as comprising two interrelated dimensions: procedural accessibility and substantive effectiveness.[29] Procedural accessibility concerns the availability, affordability and fairness of legal processes. It includes the right to approach a competent, independent and impartial tribunal, as guaranteed under S 69 of the Constitution of Zimbabwe, 2013. It also encompasses broader standing provisions under S 85, which allow individuals to approach the courts in their own interests, on behalf of others, or in the public interest. These provisions align with international standards such as Article 14 of the International Covenant on Civil and Political Rights (ICCPR)[30]

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25 DL Rhode *Access to justice* (2004).

26 F Francioni *Access to justice as a human right* (2007).

27 Ibid.

28 Per S 78 of the Constitution, a person who has not attained the age of 18-years is a child or minor in legal terms.

29 Magaya & Fambasayi (n 3 above).

30 Adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI)https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. Article 14 of the ICCPR, which is germane to the present inquiry, provides thus:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

and Article 26 of the African Charter on Human and Peoples' Rights,[31] both of which recognise the right to a fair hearing. We argue that a formal declaration of freedoms and rights is inadequate; it must be complemented by effective practical implementation.[32] Thus, substantive effectiveness in this context would require that legal (including institutional) processes produce outcomes that vindicate rights in a manner consistent with children's vulnerability, dependency, and development status.[33] International law (including international and regional child rights mechanisms) supports this interpretation, particularly the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).[34] These instruments emphasise access to legal processes, the provision of effective remedies, the right to be heard and the best interests of the child as a primary consideration. Moreover, Article 12 of the CRC guarantees the child's right to express views freely in all matters affecting them. In contrast, Article 4 of the ACRWC buttresses the centrality of the best interest's principle. Accordingly, these laws enjoin that access to justice for children must be participatory and outcome oriented.

The Zimbabwean 2013 Constitution embodies these international commitments.[35] Under S 81, children are rights holders. This provision enunciates, among other things, that children must be protected from abuse, have access to legal representation and have the right to be heard. When it comes to

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

31 https://au.int/en/treaties/african-charter-human-and-peoples-rights.

32 J Tasioulas *Minimum core obligations: Human rights in the here and now* (2017).

33 Remedies for Rights Violations https://www.un.org/esa/socdev/enable/comp103.htm

34 The UN Committee on the Rights of the Child is instrumental.

35 See for example, sections 12, 46, 34, 327, 326 of the Constitution and the International Treaties Act [*Chapter 3:05*].

constitutional interpretation, courts are mandated when interpreting the Declaration of Rights, to take into account international law and all treaties and conventions to which Zimbabwe is a party.[36] The interpretation provision creates a causal link between domestic law (internal or endogenous) and international (exogenous) children's rights obligations. However, despite this apparent legal alignment, a gap exists in practice.[37] The law often secures procedural access in formal terms while leaving substantive responsiveness underdeveloped or unrealised. The result is formal compliance without transformative societal impact. Moreover, children can access the courts indirectly, even though the law may consistently fail to adapt to their specific needs. Therefore, the concept of 'child-centred constitutionalism' may address this inherent limitation. It requires that courts 'centre' the child in legal analysis. The concept extends beyond recognising children as rights holders. Specifically, it requires the development of procedures, evidentiary rules and remedies that reflect children's evolving capacities and particular vulnerabilities. For instance, the best interest's principle, entrenched in section 81(2) of the Constitution, must therefore operate as a substantive standard guiding judicial outcomes rather than a general interpretive aid.

Furthermore, transformative constitutionalism resonates with the above view, as it sees the Constitution as an instrument of social change.[38] Under this theory, courts should be active participants in transforming society.[39] Arguably, the 2013 Zimbabwean Constitution contains transformative aspirations through its emphasis on human dignity (S 51), equality and non-discrimination (S 56) and social justice. In children's parlance, the import of the Constitution is that it mandates courts to move beyond formal equality and adopt differentiated approaches that account for structural disadvantage. Therefore, the jurisprudence of the Chief Justice sits within this continuum. In principle, as stated above, there is a clear commitment to constitutional supremacy and the rule of law, as espoused in sections 2 and 3 of the 2013 Constitution. Moreover, the Chief Justice (the judiciary) indicates a preference for doctrinal clarity, procedural compliance and institutional stability.[40] Even though the extant jurisprudential

36 Section 46 (1)(c) of the Constitution of Zimbabwe, 2013.

37 M Mhaka-Mutepfa, JG Maree & G Chiganga 'Towards respecting children's rights, obligations and responsibilities: The Zimbabwean case' (2014) Vol 35 (3) *School Psychology International* 241-252.

38 H Klug 'Constitution making and social transformation' in *Comparative Constitution Making* (2019) 68.

39 JP Langa 'Transformative constitutionalism' (2006) Vol 17 (3) *Stellenbosch Law Review* 351-360; KE Klare 'Legal culture and transformative constitutionalism' (1998) Vol 14 (1) *South African Journal on Human Rights* 146-188.

40 The question whether this amounts to orthodox legal formalism or a sui generis form of jurisprudence that integrates other non-juridical variables, looms large and is beyond the scope of this contribution.

strand may strengthen legal certainty, there are concerns that it may also circumscribe the extent to which courts engage in comprehensive and child-sensitive constitutional interpretation. The procedural justice theory is another analytical approach whose outstanding feature is that it emphasises fairness in the *process* rather than *outcomes* alone.[41] For minors, justice delivery is as important as the outcome of the case. Consequently, participation and legitimacy can be undermined if justice processes are complex, intimidating or inaccessible. International children's rights instruments, like the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, mentioned previously, mainly reiterate the need for child-friendly procedures, simplified language, in-camera hearings, and other protective measures to prevent secondary victimisation.[42]

When these instruments are read cumulatively, a consistent evaluative standard emerges. The argument is that a system that genuinely secures access to justice for children must do the following. It must enable their direct or meaningful participation, adapt procedures to their age and development stage, provide effective remedies that reflect their best interests and integrate international children's rights standards into domestic adjudication. The foregoing analysis provides the basis to assess the Chief Justice's jurisprudence. The analysis assesses whether the structure and operation of the legal system enable children to exercise their rights and freedoms in practice.

3. Normative and legislative framework governing children's rights

The protection of children's rights in Zimbabwe rests in a multi-layered normative framework comprising the Constitution, precedent, statutes and international law. This framework is, on its face, comprehensive. It recognises children as rights holders and provides multiple legal avenues for protection and enforcement. The germane question, however, is whether the system is internally consistent and capable of enabling effective access to justice for children. At the top of this framework is the Constitution, which marks a decisive normative shift from a welfare-based to a rights-based approach.[43] However, S 81 of the Constitution speaks directly to children's rights. It confers children a range of rights, including the right to equal treatment before the law, protection from economic and sexual exploitation, access to education and healthcare and the right to legal representation in both civil and criminal proceedings affecting them.[44] Buttressing children's rights is , s 81(2) of the Constitution which provides for the cardinal

41 Italicisation is for emphasis.
42 Adjective law tries to implement these.
43 Moyo (n 1 above) 228.
44 Ibid.

principle that the child's best interests are paramount in every matter concerning the child.[45] The constitutional consequences of this provision are clear. It is that courts charged with effectuating the constitutional obligations under s 81 must treat subsection 2 peremptorily when deliberating on issues involving children.

