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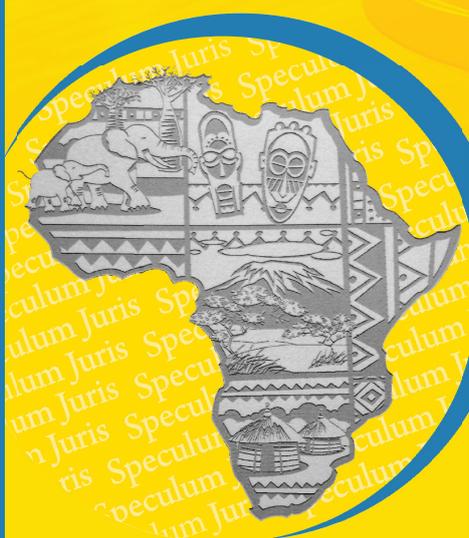
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# The Evolution of the Interpretation of Human Rights in Zimbabwe

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## Abstract

*Constitutional interpretation is a process that enables the delimitation of the obligations imposed by the Constitution. Zimbabwean courts have, in the past, interpreted the Constitution through a process encompassing a balance between text-based theoretical perspectives and the purposive approach to constitutional interpretation. Using these theoretical perspectives, judges interpreting the Zimbabwean Constitution have given meaning to constitutional text and clarified the spirit for which Constitutional provisions must be read. While constitutional interpretation theories have traditionally allowed Zimbabwean judges to give meaning to the rights provided by the Lancaster House Constitution, the Constitution of Zimbabwe Amendment Act 2013 (herein called Zimbabwean Constitution) introduced an interpretation clause. The interpretation clause intends to guide the interpreter aiming to interpret the rights embodied by the Declaration of Rights. Consequent to the introduction of the interpretation clause, this article seeks to assess the evolution of the way courts approach constitutional interpretation, particularly the Declaration of Rights, since the enactment of the 2013 Zimbabwean Constitution. While referring to human rights cases brought before the enactment of the 2013 Zimbabwean Constitution, this article assesses whether the Constitutional Court has integrated, maintained, or perhaps abandoned the traditional*

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*approaches to constitutional interpretation in light of the provisions of the interpretation clause guiding the interpretation of the Declaration of Rights.*

**Keywords:** 2013 Zimbabwean Constitution; constitutional interpretation; the interpretation clause; theories of interpretation; Declaration of Rights

## 1 INTRODUCTION

Constitutions are important supreme documents embodying the fundamental rights of people within a State. The precedence set by the courts when interpreting the Constitution is significant because it has a bearing on the rights of citizens. When confirmed by the Constitutional Court, it is further final and not appealable. However, despite such an important position of constitutional jurisprudence, constitutional provisions are often vague and abstract. An example of the vague and abstract nature of Constitutional provisions is in section 77(1)(b) of the Zimbabwean Constitution, which mandates the State to provide “sufficient food”. The lack of specificity that characterises “sufficient food” highlights the necessity to give meaning to this constitutional term. Constitutional interpretation is, therefore, a need and a greater responsibility.

To interpret constitutional rights, before 2013, Moyo stated that the absence of the interpretation clause in the Lancaster House Constitution (LHC) meant a “haphazard approach to interpretation”, which was not guided by an interpretation clause.<sup>1</sup> This article presents a closer look at the interpretation of human rights under the LHC, revealing that the interpretation of the LHC was not necessarily haphazard. A closer review of the cases shows that judges mainly relied on textualism and the purposive approach. The Constitution of Zimbabwe<sup>2</sup> has now introduced section 46, the interpretation clause intended to guide the interpretation of the Declaration of Rights. The interpretation clause introduces new undefined ideals, norms, and values that should be considered when giving meaning to human rights.<sup>3</sup> Focusing on the dictates of the interpretation clause, this article explores the evolution of the court’s approach to interpreting human rights in Zimbabwe. The aim is to track how and whether the Zimbabwean Constitutional Court has fully utilised the provisions of the interpretation clause to accord meaning to the rights embodied in the Declaration of Rights. Judicial precedents on human rights are essential in a country with a history of human rights abuses like Zimbabwe. It is, therefore, justified for citizens to expect the Zimbabwean Constitutional Court to utilise the provisions of the interpretation clause to give meaning to human rights.

## 2 THE IMPORTANCE OF CONSTITUTIONAL INTERPRETATION

It is essential to explain the importance of Constitutional interpretation. Unlike legislation, which is voted in by the majority through their parliamentary representatives, in 2013, the Constitution of Zimbabwe was voted in by 3 079 966 voters, who approved its contents, making it their social agreement to protect and advance the unique needs of every Zimbabwean.<sup>4</sup> The people of Zimbabwe agreed that the Constitution is so important that its Declaration of Rights

1 Moyo, “Constitutional Analyses of the Interpretation Clause of the Zimbabwean Declaration of Rights” Zimbabwe Legal Information Institute <https://zimlil.org/akn/zw/doc/paper/2022-12-01/constitutional-analysis-of-the-interpretation-clause-of-the-zimbabwean-declaration-of-rights/eng@2022-12-01/source.pdf> (accessed 26-04-2024).

2 Constitution of Zimbabwe Amendment Act 2013.

3 *Ibid.*

4 BBC “Zimbabwe Approves New Constitution” 19 March 2013 <https://www.bbc.com/news/world-africa-21845444> (accessed 26-04-2024).

can only be amended by their vote through a referendum.<sup>5</sup> With such importance accorded to human rights in the Zimbabwean Constitution, it becomes vital that when such human rights are interpreted, the meaning accorded to them must have cross-generational legitimacy. Interpreting human rights must produce results that protect everyone, provide realistic solutions to problems, and apply to different contextual situations. The importance of Constitutional interpretation is further understood in recognition that the Constitution is the supreme law and, therefore, the first source of judicial decision-making. For any custom, law, practice, or conduct to be accepted, section 2 of the Constitution states that it must measure up to the standard the Constitution sets.<sup>6</sup> The supreme nature of the Constitution and its role as a yardstick for every law and every conduct makes the process of according meaning to constitutional provisions significant.

### 3 THEORIES OF CONSTITUTIONAL INTERPRETATION

Constitutional interpretation in Zimbabwe has tended to attract less debate. Indeed, the lack of debate can be seen as a defining and positive characteristic signaling agreement on the approaches that Zimbabwean Courts should adopt when interpreting the Constitution. An analysis of Zimbabwe’s legal jurisprudence shows that the interpretation of the Constitution has been centred around two theoretical perspectives: the textualism and the purposive approach. These theoretical perspectives are briefly discussed below.

#### 3 1 Textualism

Textualism is a method of interpreting the Constitution that focuses on the plain meaning of its text.<sup>7</sup> The approach acknowledges that Constitutional text is the sole source of the meaning of constitutional provisions. As such, constitutional interpretation must focus on the plain meaning of constitutional text.<sup>8</sup> Textualism focuses on the original intent of the Constitution’s drafters, rather than interpreting provisions based on judges’ preferences or the consequences of a judicial decision.<sup>9</sup> With the Constitution being a public document, textualism argues that judges cannot accord it their private meanings.<sup>10</sup> Therefore, the words of the Constitution are the primary focus of textualists because they are words that survived the people’s vote and were duly passed as text in the Constitution.<sup>11</sup> The concern from textualists is that allowing judges to consider anything other than text in the interpretation process is risky, because judges may bring their intentions into the process.<sup>12</sup> To put it succinctly:

5 Zimbabwean Constitution s (S) 328 (6)(b).

6 *Ibid* s 2(1). This Constitution is the supreme law of Zimbabwe, and any law practice, custom, or conduct inconsistent with it is invalid to the extent of inconsistency.

