



**THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE AS A NEMESIS TO PUBLIC
INTEREST AND STRATEGIC IMPACT LITIGATION IN ZIMBABWE: THESIS,
ANTITHESIS AND SYNTHESIS**

BY

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**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS OF A MASTERS DEGREE IN LAW (LLM)**

**THE FACULTY OF LAW
UNIVERSITY OF ZIMBABWE**

AUGUST 2017

Contents

Table of Cases.....	iv
Special Dedication	vi
Acronyms	vii
Acknowledgments.....	ix
Abstract	xi

CHAPTER 1: Unpacking the issues on Constitutional Avoidance and Public Interest or Strategic Impact Litigation

1	1
Introduction	1
1.1 Background to the Study.....	4
1.2 Applied legal research relevance	22
1.2.1 Drive run	22
1.1.2 Novelty aspects	23
1.3 Literature review on Constitutional Avoidance Doctrine	29
1.3.1 Literature review on strategic and public interest litigation	33
1.4 Organization of the Dissertation	34
1.5 Statement of the Problem.....	39
1.6Hypothesis	40
1.7 Strengths of Qualitative Research.....	43
1.7.1 Limitations of Qualitative Research	44
1.8 Delimitations.....	50
1.9 Limitations	50
Conclusion	52

CHAPTER 2:An Examination of the Problems of Doctrinaire Application of the Constitutional Avoidance Doctrine in Impact Litigation Cases.....

53	53
Introduction	53
2.1 A Brief historical and philosophical consideration of the Constitution.....	54
2.2 The Three Pillars of the State and the Avoidance Doctrine.....	55
2.3 The Constitutional Court and the Avoidance Doctrine.....	57
2.4 The role of the Superior Courts: Why merits of the case?	58

2.5 Invoking various doctrines as part of the variants of Avoidance doctrine	59
2.6 Constitutional matter.....	62
2.7 Navigating the Contours between avoidance doctrine and Public Interest Litigation.....	65
2.8 Theoretical Framework.....	70
2.8.1 Judicial Impact Theory	72
2.8.2 The Normative Theory.....	75
2.9 The suggested conceptual model of interpretation	80
Conclusion	83

CHAPTER 3: The Doctrine of Constitutional Avoidance, Public Interest Litigation and Strategic Impact litigation in other Countries: Comparative Approach

Introduction	84
3.1. Scanning the Avoidance-impact litigation dichotomy.....	86
3.2 The Use of the Avoidance Doctrine in the USA and other countries.....	86
3.3 The pillars of the doctrine of Constitutional Avoidance: synthetic approach	93
3.4 Lessons from the developments in the USA.....	98
Conclusion	99

CHAPTER 4: Litigation Surgery on the Challenges of the Avoidance Doctrine in Impact Cases in Zimbabwe: A Scoping Analysis.....

4.1 An Analysis of the Decision that Bear on the Avoidance Doctrine and its Variants.....	100
4.1.1 The Implications on the Variants of Constitutional Avoidance Doctrine	101
4.2 <i>Chawira & Others v Minister of Justice & Others</i> , CCZ3/17.....	103
4.3 <i>Makoni v Commissioner of Prisons & Another</i> CCZ48/2015	108
4.4 Arguments on Judicial Diference as a Variant Form of the Avoidance Doctrine	111
4.5 The contribution of the lower and High Court to the jurisprudence on constitutional avoidance.....	120
4.5.1 Analysis on the contribution of the lower and High Court to the jurisprudence on Constitutional avoidance.....	122
4.6 Analysis on the Role of Interest Groups in Advancing the Constitutional Jurisprudence through Impact Litigation	119

4.7 Discussion and implications of the involvement of interest groups	1273
4.8 Findings on the link between constitutional interpretation and the doctrine of constitutional subsidiarity in impact cases	124
4.9 Link between policy and the avoidance doctrine.....	138
4.10 Implication of the findings.....	138
4.11 The use of bad avoidance precedents in derailing constitutionalism.....	139

CHAPTER 5: Reinstatement of Arguments, Conclusion and Recommendations for Future

Research.....	145
Introduction	145
5.1 The research in a nutshell	146
5.2 Major highlights.....	148
5.3 Reaffirmation of the Objectives.....	149
5.4 Reaffirmation of methodology and framework of analysis	149
5.5 Conclusion	150
5.6 Recommendations and possibility of achieving them	154
5.6.2 Recommendations on the need for strategic research partnerships	155
5.6.3 Recommendation on the need to follow best practices from the Legal Profession	155
5.6.4 Recommendations on the litigants and lawyers in impact litigation cases	156
5.7 Recommendation for government to support impact litigation	156

Table of Cases

1. *A Juvenile v The State* (1990) (4) 151 (ZSC).
2. *Ainsbury v Millington* [198] 1 ALL ER 929 (HL)
3. *Anaritrn Karimi Njeru v Rep* (1970) KLR Q 156.
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27. *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)
28. *Loveness Mudzuru and Another v Minister of Justice and Others*, CCZ
29. *Katsande and Another v Infrastructure Development Bank of Zimbabwe* CCZ 113/17.
30. *Majome v Minister of Justice*, CCZ 14/16
31. *Makoni v Commissioner of Prisons and Another* CCZ 48/15
32. *Makunura v Minister of Home Affairs* HH113/17

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34. Mangwiro v Minister of Justice and Legal Affairs (N.O) and Others, HH 172/17
35. Marbury v Madison, 5 U.S. (1 Cranch) 137 (1803)
36. Masedza & Ors v Magistrate Rusape & Anor 1998 (1) ZLR 36
37. Mawere v The Registrar General & 3 Others CCZ 47/13.
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41. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)
42. Morgan Tsvangirai v The President of Zimbabwe and 7 Others CC7 37/13.
43. Mtikila v AG (HCCS, No. 5 of 1993).
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Special Dedication

To La and Rah, thank you a zillion times! I formally dedicate this dissertation to you.

And To those strategic lawyers, activist judges and innovative litigants who value the benefits of strategic and public interest litigation. Family, friends, workmates, your love is forever cherished.

30 seconds speech by Bryan Dyson-Former CEO of Coca Cola:Five Balls of Life Speech

‘Imagine life as a game in which you are juggling some five balls in the air. You name them Work, Family, Health, Friends, and Spirit and you are keeping all of these in the air. You will soon understand that work is a rubber ball. If you drop it, it will bounce back. But the other four balls-Family, Health, Friends and Spirit are made of glass. If you drop one of these; they will be irrevocably scuffed, marked, nicked, damaged or even shattered. They will never be the same. You must understand that and strive for balance in your life’.

Bryan continues:

‘You live in a world of growing opportunity at one of the most exciting times in history, and you have been prepared with an exceptionally fine education because you are also well-educated, let me pause this final question to you. What is education for? Is it for the pursuit of knowledge or for the pursuit of significance? How you answer makes a difference. Knowledge is merely a tool. There is someone in Argentina or Singapore who has the same degree as you. The difference lies in how you use it. Will you use your education for life or just as a living? It’s up to you now’.

Give the required time to the five balls. Value has value only if its value is valued!

ACRONYMS

BREXIT –Britain exiting the European Union

CJ-Chief Justice

CPR-Civil and Political Rights

ECOSOC-Economic, social and cultural rights

JCC-Judge of the Constitutional Court

MDC-Movement for Democratic Change

NCA-National Constitutional Assembly

RBZ-Reserve Bank of Zimbabwe

SADC – Southern African Development Community

SIAM-Strategic Impact Avoidance Model

UK=United Kingdom

UN-United Nations

USA-United States of America

ZANU PF-Zimbabwe African National Union Patriotic Front

ZEC-Zimbabwe Electoral Commission

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5. Customary Marriages Act (Cap 5:23)
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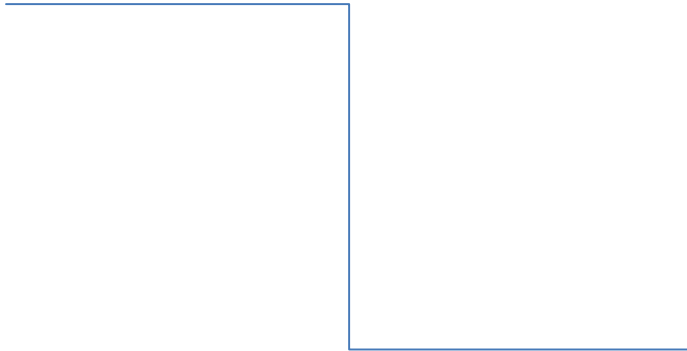
Acknowledgments

This dissertation is not a product of happenstance. It is an outcome of an attempt to establish a wide base of academic literature on the doctrine of constitutional avoidance as it is related to strategic litigation and public interest litigation in Zimbabwe. It is a comprehensive survey of the decisions made by the judges of superior courts in Zimbabwe. The researcher is extremely grateful to the respondents in this study and to Elias Man`ombe and Jonathan Muzuva for typing some parts of this dissertation. Great appreciation is given to my supervisor, Professor Lovemore Madhuku, for providing me with the valuable guidance in this research. The teaching staff and students in the LLM taught program at the Faculty of Law, the non-teaching staff at the same faculty, 2017 final year students of Political and Administrative Studies who participated in criticizing some decisions on constitutional breaches and the attendees of debates and seminars on constitutional issues about different parts of human rights-I thank you. Sisi Aby at the Faculty of Law, I feel fortunate beyond measure to work with you. I want to express appreciation for the support of those who gave email and whatsapp feedback to my published articles. The Political and Administrative Studies Department organized a seminar in April 2017 at the University of Zimbabwe which provided some indication on the importance of strategic litigation in developing constitutional jurisprudence. I always want to thank the Zimbabwe Lawyers for Human Rights (ZHLR), for the opportunity that they gave me to litigate, attend trainings and facilitate in trainings that bear on strategic litigation. To be a public interest lawyer,-or more generally, to meet litigants of public interest-I would not have been able to do so without ZLHR support. I also want to thank the Department of Political and Administrative Studies where I have had the opportunity to share ideas with staff and students on the benefits of vertical and horizontal application of the Bill of Rights. My mom, and my friends Effort Jera, Takunda Gumbo, this dissertation is a product of your moral support.

Above all, I want to thank the Almighty Creator, who endows me with the knowledge of how they that know Him ought to be prepared to be surprised with their great exploits. He remains the author and finisher of the life of every mortal.

Declaration on Plagiarism

I declare that the work in this think-piece is mine and the sources that were used in this dissertation were properly acknowledged.



Signed-----

Sharon Hofisi

Abstract

The case of *Zinyemba v Minister of Lands and Rural Settlement*, CCZ 3/16 clearly set the pace for the Constitutional Court's use of the doctrine of constitutional avoidance. Since then, the Court's judges have invoked the doctrine in varied forms. As its case load grows, this research looks at the way in which constitutional matters are being dismissed or struck off the roll on the basis of technical arguments. Implausibly, constitutional supremacy is ignored, and judges of calculatingly invoke the avoidance doctrines with astonishing constancy. The practice, as led by the current Chief Justice (CJ), Luke Malaba, is a disappointing one that adds little to the infant jurisprudence on a potentially transformative Constitution. Where the Constitutional Court used reasonable review, it also avoided key constitutional arguments. Likewise, in typical '*packing the punch*' approach, the Court has been flipping with the other variants of the avoidance doctrine such as judicial deference, subsidiarity, reserving judgments, preference of non-judicial remedies, failure to give reasons or judgments and the presumption of constitutionality. What could have otherwise been a strategic opportunity for this Court to pronounce authoritatively on the merits of key constitutional matters has largely been lost. The three pillars of what constitutes constitutional matters: *interpretation, protection and enforcement* of the Constitution, have also immensely suffered from the Court's flirtation with the avoidance doctrine. The doctrine, as a remedy, has been used by Constitutional Court judge, Justice Patel, once. Chief Justice Malaba, as well as Justices Bhunu and Gwaunza, have also used the doctrine. The doctrine has been used in various forms that include the subsidiarity doctrine in the *Majome v Minister of Justice*, CCZ 14/16 on a challenge to ZBC licensing; reasonable review in *Makoni v Commissioner of Prisons and Another*, CCZ 48/15 on the death penalty challenge), and expressly in *Katsande and Another v Infrastructure Development Bank of Zimbabwe* CCZ 113/17 and *Chawira and Others v Minister of Justice and Others*, CCZ3/17 (death penalty case). In contradistinction, lower courts

and the High Court have frequently been referring to the Constitution. They deal with the merits of key constitutional cases brought through public interest or strategic impact litigation. In these cases, the Constitution is not treated as if it is some '*rebound*' from some broken romance. As such, this study argues that, *if* the '*real romance*' is extant, then technical arguments must be sparingly used to avoid or skirt the merits of constitutional cases. It is indeed not fallacious to say, from a jurisprudential position that, '*romance does not produce an offspring*'. It is incontrovertible that the determination of the merits of any case is important in bringing matters to finality. As a result, this research essentially deals with the crucial aspects such as: (i) *what is the meaning of constitutional avoidance?* (ii) *Is the doctrine of constitutional avoidance a fundamental tenet of judicial review or it is a discretionary remedy? How can strategic interest litigation improve the constitutional jurisprudence of a country?* The dominant argument is that it may not be awry for the general populace to consider the judiciary's avoidance stance as a means to encourage the legislature to curtail some of the powers of the High Court judges. The judges of the High Court seem to be quick and innovative in deciding seemingly complex but key constitutional cases. And there are other judicial and non-judicial doctrines threatening the constitutional jurisprudence as well.

CHAPTER ONE

Unpacking the important issues on Constitutional Avoidance and Public Interest or Strategic Impact Litigation

Introduction

The consideration in this Chapter includes the prefatory issues for research such as introduction, background, statement of the problem, hypothesis, methodology, literature review, justification, limitations and delimitations. This research carries out the intention which had long been in the researcher's mind on the need to synthetically determine the potential of the Zimbabwean superior courts, particularly the Constitutional Court, in promoting public interest through judicial activism. As the apex Court on constitutional matters, the Constitutional Court must always demonstrate its willingness to reduce the backlog of cases that have to find their way back to its system. The Constitution and public issues that result in impact litigation are matters of public concern.

In the wake of increasing litigation on constitutional rights, various courts have at times adopted a more rights-based approach to remedies than a conservative one. The High Court has been leading in this regard through the use of urgent chamber application and court application procedures. Key constitutional cases are disposed of quickly through the provision of remedies. The State institutions such as the Ministry of Home Affairs and security institutions such as the Zimbabwe Republic Police have also been directed to comply with High Court orders. The High Court has largely been a prototypical institution in terms of ventilating the merits of strategic cases as well as the provision of constitutional remedies. From an access to justice perspective, the High Court has also demonstrated the importance of courts in monitoring the enforcement of positive judgments.

Where the High Court directed that certain State institutions must comply, steps towards compliance have been shown, although without convenience on the part of the aggrieved parties. This synthetic research considers the roles of Zimbabwean courts in which constitutional matters have been dealt with. Because every particularized synthesis about institutional practices usually starts with an investigation of the leading motives of the practitioners in that domain, the

strongest reason for an erudite research on the doctrine of constitutional avoidance, *hereinafter* referred to as the avoidance doctrine, must be that it (i) realizes the need for judges to significantly move for a developed constitutional jurisprudence under a transformative Constitution (ii) takes a nuanced approach to research on complex constitutional doctrines that have the net effect of avoiding the merits of constitutional matters in a jurisdiction that has an infant constitutional jurisprudence, (iii) gives a broad picture of the avoidance doctrine in a way that is meant to enable future researchers to continue the debate on the soundness of the doctrine from a Zimbabwean context, and (iv) allows stakeholders in the justice delivery system to gauge the impacts of technical arguments on constitutionalism, constitutional supremacy, rule of law, human rights, access to justice and constitutional democracy in Zimbabwe.

Perhaps, a caveat is important at this juncture for obvious reasons. This is a dissertation that is submitted in partial fulfilment of the Masters' degree in law. Although a worrisome trend on the use of the avoidance doctrine has been noticed, the researcher's aim is not to pick every case that was decided through public interest litigation or strategic impact litigation. Rather the research determines the nature and impact of some decisions that were decided by the Constitutional Court on the basis of technical arguments. What has happened or may happen after the determination of such cases is examined using selected cases. The nature and effect of State policy responses and reactions by the members of the public are also examined. The basis for doing this stems from the need to determine the main State actors who react to the avoidance decisions and the nature of the responses that they may or have made. Put simply, a decided case is considered in this research as a decisive factor which explains the behaviour of actors who react to such a decision.

Because some of the cases end up avoiding the determination of the constitutionality of statutes which bear on constitutional rights, the criticism of such cases cannot escape a democratic dimension. This is because Zimbabwe is built upon the bedrock of constitutional democracy, which in turn, is sculpted by the interpretation and protection of various democratic tenets that are enshrined in the Constitution. Such tenets have negatively been affected by the decisions that are based on the avoidance doctrine. Inevitably, the tenets also shed light on why the avoidance doctrine is a, or must be seen as a nemesis to strategic impact litigation. This is particularly so given the fact that the Constitutional Court for instance has not satisfactorily resolved cases that

involve various challenges that emanate from rushed State policy. As a result, the interpretive role of superior courts continues to score low in terms of encouraging litigants to participate and become relevant in the good governance trajectory that is envisioned by the Constitution.

In an editorial note to their book, '*Constitutional Law of South Africa*', 2nd edition published in 2013, Stu Woolman and Michael Bishop state the following important words that can stimulate interest on the need for judges to strive to actively contribute to the realization of democratic gains:

If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy always came last.

Section 3 of the Constitution of Zimbabwe, 2013, considers the tenets referred to above such as the rule of law and separation of powers to be the founding provisions or principles of Zimbabwe's constitutional democracy. As such, the constitutional framework must never plunge into an era of judicial siege.

This dissertation considers in broad overview the course of judicial interpretation and approach to the avoidance doctrine. It shows that judges of the Constitutional Court of Zimbabwe appear to be more motivated by doctrines from the South African Constitutional Court rather than embarking on a thorough approach to interpreting, protecting and enforcing constitutional provisions. Largely, they are still applying the avoidance doctrine in its classical nature, as part of *ex ante* avoidance. This is notwithstanding the fact that the countries that can be regarded as the progenitors of the doctrine have come to the realization of the need to tune the doctrine with the times: using other forms of avoidance such as *in medio* and *post ante* avoidance. Notably, the research examines why the judges of the Constitutional Court seem to be increasingly showing no signs of abating their admiration of the avoidance doctrine in its variegated form.

This speaks volumes on how the avoidance doctrine is largely criticized as a political doctrine. Judges exercise extreme restraint in cases where they do not want to be seen to be threatening the separation of powers doctrine. They would uphold technicalities, refuse to exercise their powers of judicial review, and advise litigants to follow certain directions or simply advise them to bark the 'right' tree. Wherein, it may be asked, *is there a way of determining what Public Interest*

Litigation or Strategic Impact Litigation is in Zimbabwe? If so, what should impact lawyers do to enable the judges of the Constitutional Court to reach the merits of such cases?

Both questions are considered to be very important in a comparative study such as this simply because there are countries such as India which have long classified public interest litigation or strategic impact litigation, hereinafter referred to as impact litigation, as distinct from general litigation or from the general nature of adversarial legal systems. By parity of reasoning, a judge who is seized with an impact litigation case must adopt an inquisitorial approach. Rather than concentrating on the litigants who ‘*put the cart before the horse*’ or ‘*jump the gun*’, the judges are called to look at impact cases with a generous calculating eye, and to always strive to find a way to reach the merits of such cases. Even if the Court regards the litigants as highly litigious, the judges must at the very least, devise a criterion that leaves the general populace convinced that the judges were still willing to decide on the merits of such cases.

1.1 Background to the Study

Eminently significant in this study is the need to offer a wide selection of the views which justify the use of the avoidance doctrine in impact litigation. This allows the researcher to consider the merits and demerits of the avoidance doctrine, all synthesized in a single work. Most importantly, the research looks at the other constitutional doctrines that have been used as variant forms of the avoidance doctrine. Before the adoption of the 2013 Constitution, hereinafter referred to as the Constitution, the presumption of constitutionality was widely used to deny litigants of a constitutional remedy. The leading case in this regard is *Associated Newspapers Zimbabwe v Minister of State for Information and Publicity in the Office of the President and Others* SC20/03. The case augurs well with the monumental observation that was made in 2001, by C. R. Sunstein, who in his ‘*One Case at a Time: Judicial Minimalism on the Supreme Court*’ stated that the ‘presumption of constitutionality is often classified under the broader heading of “judicial restraint,” together with other principles like “judicial minimalism”—the idea that a court should decide cases as narrowly as possible, in ways that are incompletely theorized’.