Furthermore, as is the norm, the Constitution should be read contextually, purposively, and in many other ways. The point is that children are rights holders under Chapter Four of the Constitution, in general, and specifically under s 81. The holistic reading, as espoused in jurisprudence, supports this. In this light, children enjoy the S 56 of the Constitution, right to equality and non-discrimination, and S 51 protection of human dignity, as expanded on in decisional law such as *Chokuramba*.[46] Moreover, children's fair trial rights are enshrined in s 69 of the Constitution which entitles them the right to a fair hearing within a reasonable time before an independent and impartial court. Furthermore, an essential feature of the Constitution is a liberalised standing provision. Unlike its predecessor under the defunct old constitution, section 85 of the Constitution of the Constitution of Zimbabwe, 2013 has been interpreted broadly and liberally as it pertains to standing. This provision allows private individuals and entities to approach the courts on behalf of vulnerable groups, including children to get legal redress. As mentioned above, children's rights adjudication is further enriched via the international law pathways recognised under the Constitution. Therefore, there is a strong normative foundation for children's rights. Among other things, the Constitution and statutes codify principles of child protection and their participation. The Constitution seeks to achieve both formal and substantive equality, with the latter being of extreme social-transformative importance. Notwithstanding, while constitutional protection is causal to effective access to justice, justice delivery entails that laws should be implemented through formal court processes or other appropriate means.

Furthermore, Zimbabwe has assumed certain obligations by virtue of its status as a state party to international human rights laws that affect the substantive content and scope of children's rights domestically. One such example is the Convention on the Rights of the Child (CRC), which is hailed as the principal instrument on children's rights. This Treaty establishes four guiding principles of (i) non-discrimination (Article 2), (ii) the best interests of the child (Article 3), (iii) the right to survival and development (Article 6) and (iv) the right to participation (Article 12). These four cardinal principles collectively define the scope of access to justice for children. Specifically, Article 12 of the CRC enjoins that children be heard in any judicial or administrative proceedings affecting them. This provision goes beyond protection and affirms the child's agency within legal processes. The

45 Magaya & Fambasayi (n 3 above).
46 *S v Chokuramba* (CCZ 10-2019).

African Charter on the Rights and Welfare of the Child (ACRWC, Children's Charter) buttresses and contextualises these principles within the African Human Rights System.[47] Article 4 of the ACRWC mirrors the best interests standard in the CRC, while other provisions address harmful cultural practices,[48] child labour, and juvenile justice. The Children's Charter is especially significant in addressing socio-cultural factors that affect children's access to justice in African contexts, including Zimbabwe. However, international law does not operate automatically within domestic law. Its effectiveness depends on incorporation and liberal and purposive adjudication. For instance, as previously mentioned, S 46 of the Constitution creates a mechanism for this integration by requiring courts to take international law into account when interpreting constitutional rights. The interpretation provision has the potential to deepen the content of children's rights and to guide courts towards child-sensitive interpretations. The critical issue, however, is the extent to which courts actively rely on these instruments in practice.

Despite being party to several international children's rights instruments, at the national level, there exists myriad legislation on child law. The premier law is the Children's Act [*Chapter 5:06*] as amended. This Act provides for, among other things, the care, protection and supervision of children, including provisions on guardianship and state intervention. Moreover, there is sectoral legislation to bolster child protection such as, the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and the Criminal Procedure and Evidence Act [*Chapter 9:07*]. These two statutes apply to children in conflict with the law and child victims of crime.[49] Also, the Domestic Violence Act [*Chapter 5:16*] provides mechanisms to protect children against abuse within the home. However, while these legislative measures are largely progressive, they are nonetheless subject to significant structural limitations. For example, it has been argued that some components of the Children's Act, specifically, still reflect a welfare-oriented approach that predates the 2013 Constitution. The argument is that the Act does not fully align with the rights-based model established under S 81. Contemporary children's rights standards favour an approach that views children as autonomous rights-holders rather than as objects of welfare. Therefore, from the foregoing analysis, one can deduce the apparent disjuncture between law in action and law in books. That is, the difference between constitutional goals and the observable implementation gaps on the ground.

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47 African Charter on the Rights and Welfare of the Child, Addis Ababa, African Union (1990); DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) Vol 10 *Int'l J. Child. Rts* 157.

48 See generally, E Durojaye, Nabaneh & J Bond (eds) *Harmful Practices and Human Rights: An International Perspective* (2025).

49 These must be read together with the Constitution, which in essence, domesticates extant international law.

Moreover, the implementation is amplified by the fragmentation that characterises child law. Of note is that children's issues are addressed by multiple Acts, often with limited coordination. This is detrimental to access to justice, creates procedural uncertainty, and increases the burden on minors seeking to enforce their rights and freedoms. It should also be emphasised that children already face insurmountable hurdles due to their age, dependency on their parents and limited legal knowledge. Thus, such complexity may be prohibitive. As such, procedural law (such as the Criminal Procedure and Evidence Act [*Chapter 9:07*] presents an additional area of concern. While the 2013 Constitution guarantees access to courts, the procedural mechanisms through which children can exercise this right remain underdeveloped. There is appropriate legal regarding standing, representation and participation. While legislative and practical measures have been taken, children still depend heavily on parents, guardians or civil society organisations to invoke their rights.

There is a disjuncture between theory and practice regarding children's rights. On one hand, the 2013 Constitution and international law establish a progressive framework for children's rights. However, the legislative misalignment, procedural gaps and institutional fragmentation limit the effectiveness of this framework in securing access to justice. Within this context, the role of the judiciary becomes the 'oxygen' to borrow from the Chief Justice's conception of the rule of law. Though Courts are interpreters of law, they are also agents of constitutional alignment. The judiciary has the authority to harmonise legislation with constitutional standards, to develop common law principles in line with rights,[50] and to give effect to international obligations. The extent to which the judiciary has exercised this function under the leadership of Chief Justice Malaba is therefore central to the analysis that follows.

4. Dissecting jurisprudence and children's access to justice

An analysis of children's access to justice under the leadership of Chief Justice Malaba extends beyond isolated precedent. On the contrary, it should be coupled with mapping a pattern of reasoning across the jurisprudence. The objective here is to determine how the judiciary has approached the interrelationship between constitutional rights, procedural doctrine and the lived circumstances of vulnerable groups, particularly children. The starting point is the Court's institutional posture. The jurisprudence has consistently emphasised constitutional supremacy, as entrenched in S 2 of the Constitution and the rule of law as a foundational value under S 3. While jurisprudence is not plain mechanical reasoning, it nonetheless contains traces of legal formalism, aspects

50 Section 46 (2) of the Constitution of Zimbabwe, 2013.

of realism, and critical approaches. For instance, while some of the contentious issues that have come before the Constitutional Court may have necessitated dissent, the Court has leaned toward consistency, predictability, and fidelity to doctrine. This is a contestable point. For now, the bottom line, though, is that the Court plays an important role in an evolving, open, and democratic polity.

Moreover, as a final arbiter, the Constitutional Court has had to rule on certain conduct or practices. The case of *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs CCZ 12/15* is *a locus classicus*. The Court annulled laws that permitted child marriage. The Court relied on S 78 (marriage rights), read conjunctively with S 81 (children's rights), and other constitutional provisions, as well as international obligations under the CRC and the African Children's Charter. The *Mudzuru* case creates a strong bond between the Constitution and international law, as mandated by S 46 and other provisions mentioned elsewhere in the article. It also shows the Court's capacity to produce progressive outcomes where doctrinal pathways are clear.