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic including the State and all executive, legislature and judicial institutions and agencies of Government at every level and must be fulfilled by them.

7 “Modes of Constitutional Interpretation” 2018 Congressional Research Service 5 <https://sgp.fas.org/crs/misc/R45129.pdf> (accessed 26-04-2024).

8 “Statutory Interpretation: Theories, Tools, and Trends” 2018 Congressional Research Service 14 <https://crsreports.congress.gov/product/pdf/R/R45153/2> (accessed 26-04-2024).

9 *Ibid*.

10 *Ibid*.

11 *Ibid*.

12 “Modes of Constitutional Interpretation” 2018 Congressional Research Service 6 <https://sgp.fas.org/crs/misc/R45129.pdf> (accessed 26-04-2024)

Proponents of textualism point to the simplicity and transparency of an approach that focuses solely on the objectively understood meaning of language independent of any ideology or politics. They argue that textualism prevents judges from deciding cases in accordance with their personal policy views, leading to more predictability in judgments. Proponents also argue that textualism promotes democratic values because it adheres to the words of the Constitution adopted by the ‘people’ as opposed to what individual Justices think or believe.<sup>13</sup>

Those advocating for textualism have also claimed that the separation of powers doctrine mandates that judges respect the statutory text and desist from encroaching on the role of legislatures.<sup>14</sup> They view any deviation from the text as legislative amendments that undermine the legislature.<sup>15</sup> In fact, the argument is that when judges render a decision that does not recognise Constitutional text, they perform legislative action, and, they will be rewriting the law.<sup>16</sup>

The author agrees that the Constitution is written text, and text is the foundation for which an interpreter must begin their constitutional interpretation. Indeed, Constitutional written text must be addressed during the interpretation process because the Constitution is, after all, a written document. The South African case of *S v Zuma*,<sup>17</sup> which is persuasive to Zimbabwe, stated that the complete negation of the role of text in interpretation can only lead to absurd conclusions.<sup>18</sup> Justice Kentridge AJ stated that:

While we must always be conscious of the Constitution’s values, it is our task to interpret a written instrument. I am aware of the fallacy of supposing that general language must have a single ‘objective meaning’. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce’s reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination. I would say that a Constitution embodying fundamental principles should as far as its language permits be given a broad construction.<sup>19</sup>

The agreement that Constitutional text is important does not mean an agreement with textualists. The arguments by textualists lend themselves to criticism.<sup>20</sup> Textualism ignores the undeniable reality that constitutional text is often written in short, constricted vocabulary, and the language used therein may be difficult to ascribe a dictionary meaning to. The law is not just about the written word. Often, a history, purpose, morality, and arguments of values, and equity build up to law-making.<sup>21</sup> This means that when a judge deviates from the law, they are not making law; they can, at best, clarify the law by bringing into focus its purpose and other considerations. Take, for example, section 75(1)(a) of the Zimbabwean Constitution provides that “everyone has a right to state-funded basic education”. What would be a textual understanding of this provision? What would be the meaning of the word “basic”? Sensibly, the court cannot rely on the plain dictionary meaning of “basic”. This is so because there is a background to the

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13 *Ibid.*

14 Winter “Is Textualism Required by Constitutional Separation of Powers?” 2016 University of Oregon <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2965&context=llr> 426 (accessed 26-04-2014)

15 *Ibid.*

16 *Ibid.*

17 *S v Zuma* 1995 2 SA 642 (CC). The South African Court, in the case of *Minister of Home Affairs v Fisher*, also stated that the language of the Constitution needs to be respected as well as “traditions and usages which have given meaning to that language”.

18 *Ibid* para 17.

19 *Ibid* para 17.

20 Winter 2016 University of Oregon 426. *Ibid.*

21 *Ibid.*

term “basic education”. A history and a context informed the inclusion and choice of words “basic education” and it must be considered in its entirety before the courts can interpret the Constitution. A mere reading of words would be problematic because a textualist would accept the text’s authority but would not be able to place the word in its historical, social or legal context and then give it a meaning purposive for the future. Realistically, therefore, a judge interpreting this provision would have to consider the history of the provision, the context in which it operates today, and the most flexible interpretation that protects the rights of those not yet born. Textualists have further been criticised for attempting to undermine the capability and authority of the courts in interpreting legislation and the Constitution.<sup>22</sup> The argument is that by simply interpreting the law purposively, judges fulfil their mandate to give meaning to constitutional provisions. In doing so, they avoid going against the majority who voted for the words in the Constitution.<sup>23</sup> The other criticism is that, as opposed to the argument that seeking the purpose of the Constitutional provision is far-fetched, the textual approach can allow judges to renege on their duty of interpreting the Constitution under the pretext that text does not allow them to go beyond a particular interpretation.<sup>24</sup> Those who oppose textual theorists have proposed that outside of the text judges must also consider moral reasoning and the practical consequences of their actions.<sup>25</sup>

### 3 2 Purposive Approach

The purposive approach is grounded in the view that merely following the dictates of the written law and absenting from interpretation the dictates of the judge, the history of constitutional provisions or values informing the Constitution is a narrow approach that ignores the social practices that inform the constitutional order.<sup>26</sup> The purposive approach views every word in the Constitution as the skin of the idea. An example of this skin of the idea is section 67(3) (a) of the Zimbabwean Constitution, which states that everyone has the right to vote. While the Constitution speaks of voting, it does not specify where the vote will be cast, who should cast it, or when it will occur. To a purposivist, the words “the right to vote” are more than just casting a vote; they are rights with a specific purpose, which is the participation of citizens in the election of their leaders.<sup>27</sup> A judge interpreting this section using the purposive approach would draw inspiration from the provisions of the whole Constitution.<sup>28</sup> A purposive approach allows for purposeful interpretation, ensuring that everyone fully benefits from constitutional protection.<sup>29</sup> Therefore, the meaning of rights is determined in their “linguistic, philosophical and historical context”.<sup>30</sup> The Canadian case of *R v Big M Drug Mart*, which has already been

22 “Statutory Interpretation: Theories, Tools, and Trends” 2018 Congressional Research Service 15 <https://crsreports.congress.gov/product/pdf/R/R45153/2> (accessed 26-04-2024).

23 *Ibid.*

24 *Ibid.*

25 “Modes of Constitutional Interpretation” 2018 Congressional Research Service 7 <https://sgp.fas.org/crs/misc/R45129.pdf> (accessed 26-04-2024).

26 “Purposive Approach to Charter Interpretation” <https://www.constitutionalstudies.ca/2020/07/purposive-approach-to-charter-interpretation/?print=print> (accessed 26 April 2024).

27 Sirota “Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation” 2021 *Queen’s LJ* 81 [https://journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2047%20i1/\(3\)%20Sirota.pdf](https://journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2047%20i1/(3)%20Sirota.pdf) (accessed 26-04-2024).

28 *Ibid* 82.