The presumption is important because it has been grouped together with the avoidance rule which states that a court should, when possible, avoid answering difficult constitutional

questions by disposing of cases on non-constitutional grounds.¹ The presumption has also been taken to mean that in evaluating the constitutionality of a statute, the Court will afford some deference to the statute, and the party challenging the statute will bear some burden of proof to show its unconstitutionality.² Clearly, Zimbabwe needs innovative judges who realize that their authority or powers of judicial review are derived from the people. The Constitution is barely four years and is now in unprecedented danger as judges ignore the effects of excessive technical reasoning to judicial decision making. There appears to be a high likelihood that the judges of the Constitutional Court will continue to avoid hearing constitutional matters on the merits. And there are various avoidance methods that are threatening the fundamental human rights and the

¹ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) where Brandeis, J stated that the Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”), see also F. A Hessick, ‘*Rethinking the Presumption of Constitutionality*’ 85 Notre Dame Law Review. 1447, 1448 (2010). He grouped the presumption of constitutionality together with other restraining doctrines such as constitutional avoidance. It should also be categorically stated here that the judges in Zimbabwe also invoke variant forms of the avoidance doctrine such as subsidiarity and permissible limitation. CJ Malaba leads the pack, with Judges of the Constitutional Court, Justices Bhunu, Patel and Gwaunza also having had to deal with the doctrine in *Chawira and Others v Minister of Justice and Others*, CCZ 3/17; *Makoni v Commissioner of Prisons and Another*, CCZ 48/15 and *Katsande and Another v Infrastructure Development Bank of Zimbabwe* CCZ 113/17. The negative policy and legal impact of the cases that were decided on the basis of the avoidance doctrine will be contrasted in this dissertation with the cases where the High Court progressively dealt with the Constitutionality of Statutes such as *Mangwiro v Minister of Justice and Legal Affairs* (N.O) HH 172/17. The constitutional jurisprudence is in its infancy as superior judges ignore the realities of excessive State policy. Theories of analysing public policies such as the green light and red light are not even used.

²E. C Dawson, ‘*Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*’ () Journal of Constitutional Law, Vol. 16:1, See *Majome v Minister of Justice*, CCZ 14/16 on the principle of subsidiarity which was used in this regard. The avoidance doctrine is indeed a statutory construction that avoids constitutional doubts, in particular the more specific incarnation of that canon holding that statutes should be construed, where possible to avoid the Constitution that Congress has eliminated from all judicial review of a question of federal law, see E.A Young, ‘*Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*’ (2000), University of Texas Law Review. For Zimbabwe, the role of Congress is taken by Parliament. Illustratively the *Majome* decision is situated in the arguments against the avoidance doctrine such as the fact that the doctrine fails as an empirical matter, to reflect the actual preferences of a law making body concerning statutory construction of constitutionally doubtful statutes, see F. Schauer, ‘*Ashwander Revisted*’ (1995) Supreme Court Review, cited in Young (ibid). further, the case also shows how avoidance doctrine has been used to justify why a court will give a narrow construction of a statute which amounts to a constitutional decision in its own right-s decision, in fact, which frequently expands the sweep of the relevant constitutional provision beyond its legitimate warrant, see R.A Posner, ‘*Statutory Interpretation-In the Classroom and in the Courtroom*’ (1983) *University of Chicago Law Review*. Further, although the constitutional doctrine has been widely used in the USA to facilitate judicial deference to legislative majorities, to minimise counter-majoritarianism or to respect the ‘case or controversy’ aspect in Article 3 of the Constitution, there is no similar provision in the Constitution of Zimbabwe, see also Caleb Nelson, ‘*Avoiding Constitutional Questions versus Avoiding Constitutionality*’. For Chief Justice Malaba, it seems that the avoidance pendulum sways the legislature way, not the people’s way.

constitutional democracy as well. Numerous other interpretations continue to be used to the detriment of constitutional jurisprudence much to the chagrin of the general populace.

The researcher argues that the approach that is used in this research uniquely adds up to the kind of synthesis that academia, the judiciary and the legal fraternity must find edifying. One further distinctive aspect about this research is the ways in which both the express and implied uses of the avoidance doctrine are heuristically presented. As such, this research is more of a seriatim than just a dissertation. Theoretically, a plethora of cases that end on technicalities could be proof of the illegitimacy of decisions of some superior courts. As such, the starting point of the investigation into the avoidance doctrine stems directly from the case of *Zinyemba v Minister of Lands and Rural Settlement*, CCZ 3/16. This case dealt with property for land rights and will be explained in detail in Chapter 4 of this research.

Numerous other doctrines have also been used and increasingly threaten the disposal of impact cases on the merits. Most judges, the leading priesthood in our society, eclipse the merits of constitutional cases. The researcher has been frequently writing on the avoidance doctrine in the print media and the claim in this research is that: the avoidance doctrine, just like any other constitutional doctrines, calls for researchers to start focusing on developing a Constitutional Research Project or Series where they contribute to in-depth research on new academic frontiers on a regular basis. This is because the avoidance doctrine, as developed or rather, when its variants are transposed by the superior courts in Zimbabwe, particularly the Constitutional Court, is usually formulated in the same social milieu where there is little literature. Its use, as is judicially envisioned, is unevenly consistent and perfunctorily considered by Zimbabwean Courts. The end result is that the judicial clockmakers are making their own clocks, and leave it to litigants to be affected by lifetime mistakes that could have been avoided had there been detailed researches before the pronouncement of judgments.

As such, the major purpose of this dissertation is to investigate the relationship between superior courts such as the High Court, Supreme Court and the Constitutional Court in as far as the ventilation of constitutional issues in impact litigation is concerned. Because the current Chief Justice is enthused with the avoidance doctrine, the danger to this is that other judges of the Supreme and Constitutional Court are highly likely to always uphold technical arguments in

impact cases. Even during his time as the Deputy Chief Justice, Justice Malaba greatly influenced other judges of the Constitutional Court to concur with his findings on both the avoidance and subsidiarity doctrines. The research is meant to be a commentary on the judgments where the avoidance doctrine was used. It is also distinct because it includes, like any commentaries, '*observations*' which enable the researcher to focus on the future findings of the superior courts.

Admittedly, it is considered in this research that the personalities and judicial competencies of the judges of the Constitutional Court differ as much as their level of judicial responsibilities. Some of the judges were appointed from the High Court to the Supreme Court on a permanent basis. The Chief Justice was recently appointed following the retirement of the late Chief Justice, Godfrey Chidyausiku. The appointed judges also serve as Judges of the Constitutional Court (commonly identified as JCC in their judgments). Because the Chief Justice seems to be the leading exponent on the use of the avoidance doctrine at the Constitutional Court, this dissertation also considers the impact of his views as captured in the media. The media can assist the general populace to see courts from a public interest perspective. They can use the judicial decisions to gauge if the Courts are being driven into judicial activism or passivism. The panorama of non-judicial alternatives provides the public with the powers to evaluate the virtues of judges using the normative framework laid out in the Constitution.

A Chief Justice for instance is considered as an extraordinary judge who serves both as a head of the judiciary and as a key member in the three pillars of the State as espoused by the separation of powers doctrine. As such, this research frequently used media monitoring as a tool to gauge how Zimbabwe's secondary population, such as the media, helps the general populace, to determine the legitimacy of the controversial decisions of the judges of superior courts. The decisions of a Chief Justice bear significantly on the emerging use of technical arguments to dispose key constitutional cases. The general public can use media reportage to understand a top judge's personal and institutional perspective. As alluded to above, the broad overview adopted in this research piece is premised on the need to present an erudite synthesis on the reasons for using the doctrine of constitutional avoidance (*the thesis*) and the reasons against its use (*the antithesis*) as a doctrine that is frequently becoming a judicial tool which usually works to the detriment of impact litigation. The synthesis of various facts, opinions and legal viewpoints

allows future researchers to treat the synthesis as a theory. They could also challenge or popularize the envisaged theory.

Although some scholars treat Strategic Impact Litigation and Public Interest Litigation as synonymous, this dissertation deliberately treats the two concepts as slightly different although they are part of the umbrella of impact litigation. The basis for distinguishing the two concepts makes constitutional sense simply because Public Interest Litigation is constitutionally pitched: the Constitution recognizes that litigants may approach a court alleging the violation of their constitutional rights by way of public interest litigation.³ However, notwithstanding that fact,

³The liberal language of Section 85 of the Constitution broadens the *locus standi* for litigants who approach the court alleging violations of their constitutional rights. Before the adoption of the Constitution in 2013, standing was narrowly considered as litigants had to show a substantial interest in the matter. Civil and political rights (CPR) were the most protected and the other generations of rights were claimed through CPR. The Constitutional Court, in its very first judgment in 2013, *Jealous Mawarire v Robert Mugabe*, CCZ 1/2013, did not invoke the avoidance doctrine. It actually became innovative and dealt with the need to protect the litigant who wanted to exercise his right to vote after the expiry of an electoral cycle. The hope for litigants in impact litigation was that the *Mawarire* judgment would be continuously used by the Constitutional Court to enable it to deal with the merits of impact litigation cases. Sadly, the Court has been increasingly upholding technical arguments and avoiding the merits of constitutional matters. This point will be elaborated in Chapter 4 on the criticism of the avoidance doctrine. Chidyausiku CJ (as he then was) remarked that the Constitutional Court does not expect to appear before it ‘*only those who are dripping with the blood of the actual infringements of their rights or those shivering incoherently with the fear of impending threat which has actually engulfed them. This Court would entertain those who calmly perceive a looming infringement and issue a declaration or appropriate order to starve the threat...*’ The case is important in showing why the current Chief Justice leads the other judges in invoking the avoidance doctrine. This is because it was heard on the merits and seven of the nine judges concurred that elections should take place no later than 31 July 2013. Deputy Chief Justice Malaba (as he then was) and Patel J dissented on the basis that the Court could not act as if it were the executive and fix election dates. The basis of the dissent fits into situations where the canon of avoidance is invoked by both the executive and the judiciary. See Caleb Nelson, ‘*Avoiding Constitutional Questions versus Avoiding Constitutionality*’ (supra note 2). It also helps in showing how Justice Malaba as deputy Chief Justice and as substantive Chief Justice has been focusing on the separation of functions rather than the rationale of the separation of powers doctrine as envisaged by philosophers like Montesquieu. For him, the pillar of State which he thinks controls a certain aspect is given the power to do so, even at the detriment of the public, from whom the three pillars of the State derive their authority. In the *Mawarire* case, the Honourable Chief Justice gave weight to executive functions. It was expected then that the Chief Justice would, even before his elevation from Deputy Chief Justice, continue to be a fan of judicial restraint as he has been doing in several cases such as the *Majome* case in supra note 2. Surprisingly, the Constitutional Court was also quick to dismiss some electoral cases such as the case of *Morgan Tsvangirai v The President and 7 others* [CCZ 37/13]. The Applicant applied to set aside the amendments made to the Electoral Act by the Presidential Powers (Temporary Measures) Act as being unconstitutional. He also applied to set aside the election proclamation setting the date for the elections. Some subtle kind of avoiding the constitutional issues was done through the failure to give reasons for the dismissal of the case. Yet, the Constitutional Court was prepared to protect the Court’s “*hands dripping with blood*” doctrine established in *Mawarire* case when it dismissed the case of *Patrick Anthony Chinamasa (in his capacity as Minister of Justice and Legal Affairs) v Jealousy Mbizvo Mawarire, Morgan Richard Tsvangirai, Welshman Ncube and 2 others*. [CCZ

litigants who act in their own interest, or utilize the broad legal standing provisions in the Constitution can also be allowed to strategically approach a court to seek a constitutional remedy whenever they raise allegations that other parties such as their political parties are also affected by certain administrative conduct.

An individual strategically approached the Constitutional Court to seek protection from a constitutional breach by a State institution. She also argued that the breach also violated the rights of her political party.⁴ She utilized impact litigation but the Constitutional Court in turn used one of the variant doctrines of the avoidance doctrine, that is, the doctrine of subsidiarity to refuse to grant the remedy that was being sought by the litigant. This was notwithstanding the fact that this was a strategic case that presented the Court with an opportunity to rule on the constitutionality of a Parliamentary Act whose unconstitutional provisions the court sadly considered had not been impugned before the Applicant had '*committed a deliberate criminal offence by refusing to pay for a license*'⁵.

Further, a critical academic synthesis cannot afford to ignore the role of private law firms in using impact litigation to develop the jurisprudence on the Constitution.⁶ The same holds for

235/13]. In the *Chinamasa* case, the Applicant applied for a two week extension of the election date fixed by the Constitutional Court in the *Mawarire* case, namely 31 July 2013. This was strongly opposed by both Mr Tsvangirai and Professor Ncube. The Applicant explained that the application was made because of a direction of the Extraordinary SADC Summit held in Maputo, although he himself had no complaints about the date set by the Court. The application was dismissed at the end of the hearing on 4 July 2013 yet the Court did not furnish the applicants with the reasons for judgment.

⁴ See the *Majome v Minister of Justice*, supra note 2.

⁵ For instance, in *Majome v Minister of Justice*, CCZ14/16, a legislator, and lawyer, strategically approached the Constitutional Court on an individual basis but her case had a bearing on the greater public good who felt that they were not supposed to pay radio licenses to the Zimbabwe Broadcasting Corporation, ZBC, for various reasons that include freedom of choice. Through invoking the doctrine of subsidiarity, the Constitutional Court derailed the benefits of impact litigation by imposing a requirement that the litigant was supposed to have first challenged the constitutionality of a Statute before disregarding its provisions. Yet and most importantly, the Court had accepted that there were two wrongs and yet, shockingly, it proceeded to make a finding against the applicant, who was also made to pay the costs of the suit. There was no balanced attempt by the Constitutional Court to show why the applicant's conduct militated against the other wrong by the Respondents, particularly in relation to the payment of the costs.

⁶ Public Interest Litigation, or strategic litigation has been utilized by private lawyers in Zimbabwe simply because the Constitution presents every lawyer with the opportunity to develop the constitutional jurisprudence on various generations of rights that are enshrined in the Constitution. Important cases include *Mawere v The Registrar General and 3 Others* CCZ 47/13 where the Applicant, a Zimbabwean citizen by birth and a South African citizen by registration, approached the Constitutional Court seeking a declaration that the new Constitution automatically confirmed his status as a citizen by birth without his having to go through a "restoration of citizenship" process. On 26 June 2013, the court, having heard argument in the matter, issued an order declaring that the Applicant was a

public interest organizations which are predominantly referred to as civil society organizations or non-governmental organizations.⁷ There seems however, to be few or no literature on government-based organizations (GONGOs) that are involved in impact litigation in Zimbabwe.⁸ This dissertation appreciates the urgent need for both compression and erudition on emerging or frequently misunderstood constitutional doctrines. This is particularly so since the Constitutional Court has had occasion to deal with the variant forms of the avoidance doctrine such as subsidiarity and alternative remedy or judicial deference as alluded to above.

In some instances, the Constitutional Court has been seen to invoke the doctrine, but no reasons for judgment have been quickly given.⁹ The leading argument that has been used by the Court as the basis for invoking the doctrine seems to be the subsidiarity principle which stipulates that where a piece of legislation stipulates a remedy that is provided for in the Constitution, the litigant must first utilize the remedy before approaching a superior court. A caveat that needs to be placed at this stage is that the fallacy of that leading approach is constitutionally improper as it defies the essential doctrine of constitutionalism which is not only a value protected by the Constitution¹⁰, but also puts the Constitution at the very top of other legislative sources. The

citizen of Zimbabwe in terms of section 36(1) of the Constitution and interdicting the Registrar-General from demanding that the Applicant renounce his foreign-acquired citizenship before issuing him with a national identity document. The Registrar-General was also directed to issue the Applicant with a national registration document as soon as possible *before* the voter registration process being conducted by ZEC was completed.

⁷Organizations such as Veritas Zimbabwe have been filing public interest litigation cases such as *Chawira and Others v Minister of Justice*, supra note 1.

⁸This is perhaps because some governments support such groups in countries such as the USA and India. In Zimbabwe though, the explanation could be that institutions that are not supposed to be cited as parties to some cases have also been seen approaching courts of law on behalf of its officials and other officers of the security institutions in Zimbabwe. This was done in the case of *Zimbabwe Electoral Commission and Another v Commissioner General of Police and 19 Others* CCZ 64/13. In that case, the prejudiced officials were given a second opportunity to vote as Special Voters. This was based on the fact that special voting on 14 and 15 July 2013 was marred by confusion and disorganisation which resulted in more than 26 000 members of the uniformed forces failing to cast their votes. On 23 July 2013 ZEC made an urgent application to the Constitutional Court seeking an order that would allow special voters who were not able to vote on the designated special voting days to vote on 31st July 2013. The applicant was heard on 26 July 2013. On the same date the Court granted the application and issued an order that ZEC should take all necessary steps to ensure that officers under ZEC's employees and members of the uniformed forces who had failed to cast their votes on 14 and 15 July 2013 should be authorised to do so at the poll on 31 July 2013.

⁹In the Bond Notes case, *Mujuru v Minister of Finance* CCZ 75/17, the reasons for the judgment have not yet been given. The court had made a finding that the bond notes were not yet in circulation. When the case was struck off the roll, the bond notes were introduced. The Constitutional Court was thus a key player in the policy taking since the bond notes were seen as Government's palliative policy measure meant to ease cash flow shortages.

¹⁰Section 3 of the Constitution

Constitution is an extraordinary legislative document and must not be haphazardly linked to ordinary statutes.

Observably, it is also important to state at this very outset that the Constitutional Court is, as its name suggests, a Court that must strive to deal with constitutional matters, unless its rules or the Constitution itself dictates otherwise. It has presented academia with many less erudite decisions on the avoidance doctrine, some of which have been wrongly linked to other legal doctrines in a manner that betrays their origin.¹¹ Further, most of the interpretive machinations in the cases that were decided by the Constitutional Court have been based on doctrines that are applicable to general litigation, and not impact litigation. As such, it was noteworthy for a synthetic research such as this to show the basis for avoiding techniques that are used in general litigation when dealing with impact litigation.

In light of the above arguments, an important normative causality to judicial review demands then that judges of superior courts, as interpreters or custodians of the Constitution whose decisions may be binding for some time, must strive to please the givers of their authority-the people. They have to do so by respecting democratic norms such as human rights, constitutionalism, and rule of law and so on.¹² While it is of the very essence of judicial pronouncement that a judge must justify his or her decision, it is argued in this dissertation that some decisions, though they explain the reasons for upholding technical arguments, are detrimental to public interest by the way they are timed, and by the extremities which they then serve.¹³

¹¹ For instance, the doctrine of ripeness was wrongly applied in *Chawira and others v Minister of Justice*, supra note 1. The reason for this argument is simply that the inmates on death row are still prejudiced and the Constitutional Court ought to have dealt with the merits of their constitutional challenge on the death penalty. See also, *S v Mhlungu* 1995 (3) SA 867 (CC) @ para 59. See also, *Spector Motor Services, Inc v McLaughlin*, 323 US.101, 103 (1994) where Frankfurter J spoke of the need to avoid passing questions of constitutionality unless such adjudication is unavoidable. See also *Joyce Mujuru v Minister of Finance*, supra note 9 where the Constitutional Court found that an applicant had come too early to challenge a legal framework which had not yet been established.

¹² These norms are enshrined in section 3 of the Constitution as founding values of democracy.

¹³ For instance, the Constitutional Court went to the extreme of justifying the policy position that there is no executioner who has been appointed in *Chawira and Others v Minister of Justice*, supra note 1. In essence, it is strongly argued in this research that this was not supposed to have been done by an apex Court in Constitutional Court. It did not even encourage the State to consider the appointment with urgency. Rather, and in surprising fashion, the Court used the State's failure to appoint an executioner as a way of expressly invoking the avoidance doctrine and justifying why it thought the death penalty challenge by 13 death row inmates was not yet ripe.

The point of unity between the judicial and the Constitution lies in the normative design of the Constitution to enhance the courts to embark on creative judicial activity. The judges have that body of norms which gives them the ability to act in the interests of the public by ensuring that social, economic and political policies are checked by a group of constitutional politicians. The researcher is familiar with the merits and demerits of both types of litigation but will not belabour himself in this endeavour. Suffice is it to state that the present study examines the ideas and ideals of the judges who have authored judgments that have had a tremendous ‘emotional’ importance to public interest litigants and the general populace at large.¹⁴ The hope in this dissertation is that the research will create a culture of research and case review among legal researchers and scholars on the heterogeneous issues that deal with the avoidance doctrine.

The Setting of this research

Neither does this study speak of the avoidance doctrine as amounting to judicial violations of the Constitution. Nor does it speak of the variants of the doctrine as contrary to other legal doctrines, or put simply, as illegal or alien legal doctrines. Rather, the argumentation in this study is that: the doctrine and its variants, when reflected properly, have largely been used to the detriment of impact litigation or even the development of constitutional jurisprudence in general. When judges unanimously agree that a constitutional challenge to the death penalty is not ripe¹⁵; when they consider labour matters as non-constitutional matters¹⁶; when they do not consider the justiciability of freedom of choice¹⁷; and when they ignore policies that bear on the economic well-being of the general populace¹⁸; there is nothing amiss if they are perceived as reneging on their duty to be the independent national arbiters or ultimate adjudicators of constitutional disputes.

¹⁴This is descriptively used in this research to show how judges’ decisions are nothing more than their expressed emotions. Loosely argued, these ‘emotions’ are part of a judge’s passive virtues and are then supported by reference to some legal viewpoints. The admixture of emotions and legal points would come to the general populace as judicial decisions that are binding on them, for a long time, unless they have been overturned by other ‘emotions’ from a superior judge or constitutionally speaking, another judge who exercises the power to regulate the processes of the same court. See also section 176 of the Constitution on their duty to develop the common law and not to express their emotions.