However, a pattern emerges beyond *Mudzuru*. The jurisprudence appears circumscribed to established procedures rather than reconstituting them to accommodate children's specific position.[51] This argument may be true when it comes to standing, participation and procedural fairness.[52] Even though S 85 of the Constitution confers broad standing and allows litigation in the public interest and on behalf of vulnerable persons, the Court has arguably treated standing as a matter of legal entitlement rather than a mechanism to bolster children's direct participation. Resultantly, children's access to the courts remains largely mediated by majors. The technique indicates an underlying conception of vulnerability. In *Mudzuru*, the Court correctly acknowledged that children are among the "weak and vulnerable" members of society who often lack the capacity to approach the courts on their own. This has contributed to an expanded version of standing. Conversely, Courts should shun approaches that filter children's voices through representatives rather than directly incorporate them into judicial proceedings. The CJ's jurisprudence is a giant leap forward, but should be seen as a starting point, as more developments are expected.

For contextualisation and completeness, the judiciary's approach to procedural rights as mandated by the Constitution is dissected. Among other themes, we evaluate section 69 of the Constitution, which enunciates the right to a fair hearing. The import of the section is that there is a constitutional right to be heard within a reasonable time by an independent and impartial court, tribunal or other forum. In its jurisprudence, the Constitutional Court has conceptualised section

51 Moyo (n 1 above).
52 Ibid.

69 as a corollary of the rule of law and human rights. Be that as it may, there are practical challenges that arise in its implementation. Part of the reason could be that, the jurisprudence has yet not been systematically adapted to speak to the specific needs of children, to mention but a few, simplified procedures, child-sensitive evidentiary rules and mechanisms for direct participation. In practice, insufficient attention to these considerations can severely restrict the realisation of access to justice. The approach to interpretation is key here, as it significantly influences access to justice outcomes. As previously mentioned, the extant jurisprudence seems to favour a textually grounded and 'limited' approach to constitutional interpretation, save in *Mudzuru*. In that case a liberalised and purposive interpretive approach was used. However, the default interpretive approach prizes the wording used in legal instruments such as the Constitution, the construction of legal provisions and certainty. In most matters except for some children's rights ones, the jurisprudence has tended to avoid broad-based or overly 'creative' legal interpretations that might cause legal uncertainty. Cognisant of its merits, the approach may therefore constrain the development of suitable doctrines that can promote child-centred justice as informed by the Constitution.

In light of the above, the construction of section 81(2), that is, the best interest of the child principle, of the Constitution is telling. While this cardinal principle has been invoked, its application nonetheless has not always been effectively fully subsumed into the jurisprudence as a decisive factor. Conversely, the principle has served as a generic interpretative tool rather than a normative requirement to meaningfully influence procedural or remedial outcomes in all matters involving children. Thus, the approach may be incongruent with the tenor of section 81 (2) and therefore fall foul of the requirements enunciated therein. Treating the best interests standard as supplementary rather than determinative is deleterious since it cannot fully reorient legal processes to the child's needs. Moreover, the jurisprudence on international law is very cautious. Section 46(1)(c) of the Constitution enjoins courts to take international instruments into account when interpreting fundamental rights and freedoms. Courts have upheld this principle in several matters[53] especially when international norms are compatible with constitutional provisions. Nevertheless, the use of international law has not been consistently developed into a robust interpretation practice that deepens the content of procedural rights for children. The application of international law is selective rather than systematic.

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53 *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (CC 12 of 2015; Constitutional Application 79 of 2014) [2016] ZWCC 12 (20 January 2016); *S v Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights Intervening As Amicus Curiae* (CCZ 10 of 2019; Constitutional Application CCZ 29 of 2015) [2019] ZWCC 10 (3 April 2019.

Furthermore, the jurisprudence has sought to buttress the legitimacy and authority of the judiciary. This is demonstrated by the Court's emphasis on procedures, judicial discipline and the integrity of legal processes. These priorities are significant. They are essential to the functioning of a constitutional democracy. Nevertheless, they also influence the Court's approach to 'transformative constitutionalism'. As opposed to an overtly 'activist' posture, the jurisprudence advances what may be termed 'measured transformation' to promote children's rights within the limitation of the established rule of law. However, the jurisprudential approach may yield mixed results for children's access to justice. On the one hand, the Court has strengthened the normative system to enjoy children's rights. Moreover, constitutional principles are teased out, and the realisation of rights is affirmed, upholding the court's function to protect children in society. On the other hand, the reasoning has emphasised formalism, which may be detrimental to children's rights. Though present, access to justice is uneven.

This pattern reveals significant limits on constitutional jurisprudence, for example. True to the law-in-books and law-in-action discourses, the existence of progressive constitutional provisions does not automatically produce transformative outcomes. The approach to interpreting and implementing laws is paramount. The deducible postulation is that the Chief Justice's jurisprudence probably indicates an intricate balancing of competing interests. These factors include, among others, the need for stability and the demand for socio-economic transformation. Therefore, by necessary implication, the balance is essential to dissecting the Chief Justice's legacy over the years. For the most part, it provides the context for the subsequent thematic analysis of procedural justice and institutional practice. The germane question is whether the Courts have advanced children's rights in a manner that fully realises the constitutional promise of access to justice for children.

5. Thematic analysis: Fair trial rights and procedural justice for children

The right to a fair hearing and access to justice are inseparable. Section 69 of the Constitution grants every person the right to a fair and public hearing within a reasonable time before an independent and impartial court. In the case of children, the content of S69 as a right cannot be assumed to be identical to that of adults. The question that looms large is whether the jurisprudence under the leadership of Chief Justice Malaba has respected, protected, promoted and fulfilled fair trial rights as enunciated in the Constitution in a manner that demonstrates the unique position of children as rights holders with evolving capacities. The point of departure regards the recognition that children interact with the justice system as accused persons, victims and witnesses. In each of

these circumstances, there are distinct procedural considerations to be considered. A constitutionally compatible model of fair trial rights must therefore take into account the differentiated needs arising from these variegated ways.

(a) Standing and access to courts

Access to justice can only be realised if enforcement mechanisms are present. Section 85 is important in this respect. The provision allows litigants acting in their own interests, persons acting on behalf of others, persons acting in the public interest, or persons acting as members of a group or class. Section 85 (standing provision) of the 2013 Constitution replaced S 24 of the Lancaster Constitution, which recognised the 'dirty hands doctrine' among other features. Specifically, S 85 facilitates the realisation of children's rights by providing litigation pathways for persons who lack legal capacity or resources to initiate proceedings independently. In *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs*, the Constitutional Court explained the nature and scope of S 85. The Court emphasised that standing was important to protect the rights of vulnerable populations. According to the Court, an overly procedural stance would undermine the enjoyment of constitutional rights. In our view, the ruling is compatible with international instruments, such as Article 4 of the CRC, which obliges states to take appropriate measures to implement children's rights effectively. The question of whether representational litigation, as discussed here, would fall foul of the Constitution, specifically s85, which has been interpreted to liberalise standing, remains moot. Conventionally, the legal system has vindicated children's rights by allowing parents, guardians and other entities to champion their causes. While there is a cogent justification for this, it invokes a serious discussion. Representation by third parties should be approached with due care since it might impede the child's voice in legal proceedings. Therefore, there is an opportunity for the development if canons to regulate when and how children are heard directly when they stand to be affected personally.