29 *Ibid*, see also, the case of *Hunter v Southam Inc* 1985 11 DLR (4th) 641 stated that “... the proper approach to the definition of rights and freedoms was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect...”.

30 Kentridge and Spitz “Interpretation” Constitutional Law of South Africa 25 [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/pdf/11](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/11) (accessed 06-02-2020).

quoted in Zimbabwean case judgments,<sup>31</sup> described the purposive approach. It clarified that,

... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.<sup>32</sup>

Utilising the purposive approach, judges interpreting the Constitution cannot lay the article of the Constitution involved in the discussion beside the provision of the statute which is being challenged and decide whether the latter squares with the former.<sup>33</sup> The judge will have to view the Constitution as a living document, allowing for synergy between lived realities and the provisions of the Zimbabwean interpretation clause, which calls for a consideration of values in the interpretation process. The purposive approach makes constitutional interpretation a language practice enabling a judge to make valuable judgments and protect the rights of every individual citizen, even against majority social, religious, or political opinions.<sup>34</sup> A liberal interpretation of the Constitution advanced by the purposive approach fits with the ideas of the interpretation clause in the Zimbabwean Constitution as it allows for a purposive or teleological exercise aimed at ascertaining the purpose of the guaranteed right and determining the interest of the Declaration of Rights. The purposive manner of interpreting the Constitution was elucidated in the Canadian case of *Edwards v Attorney General of Canada*, which stated that the Constitution must be given a “large and liberal interpretation,<sup>35</sup> and that for “constitutional text to be intelligent at all, it must be situated within the linguistic practice”.<sup>36</sup>

## 4 THE EVOLUTION OF THE INTERPRETATION OF HUMAN RIGHTS IN ZIMBABWE

### 4.1 The Court’s Approach to Interpretation of the Lancaster House Constitution

Before the enactment of the 2013 Zimbabwean Constitution, in the absence of an interpretation clause to guide the interpretation of human rights, a study of the court’s decisions do not show a methodical approach to Constitutional interpretation. The 1981 case of *Hewlett v Minister of Finance* clarified that constitutional interpretation was no different from the interpretation of legislation.<sup>37</sup> This meant the same approaches between legislative and constitutional interpretation. However, it is very notable that the courts made their choices between textualism and the purposive approach. The 1994 case of *In Re Munhumeso and Ors* stated that when hearing a constitutional matter, the language of the Constitution is essential, and derogations from conferred human rights and freedoms must be done with strictness and in a narrow manner unless the language explicitly and conclusively alludes something to the contrary.<sup>38</sup> The *Munhumeso* judgment favoured a balance of textualism and purposive approaches, stating that there are two

31 *Obediah Makoni v Commissioner of Prisons* 2016 8 CCZ 23.

32 *R v Big M Drug Mart*, 1985 1 SCR 295, 18 DLR (4th) 344 cited in Sirota 2021 *Queen’s LJ* 81.

33 Post “Theories of Constitutional Interpretation” 1990 Yale Law School *Faculty Scholarship Series* 14. [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1208&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1208&context=fss_papers) (accessed 18-02-2020).

34 “Purposive Approach to Charter Interpretation” <https://www.constitutionalstudies.ca/2020/07/purposive-approach-to-charter-interpretation/?print=print> (accessed 26-04-2024).

35 *Edwards v Attorney General of Canada* (1930) AC 124.

36 Fallon “How to Choose a Constitutional Theory” 1999 <https://www.jstor.org/stable/3481027?seq=11> (accessed 18-07-2018).

37 *Hewlett v Minister of Finance* 1981 ZLR 571.

38 *In Re Munhumeso* 1994 1 ZLR 49 (S) 50.

stages to be followed when interpreting the Constitution. First, when legislation is challenged, and its interpretation affords more than one meaning, one in line with the Constitution and one against the Constitution, the “challenged legislation must be [narrowly] interpreted to suit the framework of the Constitution”.<sup>39</sup> Any need to move away from the rights and freedoms should be given a narrow rather than a broad construction.<sup>40</sup> Second, after a contextual approach and a wholesome consideration of all provisions affecting the subject matter, to conclude whether a law infringes the Constitution, examining its effect is important.<sup>41</sup>

Reinforcing the importance of a purposive approach rather than textualism, the 1993 case of *Chirwa v Registrar General* stated that constitutional interpretation “must be approached from a broad perspective” and the Constitution “must be interpreted generously so as to fulfil its purpose of securing the individual the full benefit of the [its] protection”.<sup>42</sup> Similarly, in the case of *Smyth v Ushewokunze and Anor*, the court stated that it is fundamental to ensure that a purposive, broad, and generous interpretation of a right is made, which promotes the “spirit as well as the letter of the provision”.<sup>43</sup> The interpretation must be relevant to the context of social values and norms so that provisions are elastic enough to address new problems and challenges.<sup>44</sup> The aim of interpretation must be to make human rights a practical reality and to ensure a move from unnecessary formalism.<sup>45</sup> Inspired by a purposive approach, the case of *Rattigan and Ors v Chief Immigration Officer* also made it very clear that,

What is to be avoided is the imparting of a narrow, artificial, rigid, and pedantic interpretation; to be preferred is one that serves the interest of the Constitution, best carries out its objectives, and promotes its purposes. All relevant provisions are to be considered as a whole, and where rights and freedoms are conferred on persons, derogations, therefore, as far as language permits, should be narrowly or strictly construed.<sup>46</sup>

The pronouncements of the courts in the cases above, including the *Rattigan* case, point to the fact that even before the 2013 Constitution was enacted, members of the judiciary already perceived the interpretation of the Constitution as a living practice. It is notable that the Lancaster House Constitution of 1980 did not have an express interpretive clause, but this was later introduced by the 2013 Constitution.

## 4 2 The Interpretation Clause: Section 46 of the Constitution

The enactment of the Constitution brought in an interpretation clause that mandates how the Declaration of Rights must be interpreted. Section 46 of the Constitution states that,

Section 46 of the Constitution states that,

S46 Interpretation of Chapter 4

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

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

(b) must promote the values and principles that underlie a democratic society based on

<sup>39</sup> *Ibid* 59.

<sup>40</sup> *Ibid* 59.

<sup>41</sup> *Ibid*, see also *Minister of Home Affairs v Dabengwa* 1983 1 ZLR 236 (S) 244B, *S v Ncube* 1987 2 ZLR 246 (S) 264 F.

<sup>42</sup> *Chirwa v Registrar General* 1993 1 ZLR 1 15.

<sup>43</sup> *Smyth v Ushewokunze* 1997 2 ZLR 553.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Rattigan and Others v Chief Immigration Officer* 1994 2 ZLR 57 see also *Min of Home Affairs and Ors v Dabengwa and Anor* 1982 1 ZLR 236 see also *Bull v Minister of Home Affairs* 1986 1 ZLR 202.

openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

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

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

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

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.<sup>47</sup>

Drawing from court judgments, this article attempts to give meaning to the individual provisions of section 46.