¹⁵*Chawira and others v Minister of Justice*, supra note 1.

¹⁶*Katsande supra note 1*

¹⁷*Majome v Minister of Justice*, supra note 2

¹⁸*Mujuru v Minister of Finance*, supra note 9.

And citizens can quite perceive how the policy-oriented reasoning as well as the constitutional tragedies of the avoidance doctrine unfold clearly in the decisions of the Constitutional Court, with the casual language of some of the authors of the avoidance judgments justifying the need for detailed academic research. For if in one sense the other judges of this Court would occasionally write dissenting judgments, perhaps, the general populace could find ways to legitimize the decisions using the counter-majoritarian argument which speaks to the need to legitimize the will of the majority-though the argument is a bit tyrannical. The principal argument against unanimous decisions lies in the fact that strategic impact cases are different from normal or general cases. Courts play a significant role in making human rights cases strategic. They can provide effective criteria for framing and deciding on the benefits and limitations of impact cases.¹⁹ Without judicial intervention, unaccountable pillars of the State may usually be allowed to deliberately ignore the interests of the public at the expense of policy reasons.²⁰ Similarly, the judicial approach to impact litigation through the upholding of technical arguments creates the wrong impression that either the judiciary is servile, or the citizens must always be quiescent when it comes to taking State policy. Put differently, active citizenry would appear to be discouraged by the Courts of law.²¹

Litigation on strategic or public interest cases can be done at lower courts or superior courts. The acceptance of referral cases as well as progressive judgments from lower courts can go a long way in demystifying the procedures on impact litigation. Key aspects that can help in this endeavor include the court's exploitation of the liberalization of legal standing in Zimbabwe; innovative use of their constitutional mandates to develop the common law (including constitutional common law) and the need to decide on the merits of impact cases. Strategic impact cases in Zimbabwe have been filed on various issues as shall be seen below. The determination of such cases provide researchers and impact lawyers with the fallback strategy on future cooperation, case selection, client management, filing checklists and development of litigation manuals.

¹⁹ This has been done by some countries such as India.

²⁰ This is particularly in light of the fact that the Constitution, though largely progressive, was a product of political negotiations. ZANU PF and the two MDC formations produced a compromise document which has seen the struggle to allow the first Constitutional Amendment. No wonder why been some political parties such as the NCA campaigned for a 'No Vote' to the adoption of the Constitution. Their argument was premised on the basis that this is a bad Constitution which reflects the will of the politicians and not the people.

²¹ By active citizenry, it is meant to describe those citizens who can play an oversight role or watchdog role in the protection and promotion of fundamental rights and freedoms.

The year 2016 seemed to be the defining year when the Constitutional Court began to use the subsidiarity doctrine as one of the variants of the avoidance doctrine.²² In *Chawira and Others v Minister of Justice and Others*,²³ the Constitutional Court expressly referred to doctrine, and wrongly linked it to the doctrine of ripeness. The applicants in that case were vindictively presented as, ‘*Condemned prisoners awaiting execution*’. The Court considered that they were not yet prejudiced by being continuously on the death roll. It also denied them a constitutional remedy by buttressing the avoidance doctrine with policy justifications such as the fact that there is no executioner to put the death sentence into effect. The Court took an armchair approach to judicial reasoning to say the least.

Apart from the *Chawira* case²⁴, the Constitutional Court also used the avoidance doctrine in striking a case that had been brought before it by way of impact litigation. In *Mujuru v Minister of Finance*²⁵, where the applicant, a leader of a political party challenged the legality of Bond Notes, the Constitutional Court avoided the merits of the case by describing the applicant as having put the ‘*cart before the horse*’. The applicant was first made to wait for the introduction of the bond notes so that she could challenge their legality. Subsequently, the applicant’s other case was not heard on the merits because the Court struck it from the roll for want of compliance with the rules of the Constitutional Court.

Save for the case of *Makoni v Commissioner of Prisons and Another*,²⁶ the narrative on the use of the avoidance doctrine in Zimbabwe shows that the Constitutional Court is not prepared to exercise its discretion to hear the merits of the case together with technical arguments. Once a preliminary objection has been raised to hearing the matter on the merits, the Court has been quick to uphold the preliminary points. It has also been seen to be prepared to write detailed reasons on why the constitutional issues must be avoided in such cases. Gleaning from the

²² *Majome v Minister of Justice*, supra note 2.

²³ CCZ3/17

²⁴ Supra note 1

²⁵ Supra note 18

²⁶ CCZ 48/15. The *Mawarire* decision, supra note 3, bear significantly on the development of constitutional gains such as the protection of political rights and lawful interests of political parties in an envisaged multiparty democracy, in that though an individual simply asserted his right to vote as envisaged by the Constitution, this case reversed other gains of constitutionalism such as the need to protect the lawful interests of the political parties which wanted to see various reforms being made before the elections could be conducted. Notwithstanding these aspects, litigants utilizing impact litigation as well as researchers can use the *Mawarire* doctrine to criticise the Constitution Court’s use of doctrines such as ripeness, and subsidiarity to deny litigants the opportunity to have their matters heard on the merits.

decided cases that bear on the avoidance doctrine, there is no one overarching reason why the doctrine is usually invoked at the hearing of preliminary arguments.

This study argues that read as a doctrine that is, or should be, invoked in isolated cases, the doctrine must be sparingly used and the Constitutional Court must show in its judgments why its discretion is only being used to dismiss, strike off or remove impact cases from the court roll. This explains why the major decided cases which are investigated in this dissertation were mostly made after the adoption of the 2013 Constitution.²⁷ Although the judges of the Constitutional Court have sometimes exercised their discretion to delve into the merits of impact cases²⁸, the argumentation in this study is that they have mostly not considered the need to retain a reservoir of public confidence in the judiciary in determining similar impact litigation cases.²⁹

The inventive approach to judicial reasoning that was established in *Mawarire v The President Mugabe*³⁰ affirms the argument that the Constitutional Court has gradually been twisting technical arguments, through a ‘pick and choose’ approach to dealing with the merits of impact cases.³¹ The case shows that occasionally, and for the purposes of political expedience, the merits of some cases are ventilated, but the Constitutional Court would dissociate itself from the reasoning adopted in such cases.³² The point that was made in the *Mudzuru* case³³ by the lawyer

²⁷The Constitution of Zimbabwe, 2013 is referred to in this dissertation simply as the Constitution.

²⁸ Such as *Loveness Mudzuru and Another v Minister of Justice and Others*, CCZ 79/14.

²⁹In *Makoni v Commissioner of Prisons and Another*, supra note 1, Patel JCC, avoided some arguments that were raised by the Applicant but the avoidance doctrine was used to innovatively give a remedy to the applicant who was challenging the death penalty. Surprisingly, the Constitutional Court used hard-hitting language in the *Chawira v Minister of Justice*, supra note 1, when it expressly invoked avoidance doctrine but wrongly linked it to the doctrine of ripeness in denying the applicants a constitutional remedy in a matter that had been brought under impact litigation.

³⁰CCZ 1/13

³¹For instance, in a case that dealt with the advancement of women’s rights, and also bears on the preparedness of the Constitutional Court to interpret the Constitution purposively, *Loveness Mudzuru and Another*, CCZ 79/14, the Constitutional Court was prepared to cite various international law aspects and to deal with methods of constitutional interpretation in detail. Tendai Biti, the lawyer for the applicants, brought this matter using public interest litigation as part of impact litigation. Malaba DCJ (as he then was) showed that the public interest litigation that would have been adversely affected by a breach of a fundamental right must be protected under section 85 (1) (d). The aspects include effective protection, context of purpose of the public interest so protected and discretionary value judgment to be made by reference to undefined factual matters decided on a case by case basis. . The case shows that legal standing under public interest litigation is broadly understood and does not include private or parochial interests. The

³²See *Mawarire v President Mugabe*, CCZ1/2013 where the Constitutional Court invented a doctrine that one should not wait to have their hands drip with blood before they can approach the court of law to seek redress.

³³Supra note 26

for the applicants, Mr. Tendai Biti, in the heads of argument demonstrate the reason why judges must write concise judgments that deal with the merits of constitutional matters. Biti stated that:

*This case allows the Constitutional Court and gives the same an opportunity of being bold, and setting up a constitutional trajectory or DNA in these early stages of the Constitution where the Chief Justice and every other Constitutional judge is privileged and rear position (sic) of being the founding interpreters of this important document the new Constitution of Zimbabwe.*³⁴

This situation holds even in instances³⁵ where cases demanded that the Constitutional Court had to continue to use the reasoning so adopted in the *Mawarire*³⁶ and *Mudzuru*³⁷ cases to deal with the merits of other impact cases.³⁸ Further, the Constitution demands active involvement of the judges of the superior courts in developing doctrines such as the common law of Zimbabwe,³⁹ including constitutional common law.⁴⁰ The common law has been described as:

*The law applicable to all people of a given society regardless of race, tribe and sex; as part of a classification of legal systems which have the influence of the English common law as distinct from those which have been termed civil law systems with a Roman law basis; and as that portion of the law which is not derived from legislation and emanates from a collection of principles made by judges in the course of resolving issues brought before the courts.*⁴¹

The description of the common law shown above is an example of what can be used by the superior courts to develop a common law that is strictly Zimbabwean. In the first instance,

³⁴ *Mudzuru* case supra note 16, the heads are available at http://www.veritaszim.net/sites/veritas_d/files/Mudzuru%20%26%20Another%20v%20Minister%20of%20Justice%20, accessed 04/08/17.

³⁵ E.g. in the *Chawira* case supra note 1, the author of the judgment, JCC Bhunu, made a finding that there was no prejudice on the part of death row inmates, who were kept in the dark on whether or not they would be hanged. In the *Mawarire* case, supra note 28, the applicant was simply wanting to vote. A **'hands-dripping-with blood'** doctrine was invented in that case. Surely in the interest of the public and greater common good, the Constitutional Court was supposed to realise that the 13 inmates in the *Chawira* case, supra note 1, are legitimately, **'in the jaws of the death'**. That there is no executioner at the moment was neither here nor there. For this reason, the *Mawarire* reasoning was supposed to have been adopted.

³⁶ Supra note 3

³⁷ Supra note 31

³⁸ Using the concerns raised by Biti in the *Mudzuru* case, supra note 31, it becomes clear that a decision by a CJ or DCJ or JCC plays a significant role in developing the jurisprudence on constitutional matters. Although the Constitution is no longer new, four years after its adoption, the arguments show how judges have a rare opportunity to develop doctrines. These doctrines can only be developed if the merits of the cases are not casually avoided.

³⁹ The common law of Zimbabwe has been described in three ways.

⁴⁰ See section 176 of the Constitution.

⁴¹ Based on arguments by Glanville Williams (1982), *'Learning the Law'*. London: Sweet and Maxwell, p. 24, cited in L. Madhuku, *'Introduction to Law'*, (2010) Weaver Press.

impact litigation can be used to ensure that there is no selective application of the law,⁴² and progressively realized constitutional rights are protected, respected, and promoted.⁴³ The second description of the common law shows how judges have been prepared to use comparative reasoning in developing the jurisprudence of the Constitution.⁴⁴ The third aspect deals with the pseudo-lawmaking powers of the judges which demand that judges of a superior court, appointed under a normative framework, must innovatively develop the principles of the Constitution in a manner that removes judicial acceptance of rigid doctrines that hamper the development of constitutionalism.

The pseudo-legislative powers of the judges have over the years been gaining tacit support from the legislature and the executive.⁴⁵ As such, it is argued in this study that what the Constitutional Court has been doing is to set the pace for legislative and executive intervention to plug ‘policy holes’ supposedly opened by impact litigation,⁴⁶ and distil the acceptance approach of the High Court.⁴⁷ It refused to reasonably exercise its judicial discretion to ventilate the merits of impact

⁴²The High Court, Harare has been active in this regard as was seen in the strategic cases such as *Nyika and Another v Minister of Justice*, HH181/16, where a shorter prescription period in the Police Act was challenged in terms of the non-discrimination clause in section 56 of the Constitution. This clause fits perfectly into the first description of the common law presented above. See also the two Mangwiro cases e.g. *Mangwiro v Co-Ministers of Home Affairs and Other*, HH 147/15 and *Mangwiro v Minister of Justice and Legal Affairs (N.O) and Others*, HH 172/17 where the State Liabilities Act was challenged for being a statute of limitation in that it limits the ability of a litigant to attach the property of the State. The three cases cited above are important in showing how superior courts have not ended on technical arguments that were raised by the State. They show how the courts have played a dominant role in showing the gains of transformative constitutionalism and the benefits if impact litigation, as well capturing the ability of judges to deal with the three aspects of what constitutes a constitutional matter: interpretation, protection and enforcement of constitutional rights.

⁴³See *Farai Mushoriwa v City of Harare and Another* HH 195/14. In that case, the High Court granted a spoliation order to an applicant who had been affected by unilateral disconnection of his water supply by the City of Harare. This case was of strategic importance to the development of the jurisprudence on water rights which are now justiciable and protected under section 77 of the Constitution. Although Advocate Mpofu was acting for the applicant, this case fits under SIL because of its importance alluded to above. Bhunu J (as he then was) used the doctrine against deriving benefit from one’s own wrong as enunciated in the American case of *Riggs v Palmer* (1899) 115 NY 506, NE 188 where the court was prepared to develop the common law. Surprisingly, the Constitutional Court did not adopt this stance, or at the very least, deal with the import of the decision when it refused to deal with the merits in the *Majome* case, supra note 2.

⁴⁴See *Nyika* case supra note 42 and, *Mudzuru* case, supra note 31.

⁴⁵For instance, following the striking off of the *Mujuru* case, supra note 9, the legislative framework that dealt with the introduction of the Bond Notes was gazetted in a manner that was a direct response of the arguments that had been raised by the applicant.

⁴⁶*ibid*

⁴⁷For instance, in the *Mangwiro* case, supra note 1, the High Court had progressively referred its order to the Constitutional Court for confirmation as envisaged by section 175 of the Constitution. Surprisingly, the Court avoided the arguments on the confirmation by upholding technical errors that were raised on behalf of the respondents. Considering that this case was the first to strategically deal with the confirmation of progressive judgments that bear on the equality before the law and equal protection of the law provision of the Constitution, that

cases.⁴⁸ Most importantly, because the jurisprudence on the Zimbabwean Constitution has not yet developed, it is avowedly necessary that the superior judges should perform their judicial roles by enriching the common law, interpreting the Constitution widely and effectively regulating their own processes.⁴⁹

Because the endeavour in this dissertation is to present a detailed analysis of the impact of invoking the avoidance doctrine on constitutional jurisprudence in Zimbabwe, this study also echoes what the researcher said in some newspaper review that while it is encouraging that the High Court has used its discretion to the benefit of impact litigation, the Constitutional Court continues to avoid the merits of the case.⁵⁰ This procedure has also been made pursuant to the High Court's role as a constitutionally established court.⁵¹ Further the High Court has also largely reflected in its decisions the fact that the Constitution requires that judges must consider the values that are enshrined as founding values in the Constitution when interpreting constitutional breaches to human rights.⁵² For the avoidance of doubt, the empowering provision in this regard is worthy reproducing at this instance as it states that:

46 Interpretation of Chapter 4

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

is, section 56, the Constitutional Court was supposed to deal with the case and then suggest the correct procedure which the judges of the High Court must follow. It was disingenuous on the part of the Constitutional Court to accept that the applicant could still come back to the Court but at the same time refuse to deal with a case that was of strategic significance. Its approach raises strong fears that the *Nyika* case, supra note 42, which was again referred to it for confirmation may also be referred back to the High Court if it borders on similar arguments. Consequently, the avoidance doctrine is used as a nemesis to impact litigation. In both cases, the applicants were greatly affected by the constitutional breaches on the part of the Zimbabwe Republic Police. In the *Mangwiro* case, supra note 1, the Applicant lost over USD1.5 million and has not received his money since 2008, a year before the dollarization or introduction of a multicurrency regime in Zimbabwe. In the *Nyika* case, supra note 42, one applicant had his leg amputated and the other one has a bullet still lodged in his board and was also injured on his finger. See S. Hofisi (2017) 'Avoidance Doctrine: Arguments and Analysis', <http://www.herald.co.zw/avoidance-doctrine-argument-and-analysis/> accessed 04/8/17.

⁴⁸Section 176 is important in this regard. The superior courts have huge backlogs of cases that were brought before them which bear on impact litigation. There is no basis for keeping on adding to the backlog by keeping on postponing or striking cases off the roll when it is clear that those cases will come back to the same courts once the technical defects are addressed.

⁴⁹See also section 46 of the Constitution

⁵⁰See S. Hofisi (2017) 'Avoidance Doctrine: Arguments and Analysis', <http://www.herald.co.zw/avoidance-doctrine-argument-and-analysis/> accessed 04/8/17

⁵¹See cases cited in supra note 42.

⁵²Section 46 (1) (b)

(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.*⁵³

It is argued in this dissertation that the proof of the competency of a judge and the legitimacy of his or her decisions are measured by the willingness by the respective judge to either adhere to constitutional ethos or by his or her preparedness to read into the public impact of the decisions. Judges are not merely court personnel, that is, case and court managers, but are in many public spheres the main actors in defining the legal needs of a society. This is particularly the case in the superior courts where judges play a critical role in shaping the constitutional jurisprudence as well as in developing methods of interpreting the Constitution.⁵⁴ The corollary to this is that the overall protection of human rights by encouraging effective enforcement of judgments.⁵⁵

Research Relevance

The relevance of this research cannot be underestimated considering that the Constitution of Zimbabwe is a transformative document which must be interpreted generously if its provisions are to be protected. A Constitution is the soul that animates the existence of a nation. As such, the central role that the judges of the superior courts play in interpreting the Constitution must be analyzed with erudition. Avid and constitutionally-informed members of the public, legal scholars, researchers and litigants have the opportunity to read and critique the judges' reasons of judgment in impact litigation cases.

They are also afforded the opportunity to legitimize or delegitimize the seeming 'dilemma' which is predicated upon the fact that the Constitutional Court is sometimes treated as both a 'constitutional' court⁵⁶ and an extraordinary court.⁵⁷ The Constitution also contains various

⁵³Section 3 lists several principles that must be considered by judges such as the rule of law and human rights.

⁵⁴Section 176 of the Constitution

⁵⁵For instance, in the *Mangwiro* decisions cited in supra note 1 above, the applicant, who was adversely affected by a ZRP decision some nine years ago, has been to and from the courts to have the Minister of Home Affairs comply with the decision of the court to pay the applicant. Added to this has been the rigmarole of court procedure from the High Court and Constitutional Court. Although the Minister demonstrated that he was willing to comply with the judgment, he has not done so. When the Applicant's matter was referred back to the High Court to enable Justice Mushore to remedy a technical error, the applicant had to approach the High Court to force the minister to comply. The High Court was again forced to issue an interim order to enable the minister to purge his contempt. All this worked to the detriment of the applicant who had obtained a positive judgment. Three High Court judges have dealt with his case since 2008: Justice Musakwa, Justice Mushore and recently Justice Hungwe in the contempt proceedings.

⁵⁶As indicated in the legal standing provision, section 85 of the Constitution

public interest issues that can be constitutionally litigated in superior courts.⁵⁷ Although very few judges have directly used the phrase ‘*constitutional avoidance*’ in determining constitutional cases,⁵⁹ it is not too much to boldly state that the avoidance doctrine has emerged as a significant area of academic, legal and scholarly research in Zimbabwe whose impact has been given impetus by an increase in impact litigation cases.

Until the Constitutional Court’s judgment in the *Chawira*⁶⁰ and *Katsande* cases⁶¹, the doctrine was not expressly referred to by our superior courts.⁶² This was notwithstanding the fact that the doctrine was actually being applied impliedly in many cases before and after the adoption of the Constitution.⁶³ Although less established in its reference by superior courts, there are signs that the use of the doctrine is fast becoming more widespread. As its application is likely to become frequent and of precedential value in constitutional litigation, researchers, interest group lawyers, impact litigants and legal scholars must endeavour to understand and effectively address the courts on the doctrine by drawing from impact litigation cases that were decided across various national jurisdictions.

⁵⁷ As reflected in judgments where the Constitutional Court insists that applicants must first impugn the provisions of an Act before deciding to disobey it and come before the Constitutional Court to seek a remedy. This was the main thrust of the *Majome* decision, supra note 2. Subsidiarity as a variant form of the avoidance doctrine gives the impression that the Constitutional Court is a special court which waits for other courts to make certain pronouncements before it litigants can approach it. The description also fits how judges of this case use avoidance doctrine and its variant forms without event yet they argue that litigants who attempt to implore it to discard the avoidance doctrine would be expressing personal and legal opinions, see the *Mujuru* case in supra note 9.

⁵⁸ Public Interest Litigation is one of the ways of approaching the Constitutional Court to enforce constitutional rights as indicated in section 85 (1) (d).