(b) Legal representation and equality

Moreover, legal representation as enunciated in section 81(1)(i) of the Constitution signals the intent to ensure effective participation in legal procedures, given the nature of issues involved. Therefore, the Constitution domesticates, corresponds with Article 40 of the CRC, which mandates the provision of legal and/or other appropriate assistance when dealing with children in conflict with the law. It is argued that this essential right is largely unfulfilled. The jurisprudence reiterates the importance of representation when a child's liberty is in question. Additionally, the jurisprudence, as analysed, has not sufficiently addressed the pertinent question of 'equality of arms' in cases regarding children. Possibly, the reason is that access to legal representation is largely dependent on resource availability. Therefore, the absence of a comprehensive legal aid system tailored

to children may limit the effectiveness of their rights. However, a qualifier is necessary here, as legal representation does not automatically amount to effective participation. A child legally represented may still be excluded from meaningful engagement with the process. In this regard, the law should develop guidelines to ensure that legal representatives act in a manner that reflects the child's views and best interests, as opposed to substituting their own judgment for the child's. One pertinent question is, 'when is representation in children's cases constitutionally adequate?' In our considered view, the physical presence of legal practitioners does not on the face of it satisfy the requirements of access to justice. For representation to be meaningful, it must be alive to the child's lived reality, it strives to translate children's experiences into tangible outcomes and be attentive to children's evolving capacities. Thus, children must be placed at the 'centre' of legal representation to minimise risks. Section 44 of the Constitution creates mandatory obligations that duty bearers must comply with. Failure at this level may undermine the integrity of the process itself and weaken the Court's broader commitment to substantive justice.

(c) Best interests of the child as a procedural standard

Since there are several principles of child protection, the standard as enumerated under S81(2) of the Zimbabwean Constitution emphasises the enduring principle that "the best interests of the child are paramount in every matter concerning the child." The application of the paramountcy principle produces substantive and procedural consequences. First, it enjoins that court decisions promote children's welfare and development. Secondly, it requires that decision-making should be structured to prioritise the child's needs and circumstances. The jurisprudence under review has affirmed the utility of the sacrosanct principle. In the *Mudzuru* case, it was invoked to justify strong constitutional intervention. However, its application to procedural aspects must be expanded. Courts have not interpreted the principle to require adaptations to standard procedures. Conversely, the principle has often served as but one general factor to be considered, rather than as the overall determinative standard in child rights adjudication. However, we note the judiciary's overall contribution to the subject under review over time.

Also, transformation must permeate the jurisprudence. Section 81 of the Constitution must inform judicial reasoning, and if this happens, then we would be able to determine the effectiveness of the principle. Moreover, the best interest's principle should address paramount technical issues such as the mode of hearing, the child's role during proceedings, and the nature of the evidence considered. The methodology regarding the best interest's inquiry should be further developed. The principle should be invoked and operationalised simultaneously to avoid the impression that it is solely a justificatory tool rather than an analytical one. As a proposal, the Court should identify all relevant factors,

strike a healthy balance between or among competing interests and provide a justification as to why the chosen outcome may best improve the child's position in that context. Indeterminacy would be the result if this is not done. On a more positive note, implementing the proposal may increase the capacity of lower courts to handle similar matters. This may eliminate uneven application of the law, which has tended to be a barrier to access to justice.

(d) Child accused persons and criminal Justice

Children in conflict are in an accentuated position of vulnerability. The Constitution provided a remedy in section 70, which enumerates the rights of accused persons, including the right to be presumed innocent, the right to remain silent, and the right to a fair trial. Additionally, Section 81 of the Constitution recognises the need for special safeguards to protect children in the justice sphere. Generally, special courts, diversion programmes, among others, are exemplary initiatives that have been taken to effectuate access to justice for children. Notwithstanding this, courts do not have a comprehensive and distinct constitutional doctrine to be applied to child accused persons. In the absence of the doctrine, fair-trial principles have been applied, even though they have not been consistently tailored to children's developmental status. Under international law, including the CRC and the African Children's Charter, emphasis is placed on the need for a separate juvenile justice system that prioritises rehabilitation over punishment. The cure for deficiencies identified here is to introduce and operationalise a child-centred justice framework which reflects the ethos of the Constitution and international commitments.

(e) Child victims and witnesses

If fully operationalised, the child-centred justice framework will also apply to the law of evidence. It has been stated that children who appear in court as victims or witnesses often confront unique and pronounced challenges, such as the risk of secondary victimisation and the difficulty of engaging with formal legal procedures. To resolve this, the International Guidelines, such as the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, were developed to provide for protective measures, including privacy, support services, and child-sensitive procedures. Therefore, to meet these requirements, the mechanisms below have been implemented. These include in-camera hearings and the use of intermediaries in certain cases. However, the problem is that these have not been systematically developed into a coherent doctrine of child-sensitive procedure. As such, their application remains uneven and often discretionary at the courts' instance.

(f) Synthesis

From the above analysis of fair trial rights and procedural justice, a pattern emerges. Formal aspects of access to justice are emphasised in the jurisprudence. The judiciary has upheld liberalised standing, recognised the importance of legal representation and reinforced the right to a fair hearing. These are notable achievements since they establish legal conditions to protect children's rights. However, the jurisprudence has been slower to translate these justiciable rights into child-centred procedural practice. As argued above, participation remains mediated, procedural adaptations are limited, and the best interest's principle is inconsistently operationalised as a procedural standard. The result is a system in which access to justice is formally secured but substantively uneven. The duality of legal certainty and procedural neutrality is important. However, formalism may severely hamper the court-driven transformation required to realise children's access to justice fully. Cognisant that access to justice is justiciable, courts have upheld and applied essential components of procedural justice. However, these pillars should be integrated into a comprehensive child protection framework to strengthen it. Also, instead of conceptualising child protection principles discretely, they must be viewed as interdependent factors within a child-centred justice system. If this course is followed, the challenges associated with fragmentation will be resolved. The principles are, in fact, mutually reinforcing because each is essential to meaningfully give effect to the right of access to justice.

6. Thematic analysis: Institutional practice, judicial reform and the architecture of access to justice

Undoubtedly, access to justice is the bedrock of any legal system. However, in this article, we argue that its realisation depends equally on the implementation conditions within which children's rights are enforced. The judiciary does not operate in abstract. In practice, administrative systems, resource allocation, procedural infrastructure, and the entire justice ecosystem influence their capacity to give effect to rights. An evaluation of children's access to justice under the aegis of Chief Justice Malaba should therefore extend beyond jurisprudence to consider how the judiciary has functioned as an institution. Arguably, the jurisprudence is characterised by deliberate efforts to strengthen the efficiency and integrity of the judicial system. In our view, the judicial reforms are significant. Delay, inefficiency and unpredictability are among the most insurmountable barriers to access to justice. For children in particular, these barriers are even more pronounced. For example, time has a different meaning in a child's life. Therefore, prolonged proceedings can undermine development, disrupt education, and prolong exposure to harm. As a result, measures to improve efficiency, therefore, have direct implications for children's rights.