#### 4 2 2 Giving Full Effect to the Rights and Freedoms: Sections 46(1)(a)

Section 46(1)(a) obligates the court, forum, tribunal, or body to give effect to the freedoms and rights protected by the Constitution. This article advances that by necessitating the interpreter to give full effect to human rights, because the Constitution places the obligation on the interpreter to ensure that when the process of interpretation is complete, the intended outcome of providing such right in the Constitution is achieved.<sup>48</sup> To achieve the intended result of a right, the 2016 case of *Obediah Makoni v Commissioner of Prisons* referenced the purposive approach, and stated that the established principle of Constitutional interpretation is to adopt a “purposive and generous” meaning as opposed to “a pedantic or restrictive interpretation”.<sup>49</sup> Quoting the Canadian case of *R v Big M Drug Mart Ltd*, the court stated that what a right means to say is ascertained by analysing its purposes, *vis-à-vis* the interest for which the provision must protect.<sup>50</sup> The purpose or intended outcome of a right is found by referral to the character and larger objects of the Charter itself, an analysis of the language used by the right itself, referring to the history of the concepts cherished by the right, and the import and resolve of other rights in the Constitution.<sup>51</sup> The interpretation of a right must be liberal as opposed to a legalistic one. The aim of interpretation must be to ensure the full benefit of the protection afforded by the Constitution.<sup>52</sup> The 2016 *Makoni* case further stated the need to consider the text and language used by the Constitution if one is to give full effect to the right.<sup>53</sup> The *Makoni* case clarified that to give the full effect of a right, it is essential to consider the formulation of constitutional text and seek a purposive meaning of a constitutional provision.<sup>54</sup>

The Constitutional Court, in the 2015 case of *Loveness Mudzuru v (1) Minister of Justice Legal and Parliamentary Affairs*, stated that determining the intended outcome of a right calls for a far-reaching interpretation of a right and not a “strict, narrow and literal interpretation”.<sup>55</sup> The court stated that concepts must be interpreted as “elastic and relative rather than fixed and

47 *Constitution of Zimbabwe* 2013, S46.

48 *Obediah Makoni* 2016 8 CCZ 23.

49 *Ibid.*

50 *Ibid* see also *R v Big M Drug Mart Ltd* 1985 1 SCR 344:

51 *Ibid.*

52 *Ibid.*

53 *State v Zuma* 1995 2 SA 642 (CC), para 14.

54 *Ibid.*

55 *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 Others* CCZ 12/2015 3.

absolute”.<sup>56</sup> The court noted that giving full effect of a right called for a “broad and generous approach” so that the rights in the Declaration of Rights could be fully protected.<sup>57</sup> The court in the *Mudzuru* case desisted from a narrow conception of words and stated that to give the full effect of words, definitions “must be left open” and be determined based on the circumstances of each case.<sup>58</sup> Contrary to their approach to interpretation before 2013, which did not prescribe reliance on international law, the court stated that determining the intended result of a human right would involve a consideration of the provisions of the international human rights instruments for which a constitutional provision draws inspiration.<sup>59</sup> Giving the full effect of the rights means they must be given the “full measure of protection they deserve”.<sup>60</sup> The peremptory language in the provision “must” and the obligation to “give full effect” means that the courts must determine the scope of one right not as a “silo” but as an interdependent right whose full effect is understood by understanding the indivisibility and interconnectedness of the right being interpreted with other people’s rights.<sup>61</sup>

### 4 2 3 Value Considerations: Section 46(1)(b)

Although the LHC did not address the need to consider values when interpreting the Declaration of Rights, the 1997 case of *Smyth v Ushewokunze* had already noted that constitutional interpretation must be alive to the social, value, and norm contexts so that provisions are elastic enough to address new problems and challenges.<sup>62</sup> In the same spirit, the Declaration of Human Rights now mandates that for rights to be given their full effect, the courts should actively promote values while interpreting human rights.<sup>63</sup> Section 46(b) states that a court interpreting the Declaration of Rights “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”.<sup>64</sup> There is a need to realise that, the values of human dignity, equality, and freedom also set the spirit and tenure of the Zimbabwean Constitution in that, in addition to being founding values or considerations during the interpretation of the Declaration of Rights, they are also values to be invoked in the process of delimiting rights,<sup>65</sup> and each of the values is a self-standing human right.

The interpretation clause requires that “when determining the scope and content of human rights, the courts prefer an interpretation that fully advances and protects these underlying values

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56 *Ibid* 18.

57 *Ibid* 5–6.

58 Mavedzenge and Douglas *A Constitutional Guide towards Understanding Zimbabweans Fundamental Socio-economic and Cultural Rights* (2014) 35.

59 *Loveness Mudzuru and Another v (1) Minister of Justice Legal and Parliamentary Affairs and 2 Others* 2015 CCZ 1215-16.

60 Moyo Zimbabwe Legal Information Institute.

61 *Ibid*.

62 *Smyth v Ushewokunze and Anor* 1997 2 ZLR 553.

63 Ndlovhu “The Role of Courts in the Enforcement of Socio-Economic Rights under the 2013 Constitution of Zimbabwe” 2015 APS DPR 34–35.

64 Constitution of Zimbabwe, 2 s 3(1)n(g), States the founding values and principles of Zimbabwe to include: “the supremacy of the Constitution, the dignity of the human being, the rule of law, respect for diversity (cultural, religious or otherwise), the equality of human beings, good governance, respect for the liberation struggle, respect of children, respect of human rights protected by the Constitution and gender equality.”

65 *Ibid* s 86: Limitation of rights and freedoms  
“(2) The fundamental rights and freedoms set out in this Chapter may be limited only in Terms of a law of general application and to the extent that the limitation is fair, reasonable, Necessary and justifiable in a democratic society based on openness, justice, human dignity, Equality and freedom, taking into account all relevant factors.”

of democracy, particularly the constitutional founding values and principles provided”.<sup>66</sup> The values and principles inform the understanding of human rights protected by the Constitution.<sup>67</sup> Values,

... play an important role in promoting the achievement of an egalitarian or just society. They are broadly designed to respond to the socioeconomic challenges confronting citizens, especially those living on the margins of society and to ensure that the Government is anchored on such timeless principles as democracy and the rule of law. Founding values are largely shared by the generality of the entire population and transcend social divisions based on race, gender, political affiliation and other prohibited grounds of discrimination.<sup>68</sup>

Following the need to consider values while interpreting human rights, the Constitutional Court of Zimbabwe, in the *Mudzuru* case, stated that an interpretation of a right must “resonate with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in section 3 of the Constitution”.<sup>69</sup> The court stated that when interpreting a human right, the emerging international values advanced by international instruments that Zimbabwe is party to, must be considered.<sup>70</sup> In 2016, the Zimbabwean Constitutional Court, in the case of *Makoni*, without referring to human dignity as a value or principle, acknowledged that human dignity is a human right that reinforces a human’s intrinsic worth and enjoys a special status.<sup>71</sup> The court stated that human dignity cannot be limited by any law nor violated.<sup>72</sup> The court further clarified that the right to human dignity is “inviolable” and not “derogable by dint of any law of general application”.<sup>73</sup>

In the spirit of value-laden interpretation, a consideration of the value of equality in the process of interpreting human rights must ensure that the result shuns all forms of discrimination unless the discrimination is fair and aimed at achieving equality.<sup>74</sup> The principles of equality, together with non-discrimination, form the basis of international human rights law.<sup>75</sup> They encompass “equal treatment, equal protection of the law, equal opportunity and substantive equality”.<sup>76</sup> Relating to the value of equality, the mandated need to promote equality as a value when interpreting human rights had never been required before the enactment of the 2013 Constitution. Post the 2013 Constitution, the case of *Samuel Nkomo v Minister of Local Government, Rural & Urban Development* did not speak of equality as a value or principle but referred to it as a human right. The Constitutional Court stated that equality envisages a situation where the law equally protects everyone, and everyone equally benefits from it.<sup>77</sup> It was stated that the right to equality encompasses the right “not to be subjected to treatment to which others in a similar position are not subjected to”.<sup>78</sup>

Like human dignity and equality, freedom is a founding value that must guide an understanding

66 Mavedzenge and Douglas *A Constitutional Guide* 35.

67 Moyo Zimbabwe Legal Information Institute.

68 *Ibid.*

69 *Loveness Mudzuru* 2015 CCZ 1215 26.