⁵⁹ JCCs Bhunu expressly referred to the avoidance doctrine in the *Chawira* decision, supra note 1, albeit wrongly in that there was no basis for linking it to the ripeness doctrine in instances where prejudice was manifestly extant, and Justice Gwaunza in the *Katsande* case, supra note 1, where again, it is respectfully argued that she casually acquiesced to the *Chawira* decision, supra note 1, without considering that the case had implications on the development of jurisprudence on labour rights as constitutional rights. Section 332 of the Constitution is clear that a constitutional matter involves issues to be interpreted, protected and enforced so long as they are found in the Constitution. Labour rights as constitutional rights protected in section 65 of the Constitution are in no way different.

⁶⁰ Supra note 1

⁶¹ Supra note 1

⁶² Justice Bhunu, the author of the *Chawira* judgment condemned inmates on death row were denied a chance to challenge the constitutionality of the death penalty in light of section 48 of the Constitution (right to life), expressly referred to the avoidance doctrine, as shall be shown in chapter 4 on research findings and analysis. In *Majome* case, supra note 2 the Court referred to the doctrine of subsidiarity. In *Makoni* case, supra note 1, the Court referred to permissible limitation. In the *Mujuru* case, supra note 9, the Constitutional Court used the concept of judicial deferral.

⁶³ There are several cases where the presumption of constitutionality was used by superior courts to dismiss matters. The adoption of the Constitution in 2013 led to the evolution of the concepts of removing cases from the roll or strike matters off the roll and effectively refusing to hear cases on their merits. It is necessary to refer to such cases in this dissertation as some of them were not brought under impact litigation.

A synthetic analysis on the use of the doctrine in Zimbabwe is made in this study and it makes this study relevant as it compares the Zimbabwean approach with judicial approaches across global common law jurisdictions. The academic resolve in this dissertation is to analyze the use of the avoidance doctrine in Zimbabwe athwart three major judicial institutions alluded to above. Particularly, the research seeks to assess the thesis revolving: instances where avoidance is used as part of a court's discretion to avoid constitutional issues; and instances where it is provided as a remedy for constitutional breaches⁶⁴. It also looks at the extent to which the superior courts are prepared to directly refer to the doctrine in their decisions.

It also assesses the antithesis to the use of the avoidance doctrine mainly considering that: the judiciary's knowledge of the distinction between impact litigation and general litigation has not been shown in judgments of cases that bear on impact litigation; the application of the avoidance doctrine is done casually, and the depth of analysis of the doctrine shows a paucity of judicial research in this regard as the concepts are given a perfunctory examination. With this dissertation, the University of Zimbabwe's Law Faculty and the Judicial Services Commission (JSC) may embark on the development of a database that tracks on avoidance doctrine and/ or undertake a constitutional research series on analytic works that bears on the doctrine.⁶⁵ These works will represent the scholarship that will assist judges to develop the jurisprudence around the doctrine. Through this research, the researcher hopes to immensely contribute to the development of a scholarly culture on new developments in Zimbabwean constitutional law. The focus is on the study of the roles of functionaries of one of the three tiers of government: the judiciary.⁶⁶

As part of the relevance matrix, three main issues are embraced in this dissertation. The first is the thesis which is concerned with the nature and purpose of the doctrine and reasons for the

⁶⁴Such as the *Makoni* case, supra note 1, where Patel JCC referred to the doctrine of permissible limitation but proceeded to give a remedy to the applicants who had approached the court using impact litigation.

⁶⁵This follows the discovery in this research that there are various platforms that track the judgments of superior courts but their search engines do not lead researchers to crucial doctrines that were used by the Court. For instance a search on **Veritas Zimbabwe** and **ZIMLII** only led the researcher to judgments on avoidance of doubt and not avoidance doctrine. Further, there are some judgments that were decided on the basis of the avoidance doctrine but are not found on **Veritas Zimbabwe** or **ZIMLII**.

⁶⁶This conceptualization of the judiciary is based on the concept of the separation of powers/functions/parties doctrine which is sometimes misconstrued as the *trias politica* doctrine. The doctrine was espoused by philosophers such as Montesquieu and John Locke. It is now found in the Constitution in section 3 (2) (e)-'observance of the principles of separation of powers'.

general application of the doctrine by the superior courts in Zimbabwe. The second area of inquiry is the antithesis to the avoidance doctrine. It particularly deals with the particular public interest problems in which superior courts are deeply involved in exercising the presumption of constitutionality, or invent constitutional interpretations which carry far-reaching implications on the development of constitutional jurisprudence under a transformative Constitution. Thirdly, the dissertation synthesizes the issues that justify both the thesis and antithesis on the doctrine by drawing a fine line between general litigation and impact litigation. This line concentrates on the study of impact litigation in various jurisdictions to find out the lessons which the superior courts and impact litigation lawyers may learn from treating it as different from general litigation. This synthesis is also the basis for the suggested strategic impact avoidance model (SIAM) that is explained towards the end of this introductory chapter.

Applied legal research relevance

1.1.1 Drive run

The drive run is the Constitution. A Constitution has been described as:

*‘A legal text that grounds a legal norm, as such, it should be interpreted as any other legal text. However, constitution sits at the top of the legal system in respective state. It is designed to guide human behaviour over an extended period of time, establishing the framework for enacting legislation and managing the government’.*⁶⁷

The need for applied legal research is clear: in 2017, the Constitutional Court clearly referred to the doctrine in the *Chawira* decision⁶⁸ when the avoidance doctrine was used to justify the reasons why it had to skirt constitutional cases. The case was strategically brought to the court as a test case on the Constitutional Court’s preparedness to deal with the justiciability of the right to life. At the same time, one Judge of the Constitutional Court has expressly cited the *Chawira* case as a way of recognizing the importance of the decision as a precedent on avoidance doctrine⁶⁹. As such, this research shows that the avoidance doctrine is an important emerging area of research in Zimbabwe. The study is thus an urgent need for a broader, more case-study based research which forms the basis for specific future researches on specific impact litigation cases. It is a passionate plea for such future researches to be embarked on.

⁶⁷J. Young Hoa, ‘*The Comparative Study of Constitutional Interpretation Between U.S. Supreme Court and East Asia Constitutional Court (Korea & Japan)*’ (nd) page 7

⁶⁸Supra note 1

⁶⁹ See *Katsande* case, supra note 1.

1.1.2 Novelty aspects

By novelty it is meant new aspects that are raised by this research. Through an innovatively framed model, **SIAM**, this dissertation presents findings of a heuristic study on how the avoidance doctrine relates negatively to the development of impact litigation in Zimbabwe. It is an attempt to contribute to the sparse academic literature on the understanding of the roles of superior courts (and by parity of reasoning, inferior courts) in Zimbabwe in the development of constitutional jurisprudence in this regard. As no, or perhaps, few scholars have researched on this topic as applicable to Zimbabwe, this dissertation is not only of academic importance, but would also be of practical use in judicial research, judicial reasoning and general policy formulation and implementation on matters pertaining to impact litigation. The latter makes academic sense to the extent that court decisions can inform the other pillars of government, mostly the executive, to craft policies as a response to the impact or likely impact that a court decision would have had on such policy.⁷⁰

The dissertation specifically, compresses and explains the reasons why Constitutional Court judges have either refused to invalidate statutes, failed to declare certain laws or practices unconstitutional or used the doctrine as the preferred or alternative remedy in resolving alleged breaches of constitutional rights. It draws from decided cases in other jurisdictions the world over in an endeavour to broaden the understanding on the role of superior courts in the interpretation of, and in explaining the purpose of invoking the doctrine of avoidance. As such, the investigative analysis presented in this dissertation is also informed by the critical researches by jurists, scholars and researchers in other jurisdictions.

This dissertation has also seen this researcher writing a scholarly critique of the approach that was adopted by the Constitutional Court in *Chawira and 12 Ors v Minister of Justice and Others*.⁷¹ The study is enmeshed in the need for academics, legal scholars and courts to clearly help develop constitutional doctrines that bear on constitutionalism and the rule of law in Zimbabwe. For this reason, it has to be stated in this study that Zimbabweans care a lot about

⁷⁰For instance, the dismissal of the bond notes Challenge saw Zimbabwe adopting a policy that allowed Government to introduce bond notes as part of the currency in the multicurrency economic environment, see supra note 9.

⁷¹ Supra note 1.

constitutionalism as contained in the Constitution.⁷² This description is not only unmistakable but is demanding of attention since Zimbabweans boast of a largely transformative Constitution. Explicit attention is called in this study to the fact that a Constitution is the supreme national law (of the land of Zimbabwe).

It has among its functions, the distribution of political power between the State and society, as well as among the various branches of government.⁷³ As such, courts of law must always be seen to interpret it as a document that is distinct from ordinary statutes. Constitutionally speaking, Zimbabwe's judiciary must give impetus to constitutional doctrines by employing innovative interpretations of superior courts.⁷⁴ This is specifically because implicit in the Constitution as a supreme document is the obvious significance of its normative character which is expressed by the frequently used descriptive superlative, '*Grundnorm*'.

The above modest conception of the Constitution represents so high a degree of constitutionalism and the rule of law that in interpreting the Constitution, the Superior Courts must not be seen to be leaving out the realm of its essential features to the desires of the legislature and the executive.⁷⁵ They must endeavour to discard, or be seen to be discarding illiberal constitutional interpretations which work to the detriment of impact litigation. This is because the norm in most jurisdictions is that Constitutions should be interpreted liberally.

The absence of a mythical characterization of interpretation in the normative structure of the Constitution demands the attention of researchers, legal scholars and lawyers in general, who must compare Zimbabwe's constitutional value-system⁷⁶ with other juridical approaches in this regard. A quick scanning of the undergraduate law curriculum and various academic writings

⁷²There are public debates by institutions such as the Mass Public Opinion Institute (MPOI), Radio supported programs such as Sport FM's Point of Order supported by the Southern Africa Parliamentary Support Trust, constitutional researches by research organisations such as the Organisation on Social Science Research in Africa (OSSREA), Zimbabwean Chapter which support various academic researches on constitutional issues, the development of a new educational curriculum which also includes constitutional issues, and the increasing constitutionally-oriented litigation or referral of constitutional cases from lower to superior courts.

⁷³Fidelis E. Kanyngolo, '*The Constitution and the Democratization Process in Malawi*' (1998) page 1, SAPES.

⁷⁴Section 176 of the Constitution obliges superior courts to develop the common law in Zimbabwe and to regulate their own processes. This also extends to the need to interpret the Constitution broadly in a manner that allows the Court to consider the three facets of a constitutional matter as defined in section 332 of the Constitution.

⁷⁵As was the case with the unanimous decision that left the development of rights of prisoners to the whims of the executive (represented by the presidential pardon) in the *Chawira* decision, supra note 1 and *Mujuru* case supra note 9.

⁷⁶Due regard must be had to section 3 of the Constitution which has founding values which serve as the tenets of the constitutional democracy upon which Zimbabwe is based.

from eminent constitutional academics such as Professor Lovemore Madhuku shows that there is no exclusive curriculum on constitutional interpretation as different from ordinary statutory interpretation.⁷⁷

Be that as it may, constitutionalism in this dissertation is seen as the legitimization of the exercise of State power in its three major manifestations-executive, legislative and judicial.⁷⁸ Quintessentially, the rule of law aspect is presented simply as the absence of rule by the law, or rule according to the Constitution. The new argumentation that is presented in this study on the legitimacy of judicial decisions that bear on the avoidance doctrine and the nature of impact litigation in Zimbabwe is that litigants in impact cases have sought to deal with the constitutional breaches occasioned by one or more of the three State institutions alluded to above, as well as agencies of the State as defined by the Constitution of Zimbabwe, 2013, hereinafter referred to as the Constitution.⁷⁹ They have also endeavoured to resort to liberal ways of interpreting the Constitution.⁸⁰

Because the Zimbabwean Constitution has an expansive Bill of Rights⁸¹, and other important features that are used to interpret it include such as an all-inclusive preamble⁸², a supremacy clause⁸³, founding values or norms of democracy⁸⁴, and the interpretation clauses on independent

⁷⁷The researcher has however introduced a topic on constitutional interpretation in law courses at the Political and Administrative Studies such as Constitutional Rights, Law and Public Administration and State Legal Liabilities. Professor Lovemore Madhuku hinted during LLM lectures on Advanced Constitutional Law that the Law Faculty may soon offer separate ordinary statutory interpretation from Constitutional interpretation. This researcher also published a book, *Student's Sourcebook on State Legal Liability* which discusses some of the methods of interpreting the Constitution. There are some scholars such as G. Linington who have written articles focusing on methods of interpreting the Constitution. In his article, *'Reflections on the Significance of the Constitutions and Constitutionalism in Zimbabwe'*, in Masunungure E, *'Zimbabwe Mired in Transition'*(2012) Weaver Press, Linington argues that the Constitution is sovereign and all State organs operate *under* it, having those powers it confers upon them, whether directly or by laws authorised by, and consistent with it.

⁷⁸Issa G. Shivji, *'Problems of Constitution-making as Consensus Building: The Tanzanian Experience'* in *The State and Constitutionalism*, Owen Sichone (ed), 1998 page 3, SAPES.

⁷⁹The term State is not defined in the definitions section of the Constitution, that is, section 332.

⁸⁰See *Loveness Mudzuru and Anor v Minister of Justice and Others* in supra note 31, where lawyer, Mr.Tendai Biti implored the Court to resort to the purposive method of interpreting the Constitution. See, Chapter 4 on the applicability part of the discussion in this research.

⁸¹Chapter 4 of the Constitution from sections 44-87

⁸²The preamble is framed in the *'We the People of Zimbabwe'* structure which is similar to the American Constitution. It is considered as important in this dissertation because it affirms individual sovereignty as compared to State sovereignty. In other words, Zimbabwe has three sovereigns: the State of Zimbabwe, the Constitution (see supra note 77) and the people (as envisaged by the Preamble).

⁸³See section 2 of the Constitution.

⁸⁴See section 3 of the Constitution.

institutions that promote vertical and horizontal accountability⁸⁵, and the interpretation section in the Constitution.⁸⁶ In this light, constitutionalism is seen in this study as the social engine that rouses the citizen's spirit to utilize impact litigation in the development of the constitutional jurisprudence of Zimbabwe. In the discussion of impact litigation and the avoidance doctrine, it goes without mentioning that the researcher was confronted with the roles of a skilled group of unelected but appointed people called judges who seem to stand at the confluence of interpreting the Constitution in the resolution of disputes and the exercise of their judicial discretions in the making and taking of State policy.

While some of the judges of the superior courts appear to be proactive and are seen at once to be the boulevard of pushing forward the gains of constitutionalism brought by the transformative Constitution⁸⁷, some of them appear to have created a grim barrier on strategic litigation.⁸⁸ This is because they unnecessarily avoid constitutional issues or deliberately impose inordinate delays in dealing with the constitutionality of laws that impact on public interest litigation⁸⁹. This is notwithstanding the fact that the transformative nature of the Constitution has allowed Zimbabweans to strategically litigate and write about Constitution, research and conduct public debates about it, report on and generally deliberate on it...a lot.⁹⁰

Although the Constitution does not prescribe timelines for the Courts to decide on constitutional issues, the argument that is advanced in this study is that it is to the Constitution that Zimbabwean citizens usually seek solace when they approach the courts of law for judicial review of constitutional breaches to their fundamental rights and other constitutional obligations. The Constitution demands that justice must not be delayed, and to that extend, members of the

⁸⁵Chapter 12 institutions which include the Zimbabwe Electoral Commission, Zimbabwe Gender Commission, National Peace and Reconciliation Commission, and the Zimbabwe Human Rights Commission.

⁸⁶See section 46 of the Constitution. This section is reproduced at the end of this chapter under the Strategic Impact Avoidance Model.

⁸⁷Most judges of the High Court such as Justice Tsanga in *Nyika and Anor v Minister of Home Affairs and Others* see supra note 42 and Justice Mushore in *Mangwiro v Minister of Home Affairs and Others*, supra note 1. The Constitutional Court had the case of *Loveness Mudzuru and Anor v Minister of Justice and Others*, see supra note 31.

⁸⁸See the *Bond Notes* case in supra note 9, the death penalty case/*Chawira* case supra note 1 and so on.

⁸⁹These two aspects would be used in this dissertation to interpret the twin pillars of the doctrine of constitutional avoidance.

⁹⁰There are several instances where Zimbabweans have approached the courts to protect their civil liberties in the constitution, see VeritasZIM, ZIMLII as well as newspaper reports on cases such as *Mujuru v President of Zimbabwe*, supra note 23.

judiciary must perform their duties efficiently and with reasonable promptness.⁹¹ Thus in gauging the citizens' response to judicial review, an important point needs to be mentioned at this stage.

The point that is advanced in this study is that there are three superior courts in Zimbabwe which have the power to exercise judicial review,⁹² develop the common law and regulate their own processes on constitutional issues.⁹³ It is these courts which not only interpret constitutional issues and rule upon them, but which also must be endowed with the ability to give to the people a sense of justice that is embedded in well-reasoned judgments that consider both the technical preliminary points as well as the merits of the constitutionally-related cases. The force of impact litigation in constitutional matters remains an important element in Zimbabwe's constitutional rights jurisprudence. Constitutional rights include the three generations of rights⁹⁴ and whereas Zimbabwe has a progressive Bill of Rights, the custodians of these rights, the courts, are not uniformly letting the constitutional jurisprudence grow in importance. Because the nub of this dissertation is meant to examine how and why the avoidance doctrine is invoked in relation to strategic litigation, the reality check record on the role of superior courts goes much farther than what has been said above. This is because the purpose of impact litigation is to secure from the courts, at an acceptable level of ventilation of constitutional issues, the maximum direct contribution to the constitutional jurisprudence in terms of both the law on preliminary constitutional points and the merits of impact litigation cases, including those cases that are either referred directly to the superior courts or are instituted in these courts.

While most of the High Court judges have been frequently referring to the Constitution in their judgments, the Constitutional Court has been tarrying in effectively dealing with such referred matters. The corollary to this has been that the Constitutional Court has also been wrongly associating the doctrine of avoidance with elements of justiciability of fundamental rights such as ripeness.⁹⁵ Without throwing away the baby together with the dirty bathing water, suffice is it

⁹¹Section 165 (1) (b)

⁹²Section 85 of the Constitution which broadens *locus standi* for citizens who approach competent court in the event of constitutional breaches

⁹³Section 176 of the Constitution

⁹⁴1. Civil and Political Rights such as right to life, political rights, freedom to demonstrate and petition government. 2. Economic, Social and Cultural rights such as education, health, and shelter. 3. Collective rights such as environmental rights.

⁹⁵*Chawira* case supra note 1

to mention that the Constitutional Court has been managed to embed its visibility to the merits of cases on some important constitutional aspects such as women rights⁹⁶, and the provision of innovative remedies.⁹⁷

Several instances of avoiding the Constitution on the part of the Constitutional Court of Zimbabwe (CCZ)⁹⁸ are certainly a major cause of concern for the generality of the population. In view of these and several other such instances where the lower courts in Zimbabwe⁹⁹ and the High Court of Zimbabwe have been proactive in placing due regard to constitutional provisions when bringing matters to finality, the Constitutional Court's hesitation and faltering in this regard is considered highly unjustified in this dissertation. It leaves a welter of emotional and doctrinaire approach to judicial reasoning, which in most instances, works to the detriment of jurisprudence on strategic litigation.

While lower courts and the High Court of Zimbabwe have been making progressive decisions which bear on vertical and horizontal application of the Constitution,¹⁰⁰ the Constitutional Court, as the apex court in constitutional issues, usually avoids delving into the provisions of the Constitution, making no attempt to innovatively charm itself into the hearts of the affected citizen. Out of a need for academic analysis on the jurisprudence on impact litigation, this dissertation argues that the superior courts in Zimbabwe are called upon to 'generously'¹⁰¹ dress

⁹⁶ *Mudzuru* case supra note 31

⁹⁷ *Makoni v Commissioner of Prisons and Another* supra note 1.

⁹⁸ The outstanding case on this doctrine is the *Chawira* judgment supra note 1 where the Constitutional Court expressly referred to the doctrine of constitutional avoidance but went on to link it to the doctrine of ripeness. It ended up skirting the Constitutional issues on the basis that the applicants were supposed to first exhaust internal remedies such as approaching the Supreme Court, and the President before coming to it.

⁹⁹ The Harare Magistrates Court in *S v Manyenyeni*, CRB 9079/16 has had magistrates such as the former Provincial Magistrate, Esquire Chikwekwe who referred to the Constitution in freeing the Mayor of Harare, Councillor Bernard Manyenyeni who had been arrested beyond the 48 hour limit that is prescribed in *section 49* of the Constitution. Even the High Court did not avoid the merits of the two cases that were made on behalf of the mayor challenging the suspension on the basis that the responsible Minister, the Minister of Local Government had committed some constitutional breaches that adversely affected the mayor before the suspension was effected. In *Manyenyeni v The Minister of Local Government, Public Works and National Housing*, HH 385/16 (popularly called the second Manyenyeni case to distinguish it from the first case where he was suspended on allegations related to the criminal case under CRB 9079/16), the High Court ordered that a Mayor who had been re-suspended was supposed to be allowed to continue with his duties. This was because his first suspension had lapsed by operation of law and the Minister could not suspend him again in terms of the law. Essentially, the court was invoked the doctrine of legality or its mirror image, the doctrine of ultra vires to protect the mayor's rights.