(a) Efficiency, case management and timeliness

The emphasis on timely dispute resolution comports with S 69(1) of the Constitution, which guarantees a hearing within a reasonable period. We refer to the judicial reforms adopted by the Judicial Service Commission (JSC) that give practical effect to the right in question. These include, among others, improved case management, administrative oversight, reduced case backlogs and judicial discipline. Their overarching goal is to produce a more predictable (enabling) legal environment. These have been justified by the need to promote efficiency and effectiveness in the judiciary. However, to realise children's access to justice, there must be a healthy balance between the overarching goal of expeditiously meting out justice and adapting procedures to achieve both procedural and substantive justice. Therefore, if there is over-emphasis on formal compliance or on one factor over another, then access to justice would be unmet. For example, a justice system that prioritises expedited dispute resolution and fails to allow sufficient time for child participation or for the preparation of (relevant and admissible) child-sensitive evidence falls foul of the requirements discussed here.

(b) Digital transformation and technology-induced rule of law reform

On an unrelated and additional note, the Chief Justice's tenure coincided with the Fourth Industrial Revolution (4IR) boom and its associated novel technologies. While global rule of law reform discussions on this have gained prominence over the past decades, judiciaries, including those in Sub-Saharan Africa, have begun to integrate technology into the justice sector. However, we do not review comprehensively the opportunities and pitfalls of these reforms here, as another entry in the Special Issue is dedicated to them. For now, however, it suffices to note that the introduction of electronic filing systems, such as the Integrated Electronic Case Management (IECMS), characterised by virtual hearings and e-filing, is a major reform implemented during the Chief Justice's tenure. The judiciary has signalled its strategic intention to prioritise digital transformation, as indicated in its Strategic Plan spanning 2026-2030. Among other justifications, IECMS is hailed as less costly and as having the potential to increase transparency and access to justice, especially in urban areas. The Strategy also aligns with broader international, regional, and national justice-sector reform trends to 'modernise' the judiciary. Therefore, the JSC's trajectory here shows strong transformative leadership and policy direction. However, we see an area for potential improvement. While this applies to the general population of Zimbabwe, it is particularly pronounced when it comes to children. The theme of digital (ex)inclusion is relevant here. Digital transformation or digitisation is not a silver bullet to resolve access to justice challenges. It may not yield the desired results, as access to technology is unevenly distributed across the country, as revealed by data from the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) and other sources. The rural-urban divide can play out

in this domain. Specifically, those on the margins of the rule of law, such as children in rural areas and impoverished situations, may not benefit from digital transformation to the same extent as their urban counterparts. On this point, we note the Government of Zimbabwe's efforts, through the Ministry of Information and Communications Technology and Courier Services, to roll out community information centres nationwide. Equally important is the JSC's thrust to decentralise courts. The IECEMS system partly tries to resolve some of the challenges we have mentioned here. One challenge of note is, the use of virtual proceedings, introduced as part of the above stated reforms. Fundamental questions regarding child participation arise. To be effective, child participation in the digital transformation context depends largely on the availability of (suitable) supportive mechanisms such as trained facilitators, appropriate technology and infrastructure. Without such support, the digital transformation agenda may reinforce existing socio-economic inequalities. These risks are more pronounced in the era of intelligent systems such as Artificial Intelligence (AI) and others. While digital transformation and AI may give rise to unprecedented challenges, we opine that the judiciary should develop a framework to address the ensuing disparities and position itself to spur prosperity as envisaged in economic development policy. These goals cannot manifest if access to justice is not centred. In essence, therefore, it would seem that the Judiciary technology reform thrust has arguably been pursued primarily as an efficiency measure rather than as part of a child-centred access-to-justice strategy. As a result, its benefits for children might remain contingent and uneven.

(c) Cost and economic barriers

Access to justice is intimately linked to the 'cost of procedure' or affordability. Despite the constitutional protection, access to justice remains one of the insurmountable challenges to the rule of law. While there are numerous reasons for this, the cost of the procedure is often cited as a serious impediment. The challenge is particularly pronounced for children who rely on others for financial support. The prohibitive cost of litigation poses an insurmountable challenge for justice systems due to legal fees and related expenses. Consequently, appropriate cost-saving measures should be implemented to address the situation. If left unaddressed, those on the margins of the rule of law, such as children, will be greatly affected. Moreover, existing mechanisms, such as fee exemptions and pro bono legal services, should be strengthened and tailored to meet children's unique justice needs. Resolving the costs issue may promote certainty and dissuade litigation, even when child rights violations are observable. Fundamentally, cost issues may trigger regulatory challenges. In turn, if this happens, most legal commitments become unrealisable, thereby rendering access to justice a hollow aspiration. Importantly, unaffordable justice mechanisms that prevent children from approaching courts for redress may

undermine the very international (access to justice) commitments that Zimbabwe has assumed. As it stands, the jurisprudence has not developed canons to address this challenge. The issue of costs is not only an administrative limitation. This is a children's rights and rule-of-law issue. Specifically, legal costs are a barrier to children's access to justice. This view views the cost of the procedure as situated (internally) within the right to access justice and not extraneous to it. According to this approach, the state assumes obligations under the Constitution to mitigate financial and other barriers.

(d) Geographic accessibility and decentralisation

Another challenge is that most Zimbabweans live in rural areas. Therefore, access to courts is a critical factor in access to justice. While the country has several courts, the distribution should be improved to address the needs of all communities fully. Geography matters here. Children in rural and remote areas are most affected, as they face additional challenges, including travel costs, limited information, and limited access to legal services. Just like the evolving digital transformation agenda, when it comes to physical locations, the extant judicial reforms have partially resolved the underlying socio-economic inequalities. We already have measures to decentralise judicial services (courts and the like) across the country, such as circuit courts and outreach initiatives. However, the reforms are limited but relatively progressive. The challenge for children, particularly those with limited mobility who rely on adults for physical access, is that geographic barriers may be decisive. The challenges are accentuated in the 4IR era, where the cost of data, digital literacy skills, and the availability of gadgets, to mention a few, are paramount. In our view, a liberal and transformative child-sensitive approach to access to justice requires increased decentralisation (subject to resource availability and other factors) and the integration of courts with customary law courts. In fact, the JSC Strategic Plan (2026-2030) has a clear-cut, forward-looking thrust on this. Moreover, there must be improved coordination (integration) with other key stakeholders, including social services, schools, Civil Society Organisations (CSOs), and child protection agencies, *inter alia*.

(d) Specialisation and child-sensitive institutions

In our assessment, we observed numerous initiatives to advance access to justice, including the creation of specialised institutions and procedures. These judicial programmes are in place in the country. For the most part, they include juvenile courts, capacity-building for judicial officers, and other procedures designed specifically for children. Specialisation in the context of access to justice may engender the development of suitable expertise and the consistent application of child-sensitive principles. The judiciary has taken reasonable steps towards specialisation in juvenile justice. However, these measures arguably

remain partial. Therefore, the absence of a fully implemented and comprehensive child justice framework may limit the consistency of practice across the system. The judiciary continues to operate largely within general procedural frameworks, with limited adaptation for children. The intervention here could be tailor-made judicial training, which plays an important role in addressing this gap. As such, the implementation of child-sensitive jurisprudence requires legal proficiency and an understanding of child psychology, communication and vulnerability.