70 *Ibid.*

71 *Obediah Makoni* 2016 8 CCZ 5.

72 *Ibid.*

73 *Ibid.*

74 Constitution of Zimbabwe 3(1)(f). *Ibid* s 56(5).

75 “The Equality and Non-Discrimination Provision” 2016 Global Institute for Advanced Study 1 [https://cdn.openbookpublishers.com/The\\_UDHR\\_21st\\_C\\_Appendix\\_E3\\_89e6cdcd37.pdf](https://cdn.openbookpublishers.com/The_UDHR_21st_C_Appendix_E3_89e6cdcd37.pdf) (accessed 06-07-2024).

76 *Ibid.*

77 *Samuel Nkomo v Minister of Local Government, Rural & Urban Development and 2 Others* 2016 6 CCZ 7.

78 *Ibid.*

of human rights as protected by the Constitution.<sup>79</sup> Concerning the value of freedom, post-2013, the court has not directly stated what the word freedom as a value would entail and the types of freedoms it refers to, but it has made some pronouncements regarding the right to freedom of expression. In *Nevanji Madanhire v Attorney-General*, the Constitutional Court stated that the freedom to impart and receive ideas “is a core value of any democratic society deserving of the utmost legal protection”.<sup>80</sup> The court recognised that the freedom to express oneself is an indispensable value that any democratic society should respect.<sup>81</sup> Openness is also a value to consider when interpreting the Declaration of Rights. Before 2013, the courts also did not explain what the value would mean or what implications it may have when interpreting human rights. Openness is linked to the right to freedom of expression, freedom of conscience, and access to information, protected under sections 60, 61, and 62 of the Constitution, respectively.<sup>82</sup> Closer to openness, in the case of *Mutambara v Attorney General of Zimbabwe*, the Constitutional Court stated that freedom of expression “lies at the very foundation of a democratic society and that, consequently, it is a right that the courts jealously guard”.<sup>83</sup> The court accepted the argument that citizens must be allowed to openly criticise the conduct of public officials, including that of the judiciary.<sup>84</sup> It was stated that, in relation to freedom of expression,

Criticism of public authority, including the judiciary, is a valuable element of the freedom of expression because the ability to criticize the courts promotes impartiality, accessibility and effectiveness, serves as a democratic check on the judiciary and promotes peace and stability (*S v Mamabolo* 2001 (2) SA 409 CC).<sup>85</sup>

In explaining the importance of open communication and how it guides the citizens to make informed decisions, the Constitutional Court stated vehemently that criminalising open communication or, rather, providing for a crime of criminal defamation was counterproductive and inhibited the freedom of people to speak.<sup>86</sup> Section 46 of the Constitution also states that justice is a value that must be considered in interpreting human rights. The meaning of the value of justice and the indicators that justice has been attained remains to be fully explored by the Constitutional Court.

#### 4 2 4 International Law and Foreign Law Considerations: Section 46(1)(c)

Section 46(c) states that when interpreting the Declaration of Rights, the court “must consider international law and all treaties and conventions to which Zimbabwe is a party”. The Constitution further states that the Zimbabwean State must ensure the domestication of all international law instruments it is party to and their incorporation into national laws.<sup>87</sup> Customary law is considered part of the law of Zimbabwe unless it is considered inconsistent with the Constitution or legislation.<sup>88</sup> When interpreting legislation, the Constitution mandates the court to prefer the view consistent with customary international law as opposed to that which is against it.<sup>89</sup> The court is also mandated to adopt an interpretation consistent with the

79 Constitution of Zimbabwe s 3(1)(c).

80 *Nevanji Madanhire and Another v Attorney-General* 2014 2 CCZ 7–8.

81 *Ibid* 7–8

82 Constitution of Zimbabwe, s 60 “Freedom of Conscience”.

83 *A Mutambara v Attorney General of Zimbabwe and Another* Judgment No. CCZ 11/15 4.

84 *Ibid* 6.

85 *Ibid* 4.

86 *Nevanji Madanhire and Nqaba Matshazi v Attorney-General* Judgment No CCZ 2/14 8; see also *Hoho v The State* 2008 ZASCA 98.

87 Constitution of Zimbabwe s 34.

88 *Ibid* s 326 (1) 326.

89 *Ibid* s 326 (2).

provisions of any international instrument binding on Zimbabwe as opposed to anyone against it.<sup>90</sup> All the above positions were confirmed in the *Makoni* case.<sup>91</sup>

In many cases after the 2013 Constitution, the Constitutional Court has affirmed the critical position of international law in determining the scope and content of human rights embodied by the Zimbabwean Constitution. In the *Mudzuru* case, the court stated that the obligations imposed by the Constitution are “not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe, under the international treaties and conventions at the time it was enacted on 22 May 2013”.<sup>92</sup> Further, “[b]y signing these documents, Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights [and to ensure that] they are enjoyed in practice”.<sup>93</sup> The position was further confirmed by the *Makoni* case which stated that the consideration of international law and foreign law in the interpretation of human rights is afforded by section 46(1)(c) and (e).<sup>94</sup> The court stated unequivocally that it does not see the “reason to depart from the foreign and international jurisprudence that has developed on the subject over the past sixty years”.<sup>95</sup> Section 46(e) further states that foreign laws may be considered when interpreting the Declaration of Rights an approach that was followed in the case of *Mutumwa Dziva Mawere v Registrar General*<sup>96</sup> when the court referred to the foreign judgments of the South African case of *S v Zuma*<sup>97</sup> and the Namibian case of *Government of the Republic of Namibia v Cultura 2000*.<sup>98</sup> It is worth noting that in cases where binding international law introduces terms foreign to the provisions of the Zimbabwean Constitution, the court ought carefully to adopt concepts from international instruments after considering whether the international law instrument is binding or non-binding.<sup>99</sup>

#### **4 2 5 Must Consider All Provisions of the Constitution Especially Principles and Objectives: Consideration of all Contextual Considerations: Section 46(d)**

Section 46(d) states that a court interpreting a human right in the Constitution “must pay due regard to all the provisions of this Constitution, in particular, the principles and objectives set out in Chapter 2”. The principles and objectives of the Constitution are an important interpretive tool.<sup>100</sup> The interpretation clause gives

... premium to the importance of the [national objectives] in assigning meaning to the provisions that fall under Chapter 4 of Declaration of Rights. In any event, some of the [national objectives], mostly those of an economic, social, and cultural nature, correspond with the entrenched economic, social, and cultural rights under Chapter 4. A good example is Chapter 2 [National Objectives] on food security, labour, education and health services, which

90 *Ibid* s 327 (6).

91 *Obediah Makoni* 2016 8 CCZ 6.