¹⁰⁰ *ibid*

¹⁰¹ This is because the Constitution must be interpreted generously, wholesomely as a living instrument whose spirit and purport must always be upheld by its custodians-the courts.

the strategic and public interest wounds that are caused by seemingly antiquated judicial reasoning, which ends on technical arguments.

Most importantly, the avoidance doctrine is supposed to be shunned because the applicants in impact litigation are not chosen through a kind of merit-based approach to litigation.¹⁰² They are chosen so that the effective remedies that they get from the national courts may encourage perpetrators of rights abuses to end a culture of impunity. Perpetrators and lovers of impunity in human rights violations would shun their constitutional breaches and other such linked practices if the Constitutional Court starts to grant litigants constitutional remedies. The victim-cum-survivor-cum-victor (VSV) is encouraged to get about his own business and has a lot of confidence on the justice system if constitutional breaches are addressed promptly. This is particularly so in that victims of constitutional breaches might have this spate of speculative natter on the effectiveness or otherwise of the constitutional remedies that they will receive from the competent courts.

Equally true, the strategic litigant's lawyer can bounce along with his or her victim client thinking that the world to victory begins with approaching a court of law, just as every lawyer might think, only to be surprised with the raising of mere technical arguments.

1.1.3 Literature review on Constitutional Avoidance Doctrine

Because this chapter was first developed as part of the researcher's proposal, the brief review of literature was made to simply demonstrate how the scope and meaning of the avoidance doctrine and impact litigation will be understood in this study. The doctrine will be explored in Chapter 2 where the concepts of avoidance and impact litigation are exclusively dealt with. Classically, the avoidance doctrine has been described as an instrument of judicial restraint which is steeped on the need to weigh judicial power together with legislative intent¹⁰³. The modern form of avoidance has seen courts avoiding some constitutional issues but at the same time, granting a remedy to the litigants. This approach has been seen in South Africa.

¹⁰²For instance, interest litigation groups such as the Zimbabwe Lawyers for Human Rights (ZLHR) take up cases for walk-in clients who simply get referred to them by those people who know that ZLHR is a law-based organization.

¹⁰³A. Vermeule 'Saving Constructions' 1997

A court is required to assess whether a challenged statute does, or might violate the Constitution and whether in that circumstance the court ought to avoid the constitutional issue by interpreting the statute to obviate the problem.¹⁰⁴ It has been argued that the doctrine is justified in extra-sensitivity cases such as war on terror.¹⁰⁵ Courts in the USA have been considered as likely to confront Congress head-on concerning sensitive issues through statutory interpretation.¹⁰⁶ K.G Young however argues that;

*Avoidance on the part of the judiciary calls to mind a number of judicial postures such as declining to hear a matter, by denying cert or dismissing a writ or refusing an appeal; deciding a case on other grounds, avoiding a hotly contested issue by choosing to deal with an apparently more straight forward legal argument.*¹⁰⁷

Because it has usually been used in constitutional issues around ECOSOC rights, the avoidance doctrine has been seen in this light as an act of refraining, refusing, rejecting to which the judicial silence around Economic and social rights. It has also been described as more subtle and more involved than the familiar use of the term. This is why this study considers the doctrines that have been used by the Constitutional Court to avoid the merits of constitutional cases. Other pillars of the doctrine have been listed as instances where the Courts limit the development of

¹⁰⁴P. P. Frickey, 'Dangling Constitutional Conversation', (2006), Berkeley Law Scholarship Repository.

¹⁰⁵Ibid. E.A Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (2000) University of Texas, there is a distinction between a descriptive canon of construction, that is, an accurate reflection of the course that an enacting legislation would wish courts to pursue in case of a constitutional doubt on the one hand; and a normative canon, a rule designed to push interpretations in directions that reflect enduring public values such as due process clause and suspension clause. The Constitutional Court in Zimbabwe has not been referring to the normative values that are enshrined in section 3 of the Constitution, or in the interpretative parts of Chapter 4, the fundamental rights section. The reasons for this distinction are important because the avoidance doctrine is sometimes seen as a rule of interpretation or construction. Constitutions have been seen to provide the backdrop against which Statutes are written and interpreted, see C.R Sustein, 'Interpreting Statutes in the Regulatory State' (1989) Harvard Law Review. Such interpretive principles are seen as serving a substantive purpose and as a product of constitutional norms. Some scholars consider the canon of avoidance to be constitutionally-based (W.N Eskeridge and PP. Frickey 'Quasi Constitutional Law: Clear Statement Rules as Constitutional Law Making' 45 Vand. Law Review (1992) cited in EA Young, 'Constitutional Avoidance, Resistance Norms and the Preservation of Judicial Review' (2000) University of Texas. R.A Posner (1995) also considers the doctrine as establishing a judge-made constitutional penumbra that has the same prohibitory effect as the Constitution itself. Other critics however see the doctrine as reflecting the constitutionally inspired values, see J.S Schacter, 'Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation' (1995) Harvard Law Review

¹⁰⁶ibid

¹⁰⁷K. G Young, 'The Avoidance of Substance in Constitutional Rights'. This is the approach that was adopted in *Majome* case supra note 2 when the Constitutional Court simply avoided the hearing of arguments by ending on the finding that the applicant had committed a criminal offence by refusing to pay the license. The Court was not prepared to make a finding on why she thought the licence worked to her detriment and to the detriment of her political party, the Movement for Democratic Change. The Court was supposed to deal with the constitutional issues now that the Constitution states in section 67 that the political rights or lawful interests of a political party must not be violated. Regard was supposed to be had to the fact that the Applicant's argument was that ZANU PF was being given a political leverage by the ZBC.

constitutional doctrines, cede to current legislature or policy the frame of rights analysis and deliberately marginalize the judicial role.¹⁰⁸

Largely, the avoidance doctrine has been considered as part of a constitutional culture or failure. Judicial attitudes about constitutional constraint and constitutionalism include informal and formal, scope and function of constitutional constraints.¹⁰⁹ This is because constitutional matters reflect the constitutional culture of each country. Complex phenomena throughout society demands that changing practices and norms be interpreted by judges. Because a Constitution contains an ideology, historicity, political characteristics as well as basic norms, one has to take into account a distinct characteristic of constitutional interpretation.¹¹⁰ It is used to resolve interpretive ambiguities; if there are two equally plausible readings of a statute, and one of them raises constitutional concerns, judges are instructed to choose another one. This has been criticized as leading to unaccountable judicial lawmaking.¹¹¹

The doctrine has also been criticized by Randy Barnett from a normative perspective on the basis that courts should not defer to the legislature when a particular clause is vague.¹¹²

One of the variants worthy reviewing is subsidiarity. By far the simple description of the subsidiarity doctrine as a variant of the avoidance doctrine that has been widely popularized in Zimbabwe particularly in the *Majome* case¹¹³ was perhaps best captured in the dictum of Justice Kentridge in *S v Mhlungu*¹¹⁴ where he remarked thus:

'I would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'

¹⁰⁸ Ibid, see also the *Chawira* judgment, supra note 1 where the Court hid behind the policy issues such as failure to appoint an executioner to deprive the applicants of their constitutional remedy. It was disingenuous for the Court to use that as a basis to convince the applicant that they would not be executed soon and as such should go back to the High Court or wait for their appeal at the Supreme Court. Alternatively they were supposed to apply for Presidential Pardon or commutation of their sentences.

¹⁰⁹ See Hoa supra note 67

¹¹⁰ Ibid.

¹¹¹ L. Solan, 'Fish on Constitutional Avoidance as Interpretation' 2015, Yale University.

¹¹² B. T Goldman, 'The Classical Avoidance Canon as a Principle of Good-Faith Construction' Journal of Legislation, Colombia Law School.

¹¹³ Supra note 2.

¹¹⁴ 1995 3 SA 867 CC, par 59.

What is implicit in the above discussion is that the doctrine is: (i) of general application and (ii) seeks to empower the courts with the power to skirt constitutional issues where non-constitutional grounds are available. The doctrine encompasses the interplay between constitutional principles and discretions allocated to judges of the superior courts.

There have been attempts by scholars to locate the application of the doctrine in specific generations of human rights. Kathrine G. Young¹¹⁵ uses avoidance as common in litigation on socio-economic rights and calls to mind an act of refraining, refusing, (and) rejecting: to which the judicial silence is around economic and social rights. It becomes clear from the above description that litigants can apply the doctrine within the confines of their areas of specialization.¹¹⁶ It is also seen as being more subtle and more involved in nature.¹¹⁷ It is seen as a doctrine which limits the substantive development of constitutional doctrine, cedes to current legislation and policy the frame of rights analysis, and deliberately marginalizes the judicial one.¹¹⁸

The doctrine is now, in its express term, on the radar of superior courts in Zimbabwe.¹¹⁹ The most significant issue to consider is the need by courts to understand its purpose and the import of related doctrines. The unmeritorious link to the doctrine of ripeness is a case in point which has been subject to scholarly review.¹²⁰ Such piecemeal treatment of the doctrine is not healthy for the development of the jurisprudence on the doctrine, or its relationship with other doctrines. Clear distinctions can be drawn if the doctrine is given exclusive research attention by all the stakeholders in the justice delivery system.

The purpose of using the avoidance doctrine is not only to guard against recurrence of constitutional violations, but also to allow courts to avoid addressing some constitutional issues

¹¹⁵Not dated, 'The Avoidance of substance in Constitutional Rights', page 1 Constitutional Court Review, Boston College

¹¹⁶For instance the Zimbabwe Lawyers for Human Rights has member lawyers who can also institute impact litigation under its broad mission of fostering a sustainable culture of human rights. Similarly, political parties can also further their lawful interests by instituting proceedings on a strategic interest basis, see the *Bond Notes* case instituted by Joyce Mujuru, then leader of Zimbabwe People First, see supra note 9.

¹¹⁷Brian Ray cited in Young supra note 107.

¹¹⁸See Young, supra note 107

¹¹⁹The *Chawira* and *Katsande* judgments referred to supra note 1.

¹²⁰See S. Hofisi, 'Chawira Judgment: Some reflections' (2016) The Herald, Zimbabwe

at all.¹²¹ The canon of avoidance has been considered to apply only to judicial review of statutory language.¹²² While the canon allows courts to avoid constitutional issues, the doctrine fails to capture the ways that constitutional concerns have shaped the development of ordinary branches of law such as administrative law doctrines, either overtly or tacitly. The doctrine blends inquiry into statutory meaning with enforcement of constitutional norms.¹²³ Put differently, it seeks to reconcile the difference between a statute's meaning and its constitutionality.¹²⁴

1.1.4 Literature review on strategic and public interest litigation

The seemingly unending puzzle is that public interest litigation and strategic impact litigation are usually described under the umbrella of impact litigation. While this reality is not seriously obtaining in Zimbabwe, where public interest litigation is clearly mentioned in section 85 of the Constitution as a way of bringing constitutional matters to Court, the same is not true at the international level. This is because public interest litigation in some countries is the domain of interest group lawyers or financiers. This dissertation takes cognizance of the fact that strategic litigation is also called impact litigation, test case litigation or public interest litigation and is a method used by public interest organizations and lawyers through test cases in the judicial system, to create lasting effects beyond individual cases and thus further the enforcement of human rights and make social change eventually.¹²⁵ Interest group litigation has been defined as litigation that is sponsored by organizations whose attorneys typically are less interested in specific legal claims than in the constitutional principles that litigation represents.¹²⁶ Just like in Zimbabwe where legal standing has now been broadened, countries such as the USA have

¹²¹G.E. Metzger, 'Ordinary Administrative Law as Constitutional Common Law', 2010, Journal of the National Association of Administrative Law, vol. 30/issue 2.

¹²² Ibid. This would also take this research to the finding in *Majome* case, supra note 2.

¹²³ G. E Metzger and T.W Morrison, 'The Presumption of Constitutionality and the Individual Mandate' (nd), Columbia Law School, Fordham Law Review, Vol. 81.

¹²⁴ This is what the Malaba DCJ (as he then) was attempted to do in *Majome* case, supra note 2. His approach was however mistaken in that he did not go further than simply making a finding that the constitutionality of the statute had not been challenged before the applicant had committed a criminal offence of refusing to pay the ZBC license.

¹²⁵ J. Yitong, 'Strategic Litigation as a Trigger to Enforce Human Rights in China from the Perspective of Rights of the Disabled' (2011) Central European University, Budapest. Malaba DCJ in *Loveness Mudzuru*, supra note 31 described public interest as a term embracing matters that include standards of human conduct tacitly accepted and acknowledged to be for the good of society and for the well-being of its members. It must affect or potentially affect the community at large or the greater part of the community and includes cases marginalize and underprivileged persons who cannot approach the court for vindication of their rights for reasons such as poverty, disability, and social or economic disadvantages.

¹²⁶Nathan Hakman, 'Interest Group Litigation' (1986) page 987, Encyclopaedia of the American Constitution, MacMillan Publishing Co. USA

liberalized the rules of legal standing to permit lawsuits by environmentalists, taxpayers, and other special interests groups.¹²⁷ Both aspects can serve the same purpose in the sense that litigation activity by interest groups is visible in constitutional civil cases as well as in the criminal *cause celebre*.¹²⁸ If a contextual approach to constitutional interpretation is taken, Zimbabwe can be regarded as a country that distinguishes between public interest litigation and strategic impact litigation.

1.1.5 Organization of the Dissertation

This Dissertation has five Chapters. The first chapter is the introduction. It was largely developed from the proposal. As the introductory chapter, it essentially presents the crucial aspects of the research such as the background, statement of the problem, the hypothesis, limitations, delimitations, justification, methods of research and research design and literature review. It evaluates the definitions, application and purpose of the avoidance doctrine and impact litigation.

The second Chapter has the theoretical framework and conceptual framework and suggested model of the research. Literature review was not moved into Chapter 2 because this research adopts the textbook approach where each topic has to be a standalone topic. It deals with the conceptualization of the avoidance doctrine and on how it has been used as a tool to derail the benefits of impact litigation. Two theories on the roles of the court are also given. The normative theory is used because the Constitution establishes a value-based system in the Zimbabwean society. It is also the highest norm upon which all other norms must be predicated upon, failure which they will be declared inconsistent with the Constitution. The legitimacy or judicial impact theory has been chosen specifically because the decisions of superior courts have either stalled policy reforms or helped in making sure that they are accentuated. The doctrine is also conceptualized and a suggested model or framework is also presented in light of what is currently obtaining in Zimbabwe.

The third chapter presents a comparative framework where direct or indirect reference to the doctrine by Zimbabwean courts is compared with the approach in other jurisdictions. Because the dissertation is presented as a thesis, antithesis, and synthesis, this chapter is important because it uses experiences from other jurisdictions to show instances where the doctrine has

¹²⁷Ibid page 988

¹²⁸ibid

been used without qualms from the general populace; instances where it was implausibly interpreted and the preferred solution as informed by previous and current studies. The comparison is meant to demonstrate how judges of the superior courts can adopt measures that allow strategic litigants and interest group litigants to repose their confidence in them.

The fourth chapter presents the major research findings, analysis on the avoidance doctrine in Zimbabwe and also discusses the implications of the findings on future researches as well as the performance matrix of superior courts. The methods that were used to collect data are also shown as well the methods of presenting and analyzing data. The findings in this study are also informed by the comparative developments that are presented in chapter three. These events are used to buttress the findings from documentary research, interviews and court visits and observations by the researcher.

The fifth chapter presents the summary of research findings in brief, reinstates the objectives, gives the conclusion and practical recommendations for future research. The purpose of including the summary of findings in the conclusion is meant to guide the researcher in giving the outstanding issues that form part of the conclusion in this dissertation. The chapter also suggests practically achievable recommendations from an applied legal research perspective. The recommendations are drawn from the challenges, strengths and weaknesses of the superior courts. The ultimate purpose of this dissertation is motivated by the need to present research findings that will serve as an epitome of rigor, relevance, and pursuit of truth in research, an epitome which is steeped in the University of Zimbabwe's current research paradigm. The hope in this dissertation is also to ensure that academics remain part of a knowledge community which puts the University of Zimbabwe as the citadel of learning and paragon of virtuous researches in Zimbabwe and beyond.

Besides the above chapters, this dissertation also has other aspects that are worthy-mentioning in this part. These include the acknowledgments on the immense contribution of the respondents to this research as well as the family of friends and acquaintances who helped this researcher in many ways. There are appendices that are attached to this dissertation which serve the purpose of showing how the data that were used in this dissertation were gathered as well as declarations of plagiarism, ethical and confidentiality clauses. The latter documents are considered to be very important since research ethics are important in the modern day Zimbabwe.

That it is gradually becoming a discomfiting routine that today's Zimbabwean Constitutional Court is neither innovative nor remarkably interesting in its reasoning on constitutional issues is now axiomatic. Existing case law shows that the Court has fallen in love with technical arguments in constitutional matters. This found love does frighten: ***what is being decided today, what has been decided since the turn of the millennium, can hardly rival what was decided before it.*** And so the concern for researchers in Zimbabwe is simply that the Constitutional Court, between the years 2013 and now, appears as: *predictably technical, but realistically less constitutionally innovative.*

Traditionally, the avoidance doctrine was extant in countries such as the USA as early as 1803 when Chief Justice Marshall concluded that the logic of the written Constitution coupled with an independent judiciary necessitated the federal judiciary's unique role in being able to invalidate the acts of other branches of government that contravened the Constitution.¹²⁹ The invalidation exercise created problems such as 'court packing' plan by President Roosevelt that were aimed at limiting the power of the Court to invalidate progressive legislation. It has also been linked to the *Bickel* doctrine called *counter-majoritarian difficulty* in that it creates a fundamental dilemma for a court, because the judiciary, lacking either power of the 'sword' or 'purse', cannot enforce its own decisions and must rely on external support to 'compel recalcitrant parties' to comply with a given ruling.¹³⁰

For Zimbabwe, the doctrine was based on subsidiarity, presumption of constitutionality and judicial deferral. Generally in most countries, litigation in the field of human rights cannot ignore the provisions of the Constitution. A rights-based approach has been used on occasions as a basis of establishing the rights of persons in Zimbabwe.¹³¹ The Lancaster House Constitution¹³² was used in strategic litigation cases before the 2013 Constitution. Although decisions which related to it were technically litigated in any court, including the High Court and the various levels of the Magistrates Court, in reality the decisions of importance relating to human rights, as opposed to the application of those decisions, were made by the Supreme Court of Zimbabwe, either on

¹²⁹*Marbury v Madison*, 5 US (1 Cranch) 137, 177-78 (1803), see also Andrew Nolan, 'The Doctrine of Constitutional Avoidance: A legal Overview' (2014), Congressional Research Service. The doctrine of avoidance has been argued to predate the decision which establishes the doctrine of substantive judicial review.

¹³⁰Ibid citing the Federalist, No 78 @435 (Alexander Hamilton), (Clinton Rossiter ed). 1999.

¹³¹Adrian de Bourbon, 'Litigation-Human Rights in Zimbabwe: Past, Present and Future', (2003) page 108, Zimbabwe Human Rights Bulletin.

¹³²1980

appeal or sitting as the court of first instance (with no appeal from the court) for certain constitutional applications.¹³³

Zimbabwe did not have a constitutionally established Constitutional Court then, but section 24 (1) of the Lancaster House Constitution, 1979, gave litigants the right of direct access to the Supreme Court on issues that related to the Declaration of Rights. For easy of reference, the section is worth-reproducing for it was framed as:

‘If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress’.

The Zimbabwean Supreme Court would sometimes decline to hear indirect applications that were referred to it in terms of section 24 (2) of the Lancaster House Constitution which provided that:

‘if in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceeding shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious’.

The Supreme Court would normally decline to decide on the case if it felt that the referring court should first determine the matter. This is normally because (i) the applicant must raise the question for determination with the lower court, (ii), the referral would take the form of an appeal process because the lower court would have already reached its decision, and (iii) the Supreme Court did not have a wider and less fettered discretion.

The Constitution is now some four years in operation. It is justiciable and reflects the highest norms, as the Grund-norm, or the soul that animates the existence of Zimbabweans as a people. Because it is justiciable, the elements of justiciability such as constitutional avoidance are interrogated by looking at how courts exercise their judicial review powers. Because

¹³³ See, De Bourbon supra 131, page 109.

interpretation is part of the gravamen of a constitutional matter, the provisions of a justiciable Constitution must both be interpreted and applied broadly, purposively, and generously, as has been the norm in most jurisdictions. As the Constitution is reflective of the essential features and a nation's agreed norms, the Constitutional Court must innovatively review crucial aspects in a nation such as, the features of a Constitution, the mechanisms for enriching its interpretative and application jurisprudence, and the Bill of Rights, mainly the merits of cases that bear on strategic and public interest litigation. This study discusses its role as envisaged by the Constitution, compares it with approaches by other Courts across juridical systems, and assesses the impact of that role on the decision-making processes of lower courts and other pillars of the State.