(f) Institutional coordination and the justice ecosystem

However, several players are involved in the access-to-justice ecosystem, and it should not be the sole responsibility of the Judiciary. There must be mutually reinforcing interactions among these multiple institutions, such as the Zimbabwe Republic Police (ZRP), National Prosecuting Authority (NPA), social welfare departments, and CSOs. We opine that effective multi-sector and stakeholder coordination is essential to ensure that children receive comprehensive and appropriate support throughout the justice value chain. Notwithstanding this, the current child justice system is arguably fragmented. While the various institutions outlined above may perform their functions optimally, coordination remains limited. This is disruptive and can create regulatory gaps in child protection. It is paramount for a child who accesses the court system to receive adequate psychosocial support and other follow-up services, for example. The judiciary has a role to play in promoting coordination, particularly by developing procedures and practice directives that integrate multiple actors. Such reforms are usually implemented under the Justice, Law and Order Sector (JLOS). However, the coordination function is a work in progress and has not yet been fully realised. The existing judicial reforms have overly focused on the internal functioning of the Judiciary or courts rather than on the broader (child) justice ecosystem.

(g) Synthesis

From the above, we can deduce that, for the most part, the reforms implemented under Chief Justice Malaba's leadership have relatively strengthened the efficiency, effectiveness and overall integrity of the justice system. Some initiatives have focused on structural barriers, such as inordinate delays and bureaucratic inefficiencies, to improve the courts' overall functioning. These developments are essential and create conditions for children's rights to be enforced. Moreover, when analysed from the perspective of children's access to justice, these judicial reforms reveal some limitations. Judicial reforms should be designed or implemented to achieve child protection rationales. Aspects relating to legal costs, distances children travel to access courts, child participation and multi-stakeholder coordination are inadequately addressed in JSC interventions. As a result, there exists no water-tight child-centred model that integrates reforms. Thus, access to justice has remained unrealised, despite initiatives to

realise it. This resonates with findings in this article. It is that transformation that is pursued cautiously despite a strong normative and institutional foundation. Furthermore, the stark inequality persists notwithstanding efforts to decentralise courts across the country and improve efficiency in the justice delivery system. These reforms have not considered non-exhaustive issues such as digital literacy, educational levels, costs, geography, family incomes, and coordination. These necessitate the development of a child protection model rooted in the Constitution. The proposed model aligns with socio-economic justice considerations and promotes inclusion and equity.

7. Towards a coherent transformative children's rights jurisprudence

This segment further builds on the above section. It synthesises the lessons and situates them around the four corners of the article's goals. It assesses whether the judiciary has been consistent and identifies elements that should be contained in a child-centred model of access to justice. Chief Justice Malaba's jurisprudence demonstrates lessons that cannot be ignored. There is a tension between the promise of constitutional transformation and the role of adjudication. The Court has overwhelmingly upheld that children are bearers of children's rights under the Constitution. However, the approach to access to justice has not always matched the transformative constitutional vision. Thus, the jurisprudence is continuous, not settled. Additionally, the evolving and incomplete constitutional project requires consolidation, clarity in methodology and normative commitment.

The foregoing analysis emphasises a move from legal formalism. The jurisprudence often treats access to justice as an issue of 'institutional availability'. The questions are whether court structures exist, whether procedures are in place and whether remedies are theoretically obtainable. Despite this, we argue that a child-centred approach should prioritise children's vulnerability, dependency, and evolving capacities. The focus extends beyond surface-level interactions with the law. Importantly, the ability of children to effectively instruct their legal representatives and interact with authorities without fear can be said to be more likely to experience what justice is all about. In this case, pernicious poverty does not constitute a structural barrier to access to justice. Arguably, the omission to prioritise the factors discussed above risks hollowing out children's rights. The 2013 Constitution enjoins substantive accessibility, not symbolic access to justice.

The jurisprudence on the best interests of the child principle is illustrative. While the principle has been invoked, its analytical content is largely underdeveloped to date. It is not applied holistically, taking into account all applicable factors. As indicated in the literature, the principle should be prioritised and further expanded. If applied as a method, factors like balancing competing interests and providing a reasoned justification for the outcome will be considered. The failure to develop

the principle has serious repercussions for children. The best interests should not legitimise conclusions but guide them. However, the jurisprudence has, in certain decisions, moved towards a more structured application, with positive consequences. Furthermore, when it comes to children's agency, we get a sense of over-protectiveness. While child protection is important, it should not be the endpoint. Moreover, a children's rights-based approach should recognise children as participants in matters that affect them. This analysis is compatible with the right to inherent dignity of every child. There should be clear canons on how children's views should be heard, evaluated and integrated into decision-making. Moreover, child participation should be practically realised and not heavily theorised. Doing this will guide lower courts on the operationalisation of constitutional norms.

The jurisprudence on legal remedies is imperfect. This is pronounced where there are resource constraints, legal information is inaccessible, or structural poverty characterises the environment. Judicial remedies become inadequate. There is also restraint in invoking structural or supervisory remedies to address these systemic failures. On the one hand, this justification may be seen as legitimate, as it implicates issues of institutional competence and the separation of powers. We do not recommend an overly cautious or strict approach, as it achieves the opposite and may undermine children's access to justice. According to the Constitution, such infractions are proscribed and trigger remedies. However, it is noted that when children's rights violations are structural, then effectiveness cannot be achieved through narrow court orders. In such a case, the solution could be a liberalised and purposive approach that is exercised within principled constitutional limitations. While the extant jurisprudence has hinted at this possibility, it has not pursued it with sufficient particularity to reconfigure orthodox judicial remedies.

An additional epoch to consider regards the national implementation of international law. Importantly, the 2013 Zimbabwean Constitution expressly permits and encourages the use of international law as an interpretation tool. In children's rights parlance, the invocation of the Constitution is particularly valuable given the comprehensive depth and sophistication of international standards on access to justice generally. While the jurisprudence has occasionally drawn on international law, the application has been uneven. Moreover, at times, the global standards appear to be an afterthought rather than an integral component of the judicial reasoning process. This is a missed opportunity. A more deliberate and sustained engagement would not only enrich the jurisprudence but also shield it from the charge of being overly inward-looking (endogenous). In a field as normatively developed as children's rights, this 'isolation' may weaken the jurisprudence, and, as such, improved application of

international instruments may strengthen it. Accordingly, any analysis of the jurisprudence must remain fair and context sensitive. However, it would be jurisprudentially dishonest to ignore the constraints within which the Judiciary operates. For the most part, factors such as institutional pressures, resource limitations and the broader socio-political environment may inevitably influence judicial behaviour. Therefore, within these constraints, the jurisprudence has made important contributions as follows. First, it confirmed the legal status of children's rights. Secondly, it conceptualised aspects of 'transformative constitutionalism', albeit cautiously. Thirdly, it signalled an openness, however inconsistent, to international standards. In our view, these milestones matter because they provide a foundation upon which a more mature jurisprudence can be constructed.