92 *Loveness Mudzuru* 2015 CCZ 1226.

93 *Ibid*.

94 *Obediah Makoni* 2016 8 CCZ 6.

95 *Ibid* 14.

96 *Mutumwa Dziva Mawere v Registrar General and Others* 2015 CCZ 8.

97 *S v Zuma* 1995 2 SA 642 (CC) see also *Mutumwa Dziva Mawere* 4–8.

98 *Government of Republic of Namibia and Another v Cultura 2000* 1994 1 SA 407 418 FH; see also *Mutumwa Dziva Mawere* 8.

99 Liebenberg “Interpreting Socio Economic Rights” 2013:14 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap33.pdf> (accessed 26-04-2024).

100 Magaya “Justiciability and Constitutional Interpretation Value of Chapter 2 on National Objectives of the Constitution of Zimbabwe Amendment No 20 Act of 2013” *Journal of Civil and Legal Sciences* 2 <https://www.omicsonline.org/open-access/justiciability-and-constitutional-interpretation-value-of-chapter-2-on-national-objectives-of-the-constitution-of-zimbabwe-amendmen-2169-0170-1000223.php?aid=84565> (accessed 26-04-2024).

correspond with Chapter 4 rights to food and water, labour, education and health.<sup>101</sup>

The *Mudzuru* case confirmed the section 46(d) position stating that “to determine the purpose or objective of a provision, one will have to engage with the overall text of the Constitution”.<sup>102</sup> The position had been earlier stated before 2013 in the case of *Rattigan v Chief Immigration Officer* during which the court stated that while interpreting human rights embodied in the Constitution, “all relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as language permits should be narrowly or strictly construed”.<sup>103</sup> The provisions of the Constitution that may be important to consider in any process of interpreting the Declaration of Rights include the provisions of Chapter 2 of the Constitution which outline the national objectives of the Zimbabwean Republic.<sup>104</sup> Section 11 in Chapter 2 states that the State has the obligation to protect human rights and freedoms protected by the Constitution and they must promote their full realisation and their fulfillment.<sup>105</sup> Section 44 of Chapter 2 further states that the State, the agents of the State, every person and every juristic person must “respect, protect, promote and fulfil the rights and freedoms” in the Declaration of Rights.<sup>106</sup> In alluding to the provisions of section 44, and in trying to determine the extent of the right imposed by section 85, the Constitutional Court in the *Mudzuru* case stated that section 44 “requires the state to protect every fundamental right and freedom regardless of the social and economic status of the right-holder”.<sup>107</sup>

Still, on contextual understanding, section 86 of the Constitution provides the context for which we must understand all human rights in the Zimbabwean Constitution. Section 86 of the Constitution states that “the fundamental rights and freedoms set out in this chapter may be limited in terms of the law of general application” if the limitation remains “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom”.<sup>108</sup> Other factors that may be relevant include “the nature of the right or freedom concerned, the purpose of limitation, the nature and extent of limitation, the safeguard of the rights of others, the relationship between limitation and purpose and whether there is a less restrictive means to achieve the purpose of the limitation”.<sup>109</sup> The law of general application refers to limitations that are authorised by statutory or common law provisions.<sup>110</sup>

Tied to contextual consideration is the historical context of the Constitution and its provisions. The Constitution states that it is based on the respect and recognition of the liberation struggle and honours the “heroic resistance of colonialism, racism and all forms of domination

101 *Ibid.*

102 *Loveness Mudzuru* 2015 CCZ 12.

103 *Rattigan and Others v Chief Immigration Officer and Others* 1994 2 ZLR 54 (S) 57 F-H; see also *Farai Daniel Madzimbamuto v The Registrar General and Others* 2014 CCZ 5/14 5-6 see also *Immigration Officer and Others* 1994 2 ZLR 54 (S) 57 F-H.

104 Constitution of Zimbabwe, National Objectives:  
 “8 Objectives to guide State and all institutions and agencies of Government  
 (1) The objectives set out in this Chapter guide the State and all institutions and agencies of Government at every level in formulating and implementing laws and policy decisions that will Lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic Society in which people enjoy prosperous, happy and fulfilling lives.  
 (2) Regard must be had to the objectives set out in this Chapter when interpreting the State’s obligations under this Constitution and any other law see also Constitution of Zimbabwe Amendment (no.20) Act 2013 section 46 1 (b) and (d).”

105 *Ibid* 11.

106 *Ibid* s 44.

107 *Loveness Mudzurus* 2015 CCZ 12.

108 *Ibid* s 86 Limitation of rights and freedoms.

109 *Ibid.*

110 Robinson “The Children’s Rights in the South African Constitution” 2003 PELJ 7.

and oppression".<sup>111</sup> The Constitution must also be interpreted as a historic document that continuously moves Zimbabwe from repressive regimes towards a democratic state. A reading of the Constitution's preamble illustrates a transformative agenda and the departure from a repressive history towards a bright future as envisaged by the Zimbabwean people.<sup>112</sup> In stating the importance of the history of a constitutional provision in the determination of the scope and content of a right, in the case of *Mutumwa Dziva Mawere* the court stated that when interpreting a human right, its scope and content must be ascertained by analysing the purpose of the guaranteed right and viewing such purpose in the light of the historical origin, object and character of the concept enshrined in the Constitution.<sup>113</sup> Further, in the *Mudzuru* case, the court stated that human rights violations are context-specific, as such concepts must be understood to be flexible and capable of developing in line with changing times and social conditions reflective of community attitudes.

#### 4 2 6 May Develop Common Law and be Guided by the Spirit and Objectives of Chapter 46

Judges are often required also to develop common law or customary law when determining the scope and content of human rights. In doing so, they must be alive to the spirit and objectives intended to be safeguarded by the Declaration of Rights.<sup>114</sup>

### 5 THE ANALYSIS OF THE EVOLUTION OF THE INTERPRETATION OF THE ZIMBABWEAN DECLARATION OF RIGHTS

There is absolute evidence that, indeed, the dictates of the interpretation clause are being recognised as having a bearing in the interpretation of the rights in the Zimbabwean Constitution. However, this article will highlight the notable gaps in how the provisions of section 46 are utilised. The case of *Chihava*<sup>115</sup> stated that the first step when interpreting the Declaration of Rights is to refer to the text of the Constitution since the legislature is not presumed to have intended legislation to be ambiguous or absurd.<sup>116</sup> The second step is to lean on the purposive approach by giving words their practical effect.<sup>117</sup> In the process of giving words their practical effect, words must be interpreted in a manner consistent with the whole Constitution, the history of the legislative document, and the provisions it preceded.<sup>118</sup> The *Chihava* case quoted the South African case of *Minister of Defence, Namibia v Mwandighi*, which stated that interpretation of the Constitution requires "a broad and purposive interpretation" as opposed to a strict adherence to legalism.<sup>119</sup> What is, however, disturbing in the manner in which constitutional interpretation was approached in the *Chihava* case is that the court did not directly address section 46 stipulations to show how the court had promoted the section 46 values, utilised international law, gave effect to the rights and freedoms in the Constitution, and referred to international law.

In the 2013 constitutional case of *Jelousy Mbizvo Mawarire v R G Mugabe*, the court stated that words must be given their plain meaning.<sup>120</sup> However, if giving words their plain meaning leads

111 Constitution of Zimbabwe, Preamble.

112 *Ibid.*

113 *Mutumwa Dziva Mawere* 8.