Research Objectives

To enrich the constitutional and jurisprudential data on the link between constitutional avoidance and impact litigation as well as the role of superior courts in developing such doctrines on the one hand, and to provide a checklist for superior courts' avoidance strategies and tools for strengthening innovative approaches to judicial reasoning on the other, this dissertation has the following specific objectives:

- 1. Examine the extent to which Superior Courts in Zimbabwe, particularly the Constitutional Court, have been resorting to the normative Constitutional framework before avoiding constitutional issues in impact litigation cases*
- 2. Assess the developments on avoidance doctrine in impact litigation cases across various jurisdictions and to determine the differences in approaches between the Zimbabwean superior courts and other superior courts across those jurisdictions*
- 3. To determine the dichotomy between the legitimacy of judicial decisions and State policy responses that emanate from decisions where avoidance doctrine would have been invoked.*

Research Questions

- 1. To what extent can Superior Courts avoid the merits of cases that are brought before them in form of strategic and public interest litigation by making reference to the norms enshrined in the Constitution?**

The proposed assumption is that superior courts are deliberately avoiding their constitutional roles as a buy-in stance. This is because they do not refer to their constitutional roles in their judgments.

2. Are there extant lessons, from a justiciability perspective, that can be learnt by the Superior Courts in Zimbabwe either from local or foreign jurisprudence?

The proposed answer is that judges are aware but deliberately avoid the constitutional obligation to develop the common law or regulate their own processes of the courts that they preside over.

3. Is there a dichotomy between seemingly illegitimate decisions of superior Courts and the implementation of policies that emanate from such a decision?

The proposed answer is that although law is not policy and policy is not law, judge-made law ultimately shapes how policy is formulated, influenced and implemented in any country.

1.1.6 Statement of the Problem

Because the statement of the problem is the catalyst of any innovative research, the overriding problem in this mixed-research thesis is that the invoking of the doctrine of constitutional avoidance by the Constitutional Court is disappointing as it produces deleterious effects on how other superior courts (and ultimately, lower courts) can deal with strategic interest matters. Jurisprudentially, this doctrine doubtlessly shares the same DNA with the dirty hands doctrine which was outlawed by the Constitution. The Constitution clearly states that the fact that someone has contravened a law does not debar them from getting redress in a court of law. Effectively and in many ways, the spell of the avoidance doctrine affects the general populace in Zimbabwe, which represents the sample population that informs this research.

If the experiences of the general populace have any validity, the current trend toward upholding preliminary points will pose perennial challenges to those citizens who look up to the Courts for protection of constitutional rights. A plethora of cases that are disposed of based on technicalities can largely serve as proof of the illegitimacy of judicial decision-making. The decisions dampen any anticipation that the judges will either exploit the liberal language of the standing provision or exploit the opportunities presented by test case litigation to improve the jurisprudence on the

Constitution. Through mixed research methods, the possible outcome in this research is that the Constitutional Court is supposed to adopt the approach of the High Court in terms of expediting its determinations or in avoiding the use of technical defects to throw away constitutional matters. Because the Constitution outlaws the dirty hands doctrine, superior Courts are no longer at large to avoid delving into the merits of constitutional cases by casually resorting to this doctrine. They are obliged to acquaint themselves with comparative developments in interpreting this doctrine and are also enjoined to be innovative when discharging their constitutional obligations when interpreting justiciable constitutions.

In essence, the general society is continuously faced with a stressing problem where the apex court in constitutional matters, the Constitutional Court, seemingly loses legitimacy by not allowing impact litigation to see the light of the day. Being both heuristic and evaluative in nature, justiciability is seen as an antithesis to constitutional avoidance and allows the researcher to synthesize the arguments behind the invocation of this doctrine on the one hand, and the urgent need for the superior courts avoid abdicating their constitutional duties to develop the law or regulate their own processes on the other by not introducing the dirty-hands doctrine through the backdoor. Ultimately, superior courts must not be seen to be setting wrong precedents by way of either wantonly skirting constitutional issues or remotely associating the doctrine of avoidance with elements of justiciability such as the effect of ripeness or mootness on judicial review.

1.1.7 Hypothesis

The working hypothesis in this dissertation is that *if* the Zimbabwean superior courts, particularly the Constitutional Court, decide to consider impact litigation as different from general litigation, *then* it will be easy for them to develop the constitutional jurisprudence on various constitutional issues by not avoiding the merits of impact litigation cases through the upholding of technical arguments or invoking the avoidance doctrine in its variant forms in such cases.

Research Design and Methodology

Scope of the research

The research calls for a critical analysis of the reasons for adopting constitutional avoidance as well as reasons for discarding some or most of its variants. The analysis is presented by seeking to provide the following:

- A suggested model of judicial reasoning that hinge on the need to develop the jurisprudence of a Constitution which is considered as transformative
- Characterize and examine the performance matrix of the superior courts within the Constitutional ‘*superiority hierarchy*’ and the outstanding contribution to impact litigation
- Examine the competence of judges of the superior courts to use the Constitution as the supreme law of the land and as a centripetal tool to adopting foreign law and international law as well as the influence of ‘*rushed decisions*’ on the development of judicial precedent and State policy
- Single out the key constitutional areas that have experienced the most interpretative losses as a result of the use of the avoidance doctrine.
- Single out the motives that encourage judges of the superior courts, particularly the Constitutional Court to use their discretion to invoke the avoidance doctrine through the use of the ‘*alternative remedy*’.
- Evaluate the constitutionality of using decisions that were decided under a less transformative Constitution against using the wide approach envisaged by a largely transformative Constitution
- Proffer appropriate recommendations based on the implications of the avoidance doctrine on impact litigation.

This dissertation fuses qualitative and quantitative research methods. Mixing qualitative and quantitative methods has a huge influence on the reliability and validity of the research. Qualitatively, the research used a longitudinal approach to examine the various ways that can be located under the purview of the avoidance doctrine. The Constitutional Court judgments were evaluated since 2013 when the Constitution was adopted. The major cases on avoidance doctrine

were criticized with a view to understanding the reasons behind the Constitutional Court's dismissal of constitutional matters on technicalities. In this endeavour, documentary search and web visits were used to collect data from various legal source banks such as ZIMLII, Veritas Zimbabwe, and Optima legal and electronic documents such as textbooks, journal articles, reports, bulletins and newspaper articles. The researcher also used participatory observation to gather data since he has been involved in impact litigation in the lower courts and the High Court. He also observed cases through media monitoring and reading organizational alerts such as Veritas' Constitutional Watch. He also visited the Constitutional Court when some of the cases were being heard and this gave the researcher the opportunity to use non-participant observation method to understand the mood of the judges and lines of reasoning.

Further, focused interviews were conducted with lawyers who are into impact litigation. The basis for using focused interviews was that most of the lawyers had the detail on the CC and were familiar with some of the cases where the Constitutional Court used the presumption of constitutionality or the doctrine of subsidiarity to avoid hearing constitutional matters on the merits. These lawyers became the key informant interviews. Some lawyers would also provide feedback on the whatsapp platform and even refer the researcher to some judgments. For instance, the following whatsapp conversation was recorded by this researcher

Respondent X: Counsel, have you read the Katsande judgment on labour. It refers to the Chawira decision which you are researching on.

Researcher: I think I heard something in the Herald. Who is the author of that judgment?

Respondent X: Justice Gwaunza.

The researcher then searched on the Veritas site but could not get the judgment. He sent a whatsapp message to the respondent who then indicated that the *Katsande*¹³⁴ case is reported at ZIMLII. The researcher then visited the ZIMLII site and found the case under the K-section. Further input on the decision was obtained from the respondent by way of soliciting his views on the reliability of the judgment.

Data that were collected from the cases that were reviewed on the basis of the avoidance doctrine's content and themes were presented using the Most Significant Stories (MSS) tool.

¹³⁴ Supra note 1

This tool enabled the researcher to choose cases that had the same theme and content such as *Majome*¹³⁵, which dealt with ZBC licensing, and *Chawira*¹³⁶ and *Makoni*¹³⁷ cases which dealt with the death penalty. Because qualitative research allows the researcher to explore various themes and content, this research used thematic and content analysis to evaluate the views of various scholars who were cited by the Constitutional Court whenever it invoked the avoidance doctrine. These views were also compared together with the views of the other writers on the avoidance doctrine. This helped the researcher to compare the views of various scholars and researchers on how the avoidance doctrine has been avoided in impact litigation cases.

Essentially, the benefits and demerits of qualitative research which were considered in this study have been shown by Claire Anderson.¹³⁸ Although Anderson was using his views in relation to pharmaceutical study, the views expressed in that study augur well with this exploratory study. The strengths and demerits include:

Strengths of Qualitative Research

- *Issues can be examined in detail and in depth (For instance impact litigation lawyers were asked to comment on the avoidance doctrine. After posting their comment on the whatsapp platform, they also sent the researcher an updated copy of the South African author who had been cited by the researcher in one of his newspaper articles).*
- *Interviews are not restricted to specific questions and can be guided/redirected by the researcher in real time (For instance during the hearing of the matter or shortly after an alert has been made or during human rights training where the training material will have the information. The facilitator will also refer the researcher as a participant to a specific case. For instance, the researcher wrote an article on the **Chawira** case¹³⁹. The organisation that he worked for organised training on the avoidance doctrine. The researcher received an invitation to attend the workshop to which he responded in the affirmative. He had the program and had occasion to briefly attend when one facilitator indicated that he had a case on the presumption of constitutionality which involved war veterans. The researcher noted this in his note book for further research.).*
- *The research framework and direction can be quickly revised as new information emerges (For instance, the researcher was removed from the participants' list because he had to attend to other administrative issues but he momentarily visited the venue of the training and had the opportunity to converse with some lawyers on the avoidance doctrine).*

¹³⁵ Supra note 2

¹³⁶ Supra note 1

¹³⁷ Supra note 1

¹³⁸ C. Anderson, 'Presenting and Evaluating Qualitative Research', (2010) American Journal of Pharm. Education.

¹³⁹ See supra note 1

- *The data based on human experience that is obtained is powerful and sometimes more compelling than quantitative data (For instance, it was encouraging to hear from an impact litigation lawyer using examples on how he dealt with the presumption of constitutionality when it was raised in one of his impact litigation cases. This lawyer worked with law-based organisations and was a member lawyer who was usually deployed to represent lawyers. His information was hands on and the research was enriched in this regard).*
- *Subtleties and complexities about the research subjects and/or topic are discovered that are often missed by more positivistic enquiries (For instance, the researcher was able to scrutinize certain doctrines that were used to grant litigants the relief that they sought before the High Court only to have such doctrines being used against litigants by the Constitutional Court. In one case, Bhunu J, used the doctrine to grant relief to Mr.Mushoriwa but the Constitutional Court used it to deny Mrs.Majome relief.*
- *Data usually are collected from a few cases or individuals so findings cannot be generalized to a larger population. Findings can however be transferable to another setting (This was the case where at least two cases were used to deal with one theme as was explained in the two ZBC licensing cases.*

Limitations of Qualitative Research

- *Research quality is heavily dependent on the individual skills of the researcher and more easily influenced by the researcher's personal biases and idiosyncrasies (For instance, the researcher has been working for an organisation that deals with impact litigation and has also been writing on the doctrine).*
- *Rigor is more difficult to maintain, assess, and demonstrate.*
- *The volume of data makes analysis and interpretation time consuming (For instance, the **Majome** judgment, supra note 2, is too long for a matter that is disposed on a technicality).*
- *It is sometimes not as well understood and accepted as quantitative research within the scientific community*
- *The researcher's presence during data gathering, which is often unavoidable in qualitative research, can affect the subjects' responses.*
- *Issues of anonymity and confidentiality can present problems when presenting findings*
- *Findings can be more difficult and time consuming to characterize in a visual way.*

The limitations were taken into consideration in this dissertation because the current study is based on a limited desk review of qualitative literature.¹⁴⁰ Because the cases reviewed have had policy implications, it is accepted in this research that there is indeed a qualitative-quantitative dilemma since policy decisions are informed by qualitative as well as quantitative research.¹⁴¹ Qualitatively, the research considered non-participatory observation by the researcher to be a way of dealing with researcher bias. The researcher would write case reviews on avoidance and

¹⁴⁰There is sparse literature from Zimbabwean authors on the doctrine of the avoidance doctrine.

¹⁴¹See Anderson supra note 138.

solicits comments from avid readers through whatsapp or email feedback. The feedbacks were sometimes sent in detail to the researcher. This researcher also took cognizance of the fact that qualitative forms of research keep on evolving. For instance, the Most Significant Story was used as an emerging method of presenting qualitative research. The researcher could not ignore its impact on innovative ways of litigating human rights.

For instance, this research found that the *Mudzuru* case (supra note 31) was a Most Significant Story on women's rights. It was also a Most Significant Story on the opportunities that the Constitutional Court has if it avoids technicalities and delves into the merits of constitutional matters. This also assisted the researcher to determine why certain litigants would approach the Constitutional Court. Mrs. Majome for instance is a lawyer and a legislator. She has a law firm. Interestingly, her law firm represented her in making a constitutional challenge. Even though the case was dismissed, her law firm played a significant role in advancing the benefits of impact litigation.

Similarly, the researcher found that Mr. Tendai Biti has also been involved in most of the PIL cases that were either heard on the merits or avoided on technicalities. He has not ended with the positive gains brought by the *Mudzuru* case.¹⁴² Although he has been at the helm of Zimbabwean politics as a Minister of Finance, he has managed to establish his law firm which is also making huge strides in Strategic impact litigation. Veritas has also been reporting widely on the cases because some of them were instigated on its instance. Academics-cum-lawyers such as Professor Lovemore Madhuku have also been active in strategic impact litigation in some of the cases where the High Court dealt protected the constitutional rights in key cases. It has been argued elsewhere that the 'serendipitous meeting of diverse people is the engine of creativity'.¹⁴³

The study also used whatsapp to collect data. The targeted population was found from the whatsapp contacts include lawyers, and students and those who give feedback to the researcher through email feedback on his newspaper column called '*Legal letters*'. He then consolidated the views from the desk review of material which included electronic journals, country-specific

¹⁴²This case put the Constitutional Court on the global map. Mr. Biti has not been invited to global forums as was done to the JSC. DCJ Malaba was able to come up with a good decision because he also received good heads of argument from Mr. Biti. Several media platforms also reported on this decision. The electronic media even shows pictures of girls who campaigned outside the CC to have their rights respected.

¹⁴³E. Newburger, '*What Justice Demands of Us, No One Person Can Do Alone: Looking Back and Ahead with Martha Minow*', Harvard Law Bulletin, 2017.

reports, case studies and case reviews to buttress the feedback. Most importantly, the dissertation combined the Most Significant Factor tool as well as the Most Significant Story tool in presenting and analyzing the impact of impact litigation cases that were decided on their merits. This was because the expected outcome of this dissertation, based on such reviews, researcher's litigation experience in impact litigation and findings from across jurisdictions, was to formulate a conclusion and provide spot on recommendations to guide judges in enriching their knowledge of the avoidance doctrine and the implications of distinguishing impact litigation from general litigation. Essentially, the dissertation provided recommendations for:

- Expected responses by the general populace to the appointment of judges and to the dichotomy between judicial decisions and policy making and taking
- Comparative use of foreign law on the development of constitutional jurisprudence on emerging constitutional issues
- Strengthening the research capacity of judges and judicial researchers on the importance of constitutional doctrines in situations where the jurisprudence is in its infancy at a country level.
- Enable judges at its hierarchical level, or the Judicial Services Commission as an institution to develop a theory of change that is based on the worst case, best case or likely responses to judicial reasoning in situations where the avoidance doctrine is invoked.
- Mainstream skills development and on the job training or continuous judicial development in developing constitutional doctrines.

Because the research focused on the role of judges of the superior courts, the role of lower courts in developing constitutional jurisprudence was also carried out in order to ascertain the preparedness of courts to deal with constitutional issues. Interviews were used to allow respondents to provide detailed information on the reasons that they think allow judges to apply the doctrine wholesomely in some situations and avoid it in *toto* in some cases. Attempts were made to include both policy makers such as Ministers and policy consumers such as students and academics.

For qualitative analysis of the collected data, the dissertation uses thematic, content and grid analysis to analyze the collected data. The grouping of data into themes allows the researcher to

determine the reasons, or perceived reasons why the superior courts are either avoiding the merits of constitutional cases due to extant or perceived technical points; or by embarking on express but wrong interpretations of the doctrine. Quantitatively, the dissertation collects data using tabular and diagrammatic presentation of data. This allowed the researcher to determine the peer approval rating of the judges. The quantitative method allows the reader to also observe easily how the authors of the judgments have been feeding soliciting favourable responses from their peers.

It is also important in allowing the researcher to validate and test the reliability of data. Reliability has been described as the reproducibility and stability of data while validity has been defined as the honesty and genuineness of research data.¹⁴⁴ Validity is usually considered as a quantitative aspect of research because it tests the extent to which the findings are an accurate representation of the phenomena they are intended to represent. Reliability, while it is both qualitative and quantitative, deals with the credibility of the data.

Justification of the study

The justification of this study is based on the benefits of a mixed method of research. The researcher considers the method significant because the validity of the data was tested using triangulation. Triangulation involves two or more methods. In this dissertation avoidance and anti-avoidance cases were used together with respondent validation where readers and colleagues were allowed to provide feedback to the researcher's articles. The primary justification of this Thesis is largely three-pronged. Firstly, it examines why superior courts are reluctant to go beyond technical arguments when seeking to dispose of important cases which bear on strategic and public interest litigation. Secondly, it interrogates the rationale behind the skirting away of constitutional arguments by Zimbabwean superior courts. It provides a comprehensive survey of the key judgments of the High Court and Constitutional Court and examines the impact of those judgments on strategic and public interest litigation. In addition, it provides a comparison of the different juridical approaches, particularly from common law jurisdictions, and locates the Zimbabwean approaches to constitutional avoidance within those common approaches.

¹⁴⁴Claire Anderson, *supra* note 138.

Thirdly, it appreciates the need to review the policy impacts of the decisions that bear on impact litigation. It does bearing in mind the fact that decisions of the court derive their legitimacy from the authors of the authority that is exercised by judges: firstly, the people, and then, the formulators and implementers of policy: the other pillars of the State; the Legislator and the Executive. The underlying justification for this dissertation proceeds from the stark realization that the constitutional jurisprudence of Zimbabwe after the adoption of a home-grown Constitution in 2013 is still in its infancy as regards the interpretation of the Bill of Rights.

This is notwithstanding the fact that the Constitution is highly justiciable and transformative in nature. It broadens the justiciability of the three conventional generations of rights: civil and political (CPR), Economic, Social and Cultural Rights (ECOSOC) and Collective Rights (CR). Essentially, Zimbabwe's Constitution clothes the Courts with the powers to protect the essential features doctrine in many ways. Chiefly, it takes away the dirty hands doctrine, or the clean hands doctrine. This allows litigants who allege constitutional violations to strategically apply to the superior courts to have the violation remedied; or to act in the interest of the broader community of individual. Equally important is the constitutional obligation that is placed on superior courts to be innovative when interpreting the common law or regulating their own processes.

Outstanding judgments that form the nub of this Thesis include those on key CPR jurisprudence such as the sanctity of human life; and ECOSOC jurisprudence such as bond notes cases. Just like any transitional institutions in most jurisdictions are undergoing several massive and institutionally-crafted transformations: the drafting of practice notes on set down of matters, the drafting of specific rules of each court, the development of a rigmarole kind of referral procedure and the invention of specific doctrines when deciding cases, it is important that these transformations be investigated through academic lens because the new transformations cannot succeed or benefit the general populace without the involvement of impact litigation.

The research is also justified because it considers that what is not sufficiently understood by litigants or the Court can be augmented by academic research through an examination of various doctrines as applied in various jurisdictions. This dissertation is not only academically concerned with the doctrine of constitutional avoidance, but the usually selective judicial activism of the constitutional court in impact litigation cases which cut across many spheres of a Zimbabwean's

life around political rights, freedom of trade, profession and occupation, freedom of religion, expression and economic freedoms. As a result a plethora of constitutional issues is analyzed from the perspective that if the issues are potent and peculiarly Zimbabwean.

It proceeds from the argument that if the citizen's misgivings about judicial impact in impact litigation are to recede, then the judiciary, academia, general citizenry and other stakeholders in the justice sector must talk easily and intelligently on constitutional issues, exchange some thoughts, and do their best to contribute to the debate on the legitimacy of judicial decisions. This research is significant because it comprehensively investigates and evaluates the reasons why judges invoke the doctrine under scrutiny. The apex court has been throwing away several strategic cases on technical reasons. Such cases bear on features of the Constitution such as founding values, national objectives and the Bill of Rights.

Further, there is dearth in literature that provides a grid analysis of the constitutional court judgments. The research also crafts a performance matrix of the three superior courts in Zimbabwe: the High Court, Supreme Court and Constitutional Court. It is unique in the sense that it cast academic lenses on how the High Court, as the feeder court, has been quite innovative and proactive in doing away with special limitation statutes and has been quick in utilizing constitutional provisions than the Constitutional Court. Similarly, it is an important study which assesses how the vacillating self-regulation processes of the Constitutional Court allow other pillars of the State to ignore adopt policies and implement them without paying due regard to provisions of the Constitution that involve the general populace. Most importantly, the research trouble-shoots on the urgent need for the alignment of laws with the constitution and the revision of the Constitutional Court rules, as they largely limit the value of strategic and public interest litigation.