The true significance of Chief Malaba's legacy, therefore, lies in its transitional character. While aspects of transformation are observable in the jurisprudence, they are not fully realised. It is arguable whether the courts foreclosed their potential either. One view is that the jurisprudence has left behind a set of doctrinal openings that serve as points of departure for future jurisprudential development. The responsibility now shifts to subsequent courts to build on this jurisprudential foundation with greater consistency, depth and courage. A modified model for access to justice for children must rest on three pillars. First, conceptual clarity: access to justice must be understood as a substantive child-centred right that encompasses participation, representation, and effective remedies. The second is methodology rigour, in which principles such as the best interests of the child must be applied through structured, transparent reasoning. The third concerns remedial responsiveness, namely that courts must be willing to craft orders that address not only individual harm but also the systemic conditions that produce it. If these elements are taken seriously, the jurisprudence that follows will not merely refine Chief Justice Malaba's approach, but it will fulfil its promise. In that sense, the analysis should not be defined solely by what was achieved during his tenure. The possibilities he opened up are enormous.

7.1. Re-thinking judicial method: Beyond caution to principled boldness

A careful reading of the jurisprudence reveals a judicial philosophy that often privileges caution. That caution is not without justification. The judiciary operates within a delicate constitutional system. Judicial overreach carries risks. However, in the specific context of children's rights, excessive caution can produce its own form of injustice. It can normalise delay. It can entrench exclusion. It can allow structural barriers to persist under the guise of institutional restraint. The difficulty, therefore, is not caution itself, but the absence of a clearly articulated threshold for when caution must yield to constitutional obligation. A transformative Constitution demands more than passive guardianship. It demands principled

boldness. This does not mean judicial adventurism. It means a disciplined willingness to intervene where the denial of access to justice is evident and ongoing. Under Chief Justice Malaba, moments of such boldness do exist. However, they appear episodic rather than systematic. The jurisprudence would have benefited from a clearer statement of when and why the Court is prepared to move beyond minimalism. Without that clarity, outcomes may appear contingent rather than principled, exposing the judiciary to the charge that similar cases are treated differently without sufficient justification. A more explicit theory of intervention grounded in the text, structure, and values of the Constitution would strengthen both legitimacy and coherence.

7.2. Lower courts, institutional culture and the diffusion of standards

Access to justice for children is not secured solely at the Constitutional Court. It is realised or denied in magistrates' courts, juvenile courts, and in everyday legal processes that rarely reach constitutional review. The influence of the Constitutional Court, therefore, depends on its ability to shape the reasoning and practices of these lower fora. Here, the jurisprudence reveals another gap. While it sets out important principles, it does not always translate them into operational standards that can guide lower courts. This creates uncertainty. Magistrates and judges may accept the importance of children's rights yet remain unsure how to apply them in concrete situations. The result is uneven practice. Some courts innovate. Others default to familiar, adult-centred procedures. A more effective approach would have involved deliberately crafting jurisprudence that speaks directly to this audience. This includes setting minimum procedural guarantees, clarifying the role of legal representatives in children's matters, and outlining how courts should adapt proceedings to accommodate children. Such guidance does not undermine judicial independence at lower levels. On the contrary, it enhances it by providing a principled framework for exercising discretion. The absence of this level of detail risks fragmenting the legal landscape. Access to justice becomes dependent on geography, resources, and individual judicial attitudes. That is precisely the inequality the Constitution seeks to overcome.

7.3. The temporal dimension: Urgency, delay and the experience of justice

Time operates differently for children. A delay that might be tolerable in adult litigation can be devastating in a child's life. Months, even weeks, can alter developmental trajectories, educational opportunities, and family relationships. Access to justice, therefore, has a temporal dimension that must be taken seriously. The Malaba Court has not consistently foregrounded this reality. While procedural timelines exist, the jurisprudence does not always interrogate whether those timelines are adequate in the context of children's rights. Nor does it consistently treat delay itself as a potential constitutional violation. A more robust approach would recognise that, in children's cases, justice delayed is often justice

denied. This would justify the development of expedited procedures, prioritisation of children's matters on court rolls, and, where necessary, the imposition of strict timelines on state actors. Such measures are not administrative conveniences. They are constitutional imperatives derived from the best interest's principle and the right to effective remedies. By not fully engaging with this temporal dimension, the Court leaves an important aspect of access to justice under-theorised. This is an area where future jurisprudence can make a significant contribution.

7.4. Legal representation: Between symbolism and effectiveness

The right to legal representation is frequently acknowledged in children's cases. However, the quality and effectiveness of that representation remain variable. There is a risk that representation becomes symbolic, a formal requirement satisfied without ensuring that the child's interests are genuinely advanced. The Malaba Court has not squarely confronted this issue. It has recognised the importance of representation, but it has not developed standards for what constitutes effective representation in the context of children. This omission is significant. Children require specialised advocacy. Their communication needs differ. Their instructions may be indirect or evolving. Counsel must navigate these complexities with skill and sensitivity. A more developed jurisprudence would articulate expectations for legal practitioners in children's matters. It would also engage with the state's obligation to ensure that such representation is available and adequately resourced. Without this, the right risks become hollow. Access to justice cannot be reduced to the presence of a lawyer; it must encompass the quality of the legal assistance provided.

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7.5. Synthesis: The architecture of a transformative child justice jurisprudence

When these strands are drawn together, a clearer picture emerges. The Malaba Court has contributed important building blocks to the architecture of children's access to justice. However, the structure remains incomplete. Key elements of methodological clarity, participatory rights, effective remedies, and systemic accountability require further development and integration. The task is not to replace the existing framework, but to refine and strengthen it. This requires a shift in emphasis. From formal access to substantive justice. From rhetorical principles to structured reasoning. From isolated interventions to systemic solutions. Such a shift would not mark a departure from the Malaba Court's approach. It would represent its maturation. It would take the foundations laid seriously and build upon them with greater coherence and depth.

In honouring Chief Justice Malaba, it is necessary to resist both uncritical praise and undue criticism. His tenure reflects the complexities of judging within a transformative constitutional order. Progress was made. Opportunities were

missed. Foundations were laid, but not fully developed. The enduring value of his contribution lies in the space he created for the evolution of children's rights jurisprudence in Zimbabwe. That space is not yet fully defined. It is open. It invites engagement. It demands refinement. If future courts approach this task with clarity, courage, and fidelity to the Constitution, the project of ensuring meaningful access to justice for children will advance significantly. In that sense, the Malaba legacy is not confined to the past. It is a living challenge to the present and the future.

7.6. Bridging doctrine and lived reality: Re-situating the child in context

Furthermore, the challenge of abstraction, a persistent risk in child rights adjudication, must be addressed. Generally, children's rights are articulated at a high level of generality, while the conditions that influence their exercise remain insufficiently interrogated and incoherent. In the context of children's access to justice, this risk is particularly acute. The Malaba Court has, at times, spoken in the language of rights without fully entrenching those rights in the lived circumstances of children in Zimbabwe. Most of the time, children do not encounter the justice system as abstract rights holders. Conversely, they encounter it as poor or relatively privileged, urban or rural, in school or out of school, within supportive families or fractured ones. These contexts matter. They determine whether a child can report abuse, whether they can reach a court, whether they can understand proceedings, and whether they can persist through them. A jurisprudence that does not engage with these contextual variables' risks producing formally correct but practically ineffective outcomes. The recalibration required is therefore epistemic as much as doctrinal. It requires the Court to treat context as constitutive of rights rather than as an external consideration. This does not mean that every judgment must become sociological. It means that reasoning must demonstrate an awareness of how structural inequality shapes the child's encounter with the law. Where such awareness is absent, the right of access to justice is thinned out. Where it is present, the right acquires depth and practical meaning.