114 Constitution of Zimbabwe s 46.

115 *Chihava & 2 Others v The Provincial Magistrates Francis Mapfumo N.O & Another* 2015 CCZ 6-9.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Ibid*; *Minister of Defence, Namibia v Mwandighi* 1992 2 SA 355.

120 *Jelousy Mbizvo Mawarire v R G Mugabe N.O and Others* 2013 CCZ 1/ 16.

to absurd conclusions in light of context or other considerations by the court, the court may depart from the ordinary “effects of the words to the extent necessary”.<sup>121</sup> In order to remove the absurdity, “the Court [will] call into aid historical, schematic, teleological and purposive approaches to interpretation”.<sup>122</sup> The *Mawarire* case was also another missed opportunity that focused its interpretation approach only on reliance on traditional approaches to interpretation without addressing section 46 stipulations to show how the court had promoted the values in section 46, utilised international law, gave effect to the rights and freedoms in the Constitution, and referred to international law.

The 2016 case of *Farai Daniel Madzimbamuto v The Registrar General* stated that when interpreting human rights in the Constitution, “narrow, artificial, rigid and pedantic interpretation” must be avoided in preference of interpretations which promote the objects and purpose of the Constitution.<sup>123</sup> While the court encouraged the purposive approach to interpretation, again, an opportunity was missed to directly address section 46 stipulations to show how the court had promoted the values in section 46, utilised international law, gave effect to the rights and freedoms in the Constitution and referred to international law. The court would have taken the opportunity to engage with the values stated by section 46 and linked them with a broad and flexible purposive meaning of the word “public interest”.

Discussing the important right of freedom of expression, the 2016 judgment of *Benard Wekare v the State and the Attorney General*<sup>124</sup> did not only refer to international law provisions but also to foreign judgments, particularly the jurisprudence from the United States and Columbia.<sup>125</sup> What is notable is that the judges did not expressly state that they would take into cognizance the provisions of section 46 to give meaning to the right to freedom of expression. Instead, the court silently referred to the stipulations of the interpretation clause, such as international law and foreign law. This article suggests that, when rights are concerned, it is beneficial for the judiciary to be intentional and to engage directly with most of the provisions of section 46. For example, the judgment could have been specific in referencing international law and foreign law in response to the provisions of section 46. The judgment could further engage the values specified by section 46, such as the value of freedom, which had a direct bearing on the case. The case could have provided the content of the value of freedom and its intersection with the right to freedom of expression. The court could have further explained how the right to freedom of expression is given effect and further paid due regard to other provisions of the Constitution, including the principles in the Constitution. An approach that favours a deliberate engagement with section 46 provisions makes court judgments not only declarations of the law but also important jurisprudents, which develop the contents of our rights and can be used for learning and understanding the development of fundamental provisions of the Constitutions, especially the interpretation clause.<sup>126</sup>

The 2016 case of *S v Mpofo* was another opportunity the court had to give meaning to human rights, particularly the right to non-discrimination.<sup>127</sup> The applicant sought section 79 of the

121 *Ibid* 16–17; *Venter v Rex* (1906) TS 910, 914–915; see also *Jelousy Mbizvo Mawarire v R G Mugabe* 2013 CCZ.

122 *Ibid*.

123 *Farai Daniel Madzimbamuto v The Registrar General* 2014 CCZ 5, see also *Obediah Makoni s* 2016 8 CCZ 22.

124 *Benard Wekare v The State and The Attorney General of Zimbabwe and Zimbabwe Broadcasting Corporation* Judgment CCZ 9/2016.

125 Reference was made to the case of *Red Lion Broadcasting v FCC* 395 US 367 (1969) 390, 389-91. *FCC v League of Women Voters* 468 US 364 (1984) 380. *Columbia Broadcasting System v Democratic Nat'l Comm* 412 US 94 (1969) 124. *McCray v United States* 195 US 57.

126 *S v Mpofo & Another* (CCZ 5/2016 Const. Application No CCZ 08/13) [2016] ZWCC 31.

127 *Ibid* 16.

Criminal Law (Codification and Reform) Act, which was declared invalid for the criminalisation of deliberate transmission of HIV. The applicant alleged that their right not to be discriminated against and the right to equal benefit and protection of the law had been violated. The court rejected the argument, citing that the Constitution did not prohibit discrimination based on HIV status. Considering the global struggle to find a cure for HIV, and many born with the disease, it could have been beneficial for the public to follow the court's reasoning in the way it engaged with section 46 stipulations to give meaning to the right to non-discrimination. If the court engaged in section 46 stipulations, such as a referral to international laws and foreign laws, the public would have benefited from the reasoning of the court in relation to how Zimbabwe protects the rights of HIV-positive persons *vis-à-vis* international laws it is party to. The court could have stipulated how discrimination based on HIV intersects with section 46 values, such as the value of equality and human dignity. In line with section 46 provisions, which mandate giving full effect to the rights and freedoms in the Constitution, the Constitutional Court could have explained how the provisions of section 79 of the Criminal Law Act give full effect to the rights and freedoms in the Constitution. The court could have reiterated important values such as human dignity, justice, and openness and explained how its findings protected these values for the applicant and the public. The court did not explain how due regard to the provisions of the Constitution, including principles and objectives set out in Chapter 2, were considered.

The 2019 case of *S v Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights* was a pinnacle case in Zimbabwe's constitutional jurisprudence and an answer to some of the concerns raised in this article.<sup>128</sup> The case was rare in that it engaged with the provisions of section 46 extensively to give meaning to the right not to be subjected to physical or psychological torture or cruel, inhuman, or degrading treatment or punishment. The case further guided the way the courts should interpret human rights embodied in the Constitution. The court reiterated the importance of giving effect to the right against cruel and inhuman treatment protected by section 53 of the Constitution as required by section 46.<sup>129</sup> It clarified that such giving effect would be through the realisation that section 86(3) of the Constitution lists non-derogable rights and specifies that the right not to be subjected to inhuman or degrading punishment and the right to inherent dignity are both non-derogable rights.<sup>130</sup> The court further stated the need to promote constitutional values when interpreting human rights.<sup>131</sup> The court referred to the value of human dignity, specifying that human dignity offers an important lens in understanding the rights protected by section 53. The courts stated 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 when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is, therefore, both the supreme value and a source for the whole complex of human rights enshrined in *Chapter 4* of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the *International Covenant on Economic, Social and Cultural Rights (1966)* and the *International Covenant on Civil and Political Rights (1966)*. The preambles state in express terms that human rights "derive from the inherent dignity of the human person". They all refer to "... the inherent dignity ... of all members of the human family as the foundation

128 *S v Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights* Intervening As Amicus Curiae (CCZ 10/19, Constitutional Application No. CCZ 29/15) [2019] ZWCC 10 (3 April 2019) 13–18.

129 *Ibid.*

130 *Ibid* 14.