The strategic detriments of resorting to technical arguments in dismissing constitutional cases are undeviating-the distresses of being told to end on technical rules of judicial reasoning that are not even predicated on the merits of the case, the haunting phantasm of the antiquated judge on the concerned litigant and society at large, the acrimony of dealing with costs of suit that never was, the misery of being blocked from having the merits of the case being heard, the hurt of a carefully chosen technical arguments, the stresses on the part of both lawyer and client on the next course of action...! Not even the memory of a retreating dreamer this technical and

avoidance approach to litigation will bid to suffer. The harrowing court procedure of puts the litigant in some dilemma on whether to remedy the technicalities or abandon the case altogether.

Without downplaying such concerns about selective judicial activism and constitutional avoidance, this think-piece adopts the view that inasmuch as the abhorrence of the doctrine of constitutional avoidance is not a given in judicial reasoning, it is supposed to be cautiously applied especially in matters that bear on constitutional rights. The debate about the many pillars of this doctrine saw this dissertation examining the concerns by citizens as presented in the press, on social media, in academic forums, on radio programs and in legislative meetings. There may not be a conventional model of constitutional avoidance, but the concerns above are designed to work as a testament of the important place that the judges of the superior courts must occupy in every facet of impact litigation. Most importantly, the doctrine is not a sacred judicial doctrine whose development and appreciation is best left to the judge's emotions and interpretive role alone.

Further, constitutionally preaching, every Zimbabwean shares a responsibility to ensure that the Constitution is interpreted and applied in line with what is contemplated first by the Constitution itself, international law and other internationally agreed methods of interpreting the Constitution. There is, and always shall there be, a lot of methods of constitutional interpretation that remain open to academic considerations to play out. But the doctrine of constitutional avoidance has to be given a lot of academic attention which attention must inform the judicial reasoning process. The trend in most juridical systems is to have an academia which not only react to judicial decisions, but also ensures that the judicial functionary is a taker of academic reasoning.

1.1.8 Delimitations

Geographically, this study is carried out within Zimbabwe. Three superior courts form the thrust of this research: the High Court, Supreme Court, and the Constitutional Court. Because it is qualitative it mixed research, triangulated methods that will be used are varied. The study spans from February 2017 to July 2017.

1.1.9 Limitations

The limitations in this research are quite multifaceted. Firstly, there is limited information on the avoidance doctrine as applicable to Zimbabwe. As such, this study is largely '*virgin*' and does

not offer what can be called '*exclusively alien*' data on the doctrine. To counter this limitation, the newness of the doctrine is developed from the presumption of constitutionality and the subsidiarity doctrine which have been used quite often by the Zimbabwean courts as a pillar of the doctrine. Secondly, it is axiomatic that the doctrine has been used across jurisdictions to allow judges in judicial circles to avoid constitutional issues. Judges of superior courts have either been inventing "*contextualized*" reasoning which takes issue with foreign law; or have been using the reasoning from other foreign superior courts. To counter this limitation, this study used the Constitution as both the entry and the exit point in assessing the legitimacy of judgments. It also reviewed the available data on how judges in some jurisdictions have been innovative enough to distinguish the avoidance doctrine as used in general litigation and doctrine as used in strategic litigation.

Thirdly, the Constitution clearly allows superior courts to regulate their own processes. In essence, they cannot be bound by their decisions *ad infinitum*. This makes it difficult for this researcher to judge whether there is a quantum leap in invoking the avoidance doctrine or whether the judges can be said to be anti-avoidance since they use their powers as conferred to them by the Constitution itself. Cumulatively, it could be difficult under such circumstances to determine the constitutionality of their approaches using the *ultra vires* doctrine or its mirror image, the principle of legality. To ensure that this was done in furthering the Constitution, this study looked at the general virtues expected of a judge of a superior court when seized with constitutional matters. Fourthly, the person of a judge is not uniform across jurisdictions.

Some judges of the Constitutional Court have remained largely orthodox while others are slowly becoming liberal in their judicial reasoning. To address this limitation, the study considered developments in some jurisdictions where judges undergo some peer review as a way of ensuring that judges in Zimbabwe develop their ability to resort to comparative judicial reasoning. Fifthly, there is lack of consistency in judicial reasoning. Both liberal and orthodox judges usually agree unanimously in certain decisions. To address this, this study looked at reasons why judges do not usually dissent against their peers and also looked at constitutional duties of a judge when interpreting decisions such as sections 44-46 of the Constitution to determine the legitimacy of the consensus in decision-making.

Researcher bias could also not be avoided since the study was based on participatory observation by the researcher. To counter this limitation, the researcher considered the feedback from lawyers, academics and students, as part of participatory observation. The study appreciated the diversity of emerging ways of conducting research. As a practicing lawyer, and academic, the researcher found that students, fellow academics, and practitioners in a similar fraternity enable him to pursue research innovatively and purposely. Social media has created dynamic new spaces, including tweeter feedback, facebook or whatsapp feedback and so on.

Conclusion

This Chapter was introductory in nature. It dealt with the brief literature review of the avoidance doctrine public interest and strategic impact litigation; the background, research relevance, design and methodology; justification; delimitations and limitations of the study. Literature review was moved to the next chapter because the brief literature was meant for the proposal stage only to show that the area of study was researchable. The next chapter deals with the concept of avoidance in detail and also shows the theoretical framework on the study.

CHAPTER 2

An Examination of the Problems of Doctrinaire Application of the Constitutional Avoidance Doctrine in Impact Litigation Cases

Introduction

This part of the research provides some arguments against doctrinaire use of the avoidance doctrine in impact litigation cases. The arguments are largely based on the Constitution and the foundational principles of democracy that are enshrined in the Constitution.¹⁴⁵ This is because every student and every interpreter of the Constitution is a documentarian.¹⁴⁶ The avoidance doctrine is frequently associated with the right of a superior Court to refuse to exercise its powers of judicial review¹⁴⁷ in certain matters. This is correct because the judges have to fetter their discretion to deal with the merits of the case that is before them. They are however enjoined to uphold the fundamental principle of ‘*due process of the law*’ espoused by the supreme law of the land. This is because, as has been said elsewhere, that the Constitution is the law for the government and trumps a statute so judges must prefer and enforce the Constitution over a statute.¹⁴⁸

A caveat is also supposed to be made in this regard. The exercise of judicial discretion extends further than. It has to be exercised judiciously. Further, there are two major historical features of the avoidance doctrine relevant to this research are: (1) the classical aspects of avoiding constitutional matters whenever a court feels that there could be an executive response to the decision; (2) the use by judges of variant forms of avoiding constitutional matters resulting in detrimental policies that emanate from such decisions where the variant forms would have been invoked.

¹⁴⁵ See section 3 of the Constitution.

¹⁴⁶ T.E Baker and J.S Williams, ‘*Constitutional Analysis*’, (1992) page 1, Thomson and West, USA.

¹⁴⁷ A paraphrased definition of judicial review from Baker and Williams (ibid) page 53 treats it as shorthand expression for the role the Court plays as the final authority on most, although not all, issues on the constitutionality of governmental acts. It reviews these acts to see that they conform to the Constitution. The Supreme Court of the United States for instance exercises its constitutional authority when it validates or invalidates what some governmental actor has done.

¹⁴⁸ *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803)

2.1A Brief historical and philosophical consideration of the Constitution

A proper research on the avoidance doctrine enjoins this researcher to discuss the historical and philosophical contexts of the Constitution in brief. Historically, Zimbabwe's constitutionalism can be traced to the years 1923 and 1961 when colonialism was formalized. Upon attaining independence, Zimbabwe had a Constitution¹⁴⁹ which made civil and political rights justiciable. Claims for protection of the other rights such as ECOSOC and collective rights were made through CPR rights. This brief history is important because Zimbabwe now has a Constitution that makes all the three generations of rights justiciable. Courts can historically interpret the Constitution.

Philosophically, Zimbabwean constitutionalism is explained by the several amendments to the 1980 Constitution. The several amendments showed how Zimbabwe was reimagining the relationship between government and the individual citizen. Some of the amendments before the turn of the millennium gave impetus to the need for a home-grown Constitution. A Constitutional Commission Draft Constitution was rejected in 2000. The NCA campaigned for a 'No Vote' because the Draft was largely seen as more of a political document than a people's charter. The NCA was to become an important player in the Constitutional-making process as it emphasized on the need to have a people-driven Constitutional process. The NCA's Draft Constitution was also considered in the constitutional making process just like other drafts such as the Kariba Draft and COPAC Draft. Although it did not have founding provisions of democracy, it was reflective of international norms and standards as envisaged by the UN guiding principles.¹⁵⁰

Zimbabwe then embarked on a constitutional-making process that was largely politically driven by ZANU PF and the two MDC formations, MDC-Tsvangirai and MDC-Ncube/Mutambara. The three political parties were part of the Government of National Unity that existed between 2009 and 2013. Just like in 2000 when a referendum was conducted, Zimbabweans also voted for the adoption of the Constitution. Over 94% voted for the adoption of the Constitution although some civil society organizations such as the NCA (now a political party) campaigned for a 'No vote'. Logically, the philosophical developments in Zimbabwe can be compared with the American

¹⁴⁹The Lancaster House Constitution, 1980.

¹⁵⁰ See the UN, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes*. (2009) United Nations.

constitutionalism. The latter re-imagined the relationship between the government and the individual and codified the new social compact in a written document that is higher law.¹⁵¹

The Constitutions in the two countries are built on constitutional supremacy.¹⁵² They are built upon the tenets of democracy such as the rule of law and republican theory. The researcher chooses to pick the rule of law as one of the tenets of democracy that must always be considered when analyzing the role of the judges of Superior Courts. This is because the leading judge who has been avoiding the merits of constitutional matters is part of the government as Chief Justice. The rule of law is important in the arguments against overuse of the avoidance doctrine because it leads to a ‘government of laws and not of men’.¹⁵³ It is the fundamental principle that both the governed government are bound to follow and obey the law of the land.¹⁵⁴ While Baker and Williams trace the development of the rule of law in the USA to Aristotle, Cicero, Thomas Paine and John Adams, this research is concerned with their contention that the rule of law finds expression in the powers of judicial review. Embedded in this argument is the fact that the will of the people that is expressed in the Constitution is superior to the will of the people’s representatives in the legislature-expressed in mere Statutes.¹⁵⁵

2.2 The Three Pillars of the State and the Avoidance Doctrine

Essentially, the Constitution is law and all the three branches must adhere to the rule of law in the Constitution. Yet the doctrine of avoidance as used in Zimbabwe contains the overtones of separation of powers doctrine. The Court which invokes the doctrine usually blurs the dichotomy between law and State policy. It is axiomatic that ‘*law is not policy and policy is not law*’. A failure by a Court to deal with this dichotomy may produce deleterious effects on constitutional jurisprudence, and development of judicial creativity in impact cases. A consideration of the failure by the Constitutional Court of Zimbabwe at addressing merits of key impact litigation cases, since the adoption of the Constitution in 2013, calls for an in-depth research over the

¹⁵¹See Baker and Williams, supra note 146, page 1.

¹⁵²For instance section 2 of the Constitution of Zimbabwe shows the supremacy clause which envisages a situation where all laws, traditions, conduct or practices that are inconsistent with the Constitution are invalid to the extent of their inconsistency.

¹⁵³See Baker and Williams, supra note 151.

¹⁵⁴Ibid, page 4

¹⁵⁵Ibid, page 5

pertinence of invoking the doctrine. By way of illustration, a formidable problem that has been affecting the members of the public has been the invoking of the doctrine of subsidiarity.¹⁵⁶

The Legislature is a constitutional creature that is expected to function within the bounds of the Constitution, especially the will of the people protected in the preamble and the supremacy of the Constitution protected by the supremacy clause. The Constitutional Court has not been seen to distinguish between legislative power in the medieval and the modern era. The medieval notion of power was that all authority was attributable to God, nature or custom, and that human institutions merely discovered and enforced the pre-existing will.¹⁵⁷ Even though it can be argued otherwise that laws were made and not found, the Constitution begins with the invocation of the ‘*We the people of Zimbabwe*’ clause.

Added to subsidiarity but equally problematic are central policy issues such as the appointment of the executioner¹⁵⁸; and the use of pendency of cases and hierarchical nature of Zimbabwean Courts to avoid merits of labour matters¹⁵⁹. These decisions are both steeped in the decisions that have been made by the Constitutional Court and other superior courts such as the High Court and Supreme Court. For instance, there has not been a clear policy on who has applied for the executioner’s job, or whether members of the public have been involved to determine if they do not want to apply for the job. Further, there have not been policies that promote constitutional freedoms such as freedom cruel, inhuman and degrading treatment notwithstanding the fact that the Constitutional Court appreciates that Zimbabwe does not have an executioner.

Most of the policy issues are widely reported in the media and other social platforms that are utilized by the general populace. Nevertheless, the invoking of the avoidance doctrine remains constant and cannot be seen to be promoting judicial activism or the jurisprudence on the Constitution which is about four years old. In such a situation, the Constitutional Court was supposed to construct an interpretive structure that promotes public interests. Zimbabwe has a Constitution that is quite progressive. It shows that the judiciary derives its mandate from the people. The epitome of the importance of the people is captured by the ‘*We the People of Zimbabwe*’ part of the Preamble to the Constitution.

¹⁵⁶ *Majome* case, supra note 2

¹⁵⁷ Baker and Williams, supra note 146

¹⁵⁸ See the *Chawira* decision, supra note 1

¹⁵⁹ *Katsande*, supra note 1

Further, the Constitution entrenches democratic values that include human rights. It makes justiciable the three generations of rights: civil and political; economic and social rights (ECOSOC); and Collective or group rights. It is important that the superior courts, particularly the Constitutional Court, should not place its reliance on avoidance doctrines and proxy constitutional explanations that discard the opinions or interests of the public, from whom they derive their authority. It is the Zimbabwean people who vest the power to interpret and adjudicate important disputes in the courts. Admittedly, the judges are norm givers, and managers of the cases that are referred to them. Equally, they are court managers and are best placed to devise ways of arriving at various conclusions in different cases.

However, they must never avoid the ‘*public phase*’ in their decision-making. This phase can only be reached by ventilating the merits of constitutional matters that are usually brought under impact litigation. The Constitution allows members of the public to approach the Courts of law to seek remedies that work to the interest of the public. Because the Constitution does not define public interest or impact litigation under the definitions section in section 332, the Constitutional Court, and other superior courts must be activist enough in reflecting the spirit, purport and object of the Constitution in this regard.

2.3 The Constitutional Court and the Avoidance Doctrine

The avoidance doctrine presupposes that constitutional cases are not being accepted by the Constitutional Court in terms of the ventilation of their merits. The Constitutional Court has either expressly referred to the avoidance doctrine or has been flirting with numerous doctrines such as subsidiarity (with an impressive refinement in the *Majome* case¹⁶⁰), deference, and wrong link of the elements of justiciability of human rights (*Chawira*¹⁶¹ and *Katsande*¹⁶² cases). Despite the opportunity presented by impact litigation to develop the constitutional jurisprudence in Zimbabwe, the Constitutional Court has held a leading role in invoking the avoidance doctrine with amazing consistency, unleashing a ‘*new toy syndrome*’ kind of treatment to the Constitution. With this in mind, the question whether flirting with various doctrines to deny the litigants the chance to have their matters heard on the merits can only be addressed by looking at

¹⁶⁰ Supra note 2.

¹⁶¹ Supra note 1

¹⁶² Supra note 1

the Constitution itself: particularly constitutional supremacy and definitional aspects of a constitutional matter.

Unlike the abundance of literature on research on avoidance doctrine in countries such as South Africa and the USA, there is paucity in this regard in Zimbabwe. The same holds for impact litigation. Zimbabwe does not have a rich history of impact litigation cases compared to such countries like India and South Africa. Driven largely by the growing striking off or dismissal of constitutional matters, the past two years have seen the proliferation of attempts to measure the instances and costs of either constitutional avoidance or constitutional acceptance doctrines in Zimbabwe. While the direct costs of the avoidance doctrine have been shown in some cases¹⁶³, it is the indirect costs which are relatively easy to evaluate. The direct costs include the construction of a conformity approach where judges defend State policies such as relating to the appointment of the executioner, or the use of dangerous precedent, as was done in *Katsande* case.¹⁶⁴

2.4 The role of the Superior Courts: Why merits of the case?

It is always important to note that a judge's reflection of the merits of the case play a significant role in bringing matters to finality. In an essay presented at Notre Dame, Professor Tidmarsh (nd)¹⁶⁵ dealt with various issues that explain why the merits of cases must be dealt with from the integrated nature of the rules of civil procedure to the need for reform of rules in a legal system. He states that:

'In considering reform, therefore, it is more important to ask what kind of structure we ideally want to build and what constitutional, historical, political, and economic realities constrain this ideal'.

His concerns cannot be bettered in any way. The above apply with equal force to the struggle for legal reform that is currently obtaining in Zimbabwe under the alignment process. This alignment process is gathering at a snail's pace and resonates with what Professor Tidmarsh said that about the Anglo-American procedure that:

¹⁶³Such as the *Majome* case, supra note 2, where costs were awarded against the litigant; or the *Chawira* judgment supra note 1 where vindictive language that betrays the constitutional gains on the sanctity of human life was used.

¹⁶⁴Supra note 1

¹⁶⁵Not dated '*Resolving Cases on the merits*', Notre Dame, USA.

‘The history of Anglo-American procedure has been an unending effort to perfect the imperfect. Some of our efforts have made things worse, others have made them better. We have not yet come to the endpoint of procedural reform’

While scholars like Tidmarsh emphasize on the need to move away from the approach by legal realists such as Roscoe Pound who argued that each case must be ‘*heard on its merits*’ towards another paradigm to legal procedure, such a paradigm had not yet been found. The Pound approach has been considered simple because:

The fundamental reason for the endurance of Pound’s paradigm is its elegant simplicity: it promises to resolve each claim and each issue on its factual and legal merit, without letting procedural technicalities or traps derail the decision. No other vision—for instance, “decide claims by the most efficient means”—captures this most basic aspiration of an ideal civil justice system.¹⁶⁶

To properly determine Public interest Litigation cases, superior courts must proceed from the fact that there are no ironclad rules that are specifically laid down for such determination. In his paper presented at the Judicial Symposium on Environmental Law for the judges of the Supreme Court and Court of Appeal in Uganda, Phillip Karugaba¹⁶⁷ describes public interest litigation as legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it. The hearing of the merits of the case also allows the other side to be heard before adverse decisions are taken against them.

This research states at this stage that it has become fashionable for litigants to raise preliminary points before a matter has been heard. These preliminaries are raised at the High Court, mostly in urgent matters, or at the Constitutional Court, on issues to do with the various avoidance issues. All these points *in limine* limit the ability of a Court to deal with the real issues before it. Instead, the preliminary points are raised to stop the Court from focusing on the real issues that the litigants want them resolved.

2.5 Invoking various doctrines as part of the variants of Avoidance doctrine

While the Constitutional Court has in many situations avoided dealing with the merits of impact cases, the High Court has been accepting constitutional arguments and in some cases referring strategic cases to the former so that the cases would either be confirmed or given some other due

¹⁶⁶Ibid page

¹⁶⁷P. Karugaba ‘Public Interest Litigation in Uganda: Practice and Procedure, Shipwrecks and Seamarks’ TEAN

consideration.¹⁶⁸ The Constitutional Court has been frequently referring to the doctrine of subsidiarity and alternative remedies to deprive litigants of the chance to be heard on the merits.

Subsidiarity was well developed in SA as a doctrine that has been used by courts as a general rule for when a litigant should rely on a constitutional remedy and when a private remedy can be made available. The notion of subsidiarity is aptly captured in what was laid down in *S v Mhlungu* where a court may decide a civil or criminal rule states that without reaching the constitutional issues. The principle has been adopted by a full court in several South African cases.¹⁶⁹ The implication of this doctrine is that constitutional cases can only be heard if the remedy in a statute is insufficient to fully vindicate a litigant's right.

The doctrine has been criticized because it works in theory as a principle that is used to deny litigants constitutional remedies. The basis of the criticism is that the doctrine should not be used to prevent any constitutional right from being vindicated. It is theoretically correct to state that '*if common law remedies are not adequate-litigants are always entitled to bring a pure constitutional claim*'. This is particularly so in that inasmuch as the doctrine prevents the litigant from benefiting from a common law stream and constitutional stream on damages, the case has practical drawbacks on impact litigation. The common law remedy causes the litigant to focus on individual compensation whereas constitutional remedy enables the litigant to be concerned with the prevention of future violations which benefit a greater part of the population. Further, it is rare for constitutional remedies to go unnoticed unlike private remedies.¹⁷⁰

In essence, the doctrine is shunned because the court invoking uses the pitfalls that were created by a previous case. This creates a business as usual orientation towards constitutional remedies.

¹⁶⁸Section 175 (1) of the Constitution obliges the judges of the High Court to refer cases to the Constitutional Court for confirmation of declaratory orders.

¹⁶⁹See M. Bishop, 'Remedies' (2013), in Woolman and Bishop (2013) referring to cases such as *Ex parte Minister of Safety and Security & Ors: In re S v Walters and Anor* 2002 (4) SA 613 CC @ para 64, *Fose v Minister of Safety and Security* where a court rejected a claim for constitutional damages because the damages the plaintiff could claim in the existing law of delict would adequately vindicate the rights.