7.7. The role of values: Dignity, equality and vulnerability

Fundamentally, the role of founding principles and values in the domain of children's rights cannot be gainsaid. The values espoused in S 3 of the Constitution speak to dignity, equality and the recognition of vulnerability. These constitute the normative foundation of legal interpretation. While the 'Malaba Court' applied these principles and values, it has not always done so in ways that systematically shaped outcomes. There are decisions such as the *Chokuramba* Case[54] where the dignity as a principle and rights are strongly defended by the

54 *S v Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers for Human Rights Intervening As Amicus Curiae* (CCZ 10 of

Constitutional Court, especially in cases involving inhumane and degrading treatment. Despite this, 'dignity' as an epoch for understanding access to justice arguably remains largely underutilised. A legal system that excludes a child from justice processes or prevents them from participating in them in a manner that is confusing, intimidating or dismissive is a direct affront to a child's dignity as enshrined in the Constitution. Moreover, the S 56-bound equality and non-discrimination right has not been fully mobilised to interrogate disparities in access. Children are a heterogeneous group. There are differences in terms of gender, disability, socio-economic status and geography. These produce unequal experiences of the entire justice system. A more nuanced equality and non-discrimination analysis would expose these disparities and require justification for their persistence. Therefore, vulnerability, as often acknowledged, also requires sharper conceptualisation. It should not be used to justify paternalism that silences children but entails a dual obligation to protect and to empower.

7.8. Avoiding the pitfall of incrementalism without direction

There are numerous adjudication techniques, and Incremental development of the law is one of them. This approach allows courts to proceed cautiously and build jurisprudence gradually. However, the challenge arises when gradualism lacks a clear trajectory. When applied, gradualism must be based on cogent legal theory. A justifiable jurisprudential path may avoid uncertainty and strengthen the normative force of adjudication. Moreover, the jurisprudence on children's access to justice highlights the challenges of developing the desired body of law. While most decisions purport to promote the rule of law, the overall adjudication remains indistinct. Possibly, the missing piece is a unifying jurisprudential vision and an express articulation of what a child-centred justice system requires under the burgeoning 2013 Constitution. However, the transformative vision need not be grandiose, but it must be clear enough to guide future cases. The jurisprudence must determine the weight to be given to cardinal principles such as participation, effective remedies and the circumstances under which the Court will intervene decisively. Absent this, incrementalism may risk becoming drift. The remaining step is to retrospectively analyse the jurisprudence as containing the seeds of such a grand judicial vision. Those seeds must be cultivated into a comprehensive jurisprudential framework in the future.

7.9. The ethics of judicial restraint in children's cases

Unlike orthodoxy, do not treat judicial restraint as a virtue. The preservation of institutional balance and respect for democratic processes are two factors used to justify restraint. Nevertheless, in the province of children's rights, one opines that judicial restraint should be qualified. The reason is that the price of inaction

2019; Constitutional Application CCZ 29 of 2015) [2019] ZWCC 10 (3 April 2019.

is often borne by those least able to absorb it. Therefore, this is where the jurisprudence's calculated approach should be construed. In the foregoing, a pertinent question arises: 'When does restraint cease to be a virtue and become a failure to vindicate children's rights?' The question requires a casuistic evaluation and requires an express acknowledgement that the threshold for intervention may be lower where children are concerned. As such, a child-centred jurisprudence should recognise that the ramifications of rights violations are often immediate and irreversible. This fact justifies a more proactive approach, particularly where state inaction or systemic failure may manifest. However, this is not a judicial dominance-laden argument, but a call for judicial responsibility, exercised with sensitivity to context and consequence.

7.10. Reclaiming the transformative promise

The Constitution embodies a transformative vision, seeking to reshape social relations, address historical injustices and create a more inclusive society.[55] Children's rights are central to this constitutional endeavour. The jurisprudence is a giant leap forward and has grappled with the burgeoning transformative vision. However, the analysis is uneven. In some instances, courts have adopted the liberalised language and logic of transformation. On the other hand, the jurisprudence has often retreated into more orthodox approaches of legal reasoning that prize stability over change. The recalibration proposed in this section is, at its core, an argument for consistency. If the 2013 Constitution is transformative, then the jurisprudence must indicate that character across cases. This does not require radicalism or judicial activism in every decision. Conversely, this requires fidelity to the Constitution's purpose, particularly in cases involving children's rights. Essentially, transformative constitutionalism is a methodology capable of positively influencing the interpretation of children's rights, resolving inherent conflicts, and crafting remedies.

As a result, if this method is applied, the jurisprudence may strike at the core of justice. Moreover, in totality, the Chief Justice's contribution may be classified as transitory in nature. In the preceding sections, we analysed opportunities in his jurisprudence that should be carried forward and potential areas for improvement that judges must be alive to. The analysis calls for a paradigmatic jurisprudential shift from form to substance, from rhetoric to method, and from caution to principled jurisprudential analysis. Instead of relying solely on doctrine, we recommend an integrated approach that brings together principles, procedures, and remedies, informed by the principles and values enumerated in the Constitution. We believe the Chief Justice set the process in motion, and therefore, it is a work in progress. Accordingly, a befitting honour to the Chief

55 See the Preamble, National Objectives, for example.

Justice is neither an exaggeration of the judiciary's achievements nor a magnification of its shortcomings. In our view, the 'charity in interpretation', reflectivity, and open-ended inquiry would work best. Stakeholders must closely dissect the jurisprudence to identify its 'internal logic' and, importantly, to be expanded on with greater clarity and conviction, if the circumstances so warrant. If this assignment is undertaken with the intentionality it deserves, the legacy of Chief Justice Malaba will possibly be measured not only by 'what it made possible' and not achieved.

8. Conclusion

In conclusion, therefore, the jurisprudence of Chief Justice Malaba on children's access to justice may be classified as transitory. In the main, it is cognisant of legal commitments to be applied. The jurisprudence conceptualises children as holders of justiciable rights and freedoms. However, so far, courts have yet to develop canons to translate children's rights into consistent and substantive access. Child protection principles such as participation, legal representation, and the best interests are acknowledged, although they are not always systematically integrated. Moreover, although justice sector reforms have improved efficiency and reach, they have not eliminated deep-seated barriers related to cost, geography, and socio-economic inequality. Consequently, this has resulted in a jurisprudence that is principled in aspiration yet uneven in application. This indicates the challenges of superior adjudication. More importantly, the jurisprudence, it seems, resonates with the early stages of doctrinal formation. The Chief Justice leaves behind a formidable foundation of a child-centred approach rooted in the Constitution. The jurisprudence has created a normative space and has signalled, even if cautiously, the direction of travel. Consolidation is what lies ahead. Principles of child protection must be applied consistently. For instance, there must be a firm recognition of participation as integral to fairness and a willingness to craft remedies that address structural exclusion. The legacy clamours for national implementation of international obligations and thus compatibility between constitutional principles and practice. In this sense, the legacy of Chief Justice Malaba lies equally in what has been made possible. The Judiciary should embrace the challenge to develop jurisprudence further, because it embodies the aspirations of ordinary Zimbabweans, especially children on the margins of the rule of law.

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THEME: HONOURING THE CHIEF JUSTICE MR JUSTICE LUKE MALABA'S OVER FORTY YEARS OF JUDICIAL SERVICE

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