131 *Ibid.*

of freedom, justice and peace in the world”. The rights and duties enshrined in *Chapter 4* of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.<sup>132</sup>

On referencing international law as mandated by section 46, the court deliberated in specifying the need to consider international law to give section 53 its full effect.<sup>133</sup> The court stated that the right protected by section 53 bears a semblance of evolving standards of decency protected by international law instruments as such it is proper to refer to international law.<sup>134</sup> The court referenced the provisions of many international instruments that clarified that corporate punishment is inhuman and degrading and goes against human dignity.<sup>135</sup> Although section 46 makes reference to foreign law discretionary, the court referred to many foreign laws and case law to advance and protect people from inhuman and degrading treatment in the form of corporal punishment. Following the dictates of section 46, the court also stated the need to pay due regard to all the provisions of the Constitution, particularly the principles and objectives set out in *Chapter 2*.

The court, however, clarified that section 46 interpretation guidelines do not have the objective to compete with traditional constitutional law approaches to interpreting the Constitution. The court stated that the correct approach to constitutional interpretation is to engage with section 46 guidelines while taking “a purposive and broad, value-based approach”. The court stated that,

Whilst S46 of the Constitution enumerates specific things a court, tribunal, forum or body must do when interpreting any provision in *Chapter 4* of the Constitution, the matters listed are in addition to all other relevant factors that are to be taken into account (sic) and considered in the interpretation of a constitution. The appropriate approach to be adopted in the interpretation (sic) of a provision of a constitution guaranteeing a fundamental human right or freedom is the purposive, broad, progressive and values-based approach.<sup>136</sup>

Linking theories of interpretation to section 46 stipulations, the court clarified that a purposive interpretation of section 53 of the Constitution would lead to the conclusion that corporal punishment has the nature and effect of invading human dignity. The court was further careful to clarify that the meaning of rights is not static but evolves. Such a realisation means that there can be a time when considering the provisions of section 46 coupled with a purposive approach can lead to a different conclusion relating to the meaning and content of a right.<sup>137</sup> The court stated that,

The principle of constitutional morality requires that courts should approach constitutional issues from the point of view that accepts that the content of the rights protected by the Constitution changes with the changes in social norms. Acts that may have been regarded as falling within the scope of the protection of a fundamental right or freedom some three decades ago may no longer be accepted today. See: *Catholic Commission For Justice and Peace in Zimbabwe v Attorney-General and Ors* 1993 (1) ZLR 242 (S).<sup>138</sup>

The 2020 case of *Sogolani v The Minister of Primary and Secondary Education* has seen the court continuing on a progressive path of engaging the provisions of section 46 while adjudicating

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132 *Ibid* 17.

133 *Ibid*.

134 *Ibid*.

135 *Ibid*.

136 *Ibid* 15.

137 *Ibid*.

138 *Ibid*.

on human rights matters before it.<sup>139</sup> The court particularly mentioned the *S v Chokuramba Justice For Children's Trust* decision and its reiterations relating to how human rights must be interpreted.<sup>140</sup> To give meaning to the right to freedom of conscience, the court referenced the need to see the link between the value of human dignity and the freedom of religion. The court referred to a wealth of international law and case law from South Africa and the United States.

## 6 AN INCLUSIVE INTERPRETATION STYLE

Despite the theoretic distinction between textualism and the purposive approach, practically, the motivations behind the conceptions of the theories are not independent of each other. It is notable from the discussions above that when interpreting the Constitution, judges have referred to the interpretation clause where they deem it necessary and continued to use theories of interpretation.<sup>141</sup> The view in this article is that when interpreting human rights, the Zimbabwean judiciary cannot shake itself of theories of constitutional interpretation but must consider what this article calls “an inclusive interpretive style”. The inclusive interpretive style would be founded on the constitutional prescriptions of the interpretation clause and a balance between the use of textualism and the purposive approach.

First, as discussed, the obvious starting point to determine the meaning of a written constitutional provision will be the written text. The letter of the Constitution will provide the possible parameters for which rights will be understood. Deciphering the spirit of the right in question will become the next step. A determination of the spirit of the constitutional provision will consider the history surrounding the human right, its purpose, the objectives of the Constitution, the theoretical structure of the Constitution, all relevant provisions in the Constitution, the structure of government as it is envisaged by the Constitution and the judges’ own personal inclinations on politics, justice, morality, and general social issues. To determine the history of the human right in question, a judge may consider all the sources of history appropriate to use, including judicial precedence.<sup>142</sup> Each historical source must be used with care, and the weight given to each depends on the judge’s opinion. History relates to past events; as such, judicial considerations must not be cast in stone as changing perceptions influence viewpoints over time.

The next step will be the consideration of the guidance by the interpretation clause as they have been discussed. Constitutional interpretation should mandatorily consider values stated in the Constitution and provisions of international law, consider foreign law when necessary, and all

139 *Sogolani v The Minister of Primary and Secondary Education & 3 Ors* CCZ 2020, Constitutional Application No. CCZ 31/16 [2020] ZWCC.

140 *S v Chokuramba* 2019 CCZ 14–15 of the cyclostyled judgment, the Court commented on the interdependence between human dignity and human rights. The Court said: “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 when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is, therefore, both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). The preambles state in express terms that human rights ‘derive from the inherent dignity of the human person’. They all refer to ‘... the inherent dignity ... of all members of the human family as the foundation of freedom, justice and peace in the world’. The rights and duties enshrined in Chapter 4 of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.”

141 Murril “Modes of Constitutional Interpretation (2018)” *Congressional* 3 [https://www.everycrsreport.com/reports/R45129.html#:~:text=The%20modes%20discussed%20in%20detail,and%20\(8\)%20historical%20practices.](https://www.everycrsreport.com/reports/R45129.html#:~:text=The%20modes%20discussed%20in%20detail,and%20(8)%20historical%20practices.) (accessed 26-04-2024).

142 *Ibid* 10.

should be done as a purposive exercise.<sup>143</sup> Values and principles spell out the philosophy and the spirit of the Constitution.<sup>144</sup> It is noted that, in many circumstances, the values provided by the Constitution either are often vague and abstract and do not have a definition prescribed by the Constitution. In that case, the purposive approach will guide judges to form value judgments which are influenced by their norms, standards, principles and expectations relating to the purpose of a human right.<sup>145</sup>

## 7 CONCLUSION

This article aimed to track whether the Zimbabwean Constitutional Court has, in the past decade, utilised the provisions of the interpretation clause to accord meaning to the rights embodied in the Declaration of Rights. Reference was made to Constitutional Court cases from the Zimbabwean Constitutional Court and the limited scholarly work on interpreting the Zimbabwean Declaration of Rights. It is concluded that the interpretation of human rights is an important process which theories of constitutional interpretation have traditionally guided. The article noted the evolution of constitutional interpretation in Zimbabwe and the introduction of the interpretation clause, which guides the interpretation of the Declaration of Rights. It is noted that, despite the provisions of the interpretation clause guiding the interpretation, the judges should continue to refer to both the textualism and the purposive approach to interpretation to give meaning to constitutional provisions. The article suggests that the rules of interpretation laid down by the courts before the enactment of the new Constitution remain applicable and must be utilised in the process of constitutional interpretation. However, the interpretation of human rights demands an engagement with the dictates of the interpretation clause for the Constitutional Court to seize all opportunities to develop jurisprudence relating to the important legal subject of human rights.

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143 Currie and De Waal *The Bill of Rights Handbook* (2015) 139–140.

144 Moyo Zimbabwe Legal Information Institute.

145 Klaasen “Constitutional Interpretation in the So-called hHard Cases Revisiting *S v Makwanyane*” 2017 *De Jure* 4.