¹⁷⁰This position has been noticed in South African cases such as *Carmichele v Minister of Security* CCT 14/96 where an applicant was attacked because of the police and the prosecutor had not opposed bail, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) where an off-duty police officer attacked and raped the applicant and *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) as a result of administrative failures at a prison, the applicant ended up serving five years more than his expected sentence.

The *Fose* approach was criticized by scholars like Michael Bishop¹⁷¹ because the court used a textbook delictual sense. The approach used in *Fose* was:

Yes your right to administrative right has been infringed but we have no remedy. Your constitutional right has also been infringed but you are not entitled to delictual damages.

The doctrine of alternative remedies is a common law principle that ‘*before claiming judicial review a party should first exhaust internal remedies*’. This principle gave judges the discretion to either uphold such an argument, or dismiss it and proceed to hear the matter on the merits.¹⁷² The point may then be taken that the matter will not be ripe for hearing. This was referred to in the *Chawira* case¹⁷³ where Bhunu as a judge of the Constitutional Court refused to hear the merits of the case involving death row inmates.

Because these variants have been used as variants of the avoidance doctrine, it is important to deal with such important issues as the Constitution, constitutional matters and constitutional democracy. The canvassing of these issues is important in assessing the credibility of invoking the avoidance doctrine as a tool of judicial review. As such, it is no understatement to state that the doctrine of constitutional avoidance and its palpable manifestation as a constitutionally related concept cannot be understood unless related concepts on which its importance is to be assessed have been given due regard. It serves as a very powerful agent to rouse the need for litigants to pay special attention to the rules of the courts.

Because this dissertation adopts a mixed research type, the doctrine is considered as the **independent** variable which affects impact litigation. Impact litigation is the **dependent** variable as it is being affected by various strands of the avoidance doctrine that are used to avoid the constitutional issues. Because the dissertation presents a thesis, antithesis and synthesis, the other sub-sets of the doctrine as considered by the Courts remain part of the independent variables. However, scholarly views may form part of the **intervening** or **mediating** variables as they assist in showing how the avoidance doctrine ends up being adopted by various judges.

¹⁷¹Supra note 169

¹⁷²L. Baxter ‘*Administrative Law*’ (1984), cited in S. Woolman and M. Bishop ‘*Constitutional Law in South Africa*’ (2013), Juta.

¹⁷³ Supra note 1

2.6 Constitutional matter

The consideration of constitutional matters must ultimately supersede all other matters. The justification for this proposition sounds paranormal yet constitutionally-pitched, the paranormal remains the normative normal. Although constitutional matters are defined in the Constitution, it is also important to note that they border on constitutional issues. Courts have been seen to avoid matters that can be resolved without reaching the constitutional issues. The corollary to this is that the Constitution must experience a normative renaissance. It has been held by South African Courts that it is possible to hear a case where possible any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed.¹⁷⁴ The corollary to this has been that the court can only hear the matter where compelling reasons to do so exist.¹⁷⁵ A constitutional matter is defined in section 322 of the Constitution as a matter involving the interpretation, protection and enforcement of the provisions of the Constitution.

The role of a court in dealing with constitutional issues fall squarely on the definitional aspects alluded to above. Illustratively, constitutional issues in Zimbabwe include the death penalty. The Constitution deals with categories of people such as women and men between 21 years and 70 years as exempted from the death penalty.¹⁷⁶ Men feel that they are discriminated against in this regard. It has been stated, in relation to the death penalty, by one renowned jurist on criminal law in Zimbabwe that:

‘The death penalty debate generates a lot of emotional heat. Many people ardently support the retention of the death penalty sentence for murder. The main basis...(is) rather a deep conviction that the death sentence is a just retribution; murderers have seen fit to kill people and therefore they too deserve to die. Those opposed to the death penalty argue that it is morally wrong for the State to kill people, no matter how terrible the murders that they have committed; that the whole process of dealing with prisoners condemned to death, and finally executing them, is an extremely sordid one which debases State institutions; that the death penalty has no greater deterrent effect than life

¹⁷⁴C. Loot, ‘Standing, Ripeness and Mootness’, In Wooman and Bishop (ibid) argues that this approach was enunciated in *S v Mhlungu and Ors*, 1995 (3) SA 867, 895.

¹⁷⁵Ibid, citing *Zantsi v Council of State Ciskei* 1995 (4) SA 615.

¹⁷⁶See section 48 of the Constitution

*imprisonment; that no system of criminal justice is infallible and innocent persons could end up being hanged by mistake.*¹⁷⁷

The above constitutional issue was specifically chosen in this dissertation because the Constitutional Court had occasion to specifically deal with a case that referred to the avoidance doctrine when refusing to decide the constitutional issues that were raised by applicants who were facing the death penalty.¹⁷⁸ This was notwithstanding the fact that there was literature in Zimbabwe that had dealt with the consequences of the death penalty. G. Feltoe, a renowned writer in Zimbabwe as alluded to above, had an article which cited the English case of *R v Home Secretary, ex parte Bugdaycay*¹⁷⁹. The House of Lords stressed in that case the more the serious consequences for a person, the higher will be the standards expected in dealing with his case. From a justiciable right to life perspective¹⁸⁰, the Court in that case stated that:

‘The most fundamental of all human rights is the individual’s right to life and, when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny’.

The administrative decision that can be taken issue with constitutionally is the finding by the Zimbabwean Court in the *Chawira*¹⁸¹ decision that there is no appointed executioner. This finding was supposed to be considered pertinent to the decision-making process in this case. The court was supposed to assess if all the reasonable steps had been taken to ensure that the death row inmates were not prejudiced by being continuously placed on the row and that all salient facts had been laid below the court regarding the prejudice. Alternatively, Professor Feltoe as an academic and writer or the beneficiary Minister, who is also a Minister responsible for the Ministry of Justice could have been invited as an Amicus Curiae in that case. Added to this have been the testimonies of the high profile beneficiaries of a pro-life sentencing policy such as the Vice President, Emmerson Mnangagwa.

¹⁷⁷G. Feltoe, ‘*The Reliability of Decisions about Whom to Execute in Zimbabwe*’, (1992) page 162, Zimbabwe Law Review, Volume 9-10, University of Zimbabwe.

¹⁷⁸See the *Chawira* case supra note 1.

¹⁷⁹1987 ALL ER 840@ 95

¹⁸⁰Section 48 makes the right to life justiciable in that it is entrenched as a fundamental right under the Bill of Rights Chapter.

¹⁸¹Supra note 1

Constitutional interpretation as a pillar of what constitutes a constitutional matter has to be defined in this dissertation. This is because most judges have not been seen to show their appreciation of various methods of interpreting the Constitution. Neither have they been using comparisons from other jurisdictions, nor have they been distinguishing constitutional interpretation from ordinary statutory information. This dissertation argues that constitutional interpretation is a form of interpretation that is distinct from general statutory interpretation and superior judges must always be prepared to use this distinction in deciding constitutional matters. Because constitutional avoidance depends on the interpretive function of a judge, judges must always endeavour to demonstrate why they skirt constitutional issues from an interpretive perspective.

Constitutional interpretation must be based on principles of constitutional interpretation with deference to common statutory interpretation sparingly done if the circumstances so permit.¹⁸² The Constitution must be treated as a living document, taking into account changing conditions, social norms and values so that it remains flexible to meet newly emerging problems and challenges.¹⁸³ It must be constructed as a whole¹⁸⁴, given a generous and purposive construction¹⁸⁵ and should seek to expand the reach of constitutional rights by ensuring that rights are not diluted unless necessity or intractability of language dictates otherwise.¹⁸⁶

While protection of constitutional provisions can be self-explanatory, enforcement has a lot to do with the ability of a litigant to obtain constitutional remedies. The Constitution makes provision of the remedies such as declaration of rights and compensation.¹⁸⁷ Peter Birks as cited by Michael Bishop (2013) argues that the term remedies can be understood in five ways to mean:

- *Cause of action*
- *Right born of a wrong*
- *Right born of a court order*
- *Right born of an injustice or grievance*
- *Right born of a court order issued on a discretionary basis*

¹⁸²*Hewlett v Minister of Finance* 1981 (1) ZLR 572 (SC)

¹⁸³*Minister of Home Affairs v Bickle and Others* 1984 (2) SA 439 (ZSC) @ 447G

¹⁸⁴*Rattigan v Chief Immigration Officer* 1995 (2) SA 182 (ZSC) @185 F, *In Re Munhumeso, and Others* 1995 (1) SA 551 (ZSC)

¹⁸⁵*Smyth v Ushewokunze and Another* 1998 (3) SA 125 @113E

¹⁸⁶*Hewlett*, supra note 39, @ 496F

¹⁸⁷Section 85 of the Constitution

Admittedly, a CC has the last word on constitutional matters. The argument that has been

2. 7 Navigating the Contours between avoidance doctrine and Public Interest Litigation.

One view specifically captures the focus of this research because it condenses in simple terms important justifications of normative aspects and, indeed, how institutional links can impact on certain doctrinal conceptions. Metzger and Morrison (nd) aptly argue that:

In its most common articulation, the canon of constitutional avoidance provides that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”

Actually, the same view can be used to determine how Zimbabwean Courts have attempted to craft interpretations that tilt in favour of either the Legislature or the Executive. Regrettably, such an attempt has produced deleterious effects on the jurisprudence of the Constitution because Zimbabwe does not have centuries of constitutional interpretation as compared to countries like the USA. Further, Zimbabwean courts have not been seen to distinguish between rules of construction or rules of interpreting the Constitution.

Further, the Zimbabwean literature on this research topic is not exciting, wants vitality and it is difficult to avoid associating in this dissertation the approach of the Constitutional Court in several cases with a perceivable decline in judicial activism. There are case reviews¹⁸⁸ and critical reflections on some judgments that bear on this doctrine.¹⁸⁹ Literature on the applicability of this doctrine in other jurisdictions is however expansive. In 2009, Ndashe and Sacco dealt with the pillar of avoidance doctrine when they reviewed litigation of the right to non-discrimination on the grounds of sex in Southern Africa.¹⁹⁰

¹⁸⁸On *Loveness Mudzuru and Anor v Minister of Justice*, *supra* note 31.

¹⁸⁹S. Hofisi ‘*Chawira Judgment: Some reflections*’, (2017) *The Herald*

¹⁹⁰S. Ndashe and S. Sacco, ‘*Watch the Court Dance: Litigating the Right to Non-discrimination on the Grounds of Sex*’. *Equality Rights Review*, Vol. Four.

Constitutional avoidance has been called the doctrine of constitutional doubt.¹⁹¹ This is because it is a rule of judicial construction which holds that where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided (a court's) duty is to adopt the latter.¹⁹² It is also loosely called the doctrine of constitutional deference. The deference is necessary to ameliorate worries about the counter-majoritarian institution of judicial review which must occasionally reject the product of the democratic law-making process.¹⁹³

Critics however argue that it is no act of deference to construe a statute in a manner contrary to the expressed legislative intent on the one hand.¹⁹⁴ On the other, whenever the Court purports not to decide a constitutional question, it is in fact relying upon previously decided constitutional questions. In this way, the Legislature has a very difficult time challenging the Court to consider budging from static constitutional moorings.¹⁹⁵ The doctrine has been subject to a range of criticisms in jurisdictions such as the USA. For instance, scholars such as Eric Fish proceed from the argument that the doctrine is understood as a 'method for resolving interpretive ambiguities: if there are two equally plausible readings of a statute, and one of them raises constitutional concerns, judges are *instructed* to choose the other one' (Italicizing is mine).¹⁹⁶

Although the source of instruction is not proffered in the '*Fish approach*' above, nonetheless, the approach has two important benefits to constitutional jurisprudence and fits into the roles of judges. Firstly, it helps in criticizing interpretations that are not plausible.¹⁹⁷ Secondly, it helps litigants in public interest litigation to understand judicial instances where the doctrine is used as a form of constitutional remedy. As a remedy, courts have the power to effectively rewrite statutes. A court that finds a statute unconstitutional can creatively interpret that statute in a way that changes its meaning in order to fix the constitutional violation, just as it can invalidate-

¹⁹¹ M. T Crabb, '*The Executive Hall Construe: The Canon of Constitutional Avoidance and the Presidential Signing Statement*' (2009) University of Kansas.

¹⁹² Ibid, citing the case of *Harris v U.S* 536 US 545 (2002)

¹⁹³ W. Kelly, '*Avoiding Constitutional Questions as a Three-Branch Problem*' (2001) 86 Cornell Law Review

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ See supra note 111, see also E. Fish, '*Constitutional Avoidance Interpreted as Remedy*' (2016) Yale Law School.

¹⁹⁷ Ibid

statutory language, strike down applications, and impose other kinds of remedies that change the statute's meaning.¹⁹⁸

Public interest litigation is conceived as a strategy to advance the social rights of marginalized people-asking under what conditions it is likely to be effective-in the narrow sense of winning cases, and in the broader sense of changing social policy.¹⁹⁹ It describes legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it.²⁰⁰ Various courts across the globe have contributed to the definitional and purposive issues relating to public interest litigation. Bhagwati J in *Bandhua Mukti Morcha v Union of India* AIR 1984 SC described it as:

*'Not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution',*²⁰¹

Tanzanian courts have also defined Public Interest Litigation in the following manner:

*'It is not a type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society...the condition which must be fulfilled before public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation',*²⁰²

The import of the Bhagwati description above is of importance to judges and lawyers in Zimbabwe where the legal system is adversarial in nature. Judges must understand that SL cases are meant to develop the constitutional jurisprudence simply because the Constitution is the mirror of the nation's soul. Further, this research is relevant from the Bhagwati approach because the Constitution of Zimbabwe has three generations of rights which are clearly entrenched and must be interpreted in a way that promotes social and economic justice. Apart from that, the Tanzanian approach is important because the Constitution of Zimbabwe clearly provides certain

¹⁹⁸See supra note 182

¹⁹⁹SiriGloppen, 'Public Interest Litigation, Social Rights and Social Policy' 2005, page 1, Arusha Conference Paper, New Frontiers of social policy.

²⁰⁰Philip Karugaba, 'Public Interest Litigation in Uganda: Practice & Procedure, Shipwrecks and Seamarks' (2005) page 2, The Environmental Action Network, paper presented at the Judicial Symposium on Environmental Law for the Judges of the Supreme Court and Court of Appeal.

²⁰¹Ibid, page 2, citing Narayama, 'Public Interest Litigation' (2001).

²⁰²Ibid, page 3, citing the Tanzanian case of *Mtikila v AG* (HCCS, No. 5 of 1993)

relief for constitutional breaches of human rights such as a declaration of rights or compensation.²⁰³

Moreover, the relevance of this research relates to cases such as the *Mangwiro* decision²⁰⁴ where the Constitutional Court referred a case back to the High Court so that Justice Mushore would rectify a defect relating to a form on referral of cases from the High Court to the Constitutional Court. The Tanzanian literature assisted this researcher in assessing how effective relief should have been provided by the Constitutional Court in light of the fact that the decision impacts significantly on the whole of the Zimbabwean citizenry. Linked to the public interest litigation decisions above is the obvious need to shun the avoidance doctrine using the five-fold approach to Public Interest Litigation: effective voicing of social rights grievances; responsiveness of courts to social rights claims; judges' capability to find appropriate remedies; and determining the authorities' compliance with judgments and implementation of such judgments through social policy.²⁰⁵ Public Interest Litigation on its own has limited potential to change the situation on the ground, but creates opportunities for other actors.

The other existing gap in research in Zimbabwe relates to the role of the national courts in dealing with constitutional issues that are raised in impact litigation is important because with a 'receptive apparatus' in place, public interest litigation seems to be effective in bringing out facts that can be used for advocacy purposes, fed into social and political discourses and directly inform policy processes.²⁰⁶ It has been argued that in the display of trust in litigation among activists and donors is surprising in view of the academic skepticism towards the effectiveness of courts in effecting social change, even in countries with reasonably strong and well-functioning legal systems²⁰⁷.

Further, most public interest litigation cases that are decided by superior courts in Zimbabwe deal with human rights cases that are fundamentally protected by our Constitution. They represent the '*signature tune*' of our Constitution to employ the reasoning of Justice Bhagwati. This research is a welcome development as it shows whether, in declining to deal with merits of

²⁰³See section 85 of the Constitution

²⁰⁴Supra note 1.

²⁰⁵See supra note 202

²⁰⁶ibid

²⁰⁷Rosenberg 1991, cited in S Gloppen supra note 188,

cases, the superior courts are in fact appreciating the distinction between ordinary adversarial cases and impact litigation. Zimbabwe has a Constitution that is no longer narrow in its formulation of legal standing.²⁰⁸ The broad factors that are allowed by the Constitution include:

- a) *A person acting in his or her own interests*
- b) *Acting on behalf of someone who cannot act on his/her own behalf*
- c) *A person acting in the public interest*
- d) *Interest of an association or members*
- e) *Amicus or intervening representation*

The avoidance doctrine will thus be measured in terms of the broad standing provision as well as the limitations that are provided by the Constitution.²⁰⁹ The limitations are important because it is a requirement that derogations from human rights be in terms of the law. The law for instance should be such as

- a) *To provide notice to a person of conduct which is potentially criminal; and*
- b) *To provide a limitation upon the discretion of the authorities seeking to enforce the provision*²¹⁰

If there is no clear law that is used by the Constitutional Court, Supreme Court or High Court, then this research seeks to provide the basis why there can be no limitation of either the constitutional right or the denial of the constitutional remedy on grounds of preliminary or technical arguments. If the limitations or technical rights are not contained in law or done under the authority of a law, then the superior courts must be quick to provide effective remedies to the applicants in impact litigation. This was even the position in Zimbabwe before the adoption of a transformative Constitution.²¹¹ This will ultimately be useful in applying the normative framework as informed by the normative theory which is the preferred theory in this research.

Impact litigation has been used as a tool of great social change in India, Pakistan, Bangladesh and the Philippines on such issues as the environment, health and land issues. Zimbabwe has a constitutional that protects group rights, ECOSOC rights and political rights. The decisions of

²⁰⁸ One had to demonstrate substantial interest in the matter to approach the court. Cases would not be heard on the merits and courts avoided constitutional issues by once they found that the party raising them lacked such interest.

²⁰⁹ See sections 86 and 87 of the Constitution.

²¹⁰ *Chavhunduka and Anor v Minister of Home Affairs and Anor*, @ 561C-D.

²¹¹ Clear cases include where a dreadlocked lawyer was unconstitutionally declared unfit for registration as a legal practitioner because of his hairstyle, see *In Re Chikweche* 1995 (1) ZLR 155; and instances where a Rastafarian child was denied education because of his beliefs and hairstyle, See *Dzvova v Minister of Education and Ors* 2007 (2) ZLR 195 (S).

the superior courts have to be analyzed from the perspective of impact litigation and not adversarial litigation. Zimbabwe can also develop a criterion for dealing with impact cases by tapping from jurisdictions like Australia. For instance, literature shows that the Australian approach is that the matter must require a legal remedy and be of public interest, which means it must:

- a) *Affect a significant number of people not just the individual*²¹² or;
- b) *Raise matters of broad public concern*²¹³ or,
- c) *Impact on disadvantaged or marginalized group,*²¹⁴ and
- d) *It must be a legal matter which requires addressing pro bono public (for the common good)*²¹⁵

2. 8 Theoretical Framework

The setting of the avoidance doctrine has been shown above: it is largely policy-oriented. Constitutional law is part of public law. At face value, it may seem like the Constitutional Court is dwelling a lot on the green light theory of public law. This theory seems to meet the technical requirements of what the Constitutional Court would want the litigants to follow. Increasingly less concerned with the merits of impact cases, the judges seem to discard the red light theory of public law which enjoins public officials to act in accordance with the law, especially the supreme law of the land. Enveloped in judicial discretion, the avoidance doctrine is used as a mechanism to discourage litigants from approaching the Constitutional Court at first instance.

With the foregoing in mind, this dissertation considers the avoidance doctrine and impact litigation as both institutional and human rights issues centring on the need to develop a constitutional jurisprudence under a transformative Constitution. The theoretical underpinnings

²¹²The *Bond Notes* challenge will fit perfectly under this criterion as it affected the entire 14 million+ Zimbabweans who have been affected by the acute cash shortages supra note.

²¹³The *Chawira* decision, supra note 1 is obviously leading in this regard since the Constitutional Court's decision raised issues on whether the death penalty must be abolished in Zimbabwe.

²¹⁴The rationale behind the *Mudzuru* judgment, supra note 31, will be considered in showing why judicial activism is important and technical arguments must be ventilated together with the merits of the case. This judgment was of importance to women and also represented the broader interests of families whose children have been victims of early marriages and other forms of marriage.

²¹⁵See Penny Martin, '*Defining and Refining the Concept of practicing in the Public Interest*' (2003) page 4, cited in Karugaba, supra page 3. For the perspective from Zimbabwe, a plethora of cases come to mind: The *Nyika* case, supra note 42 and the *Mangwiwo* case, supra note 1 etc. These cases dealt with the constitutionality of statutes of limitation such as the Police Act and State Liabilities Act. The Constitutional Court on 13 July 2017 declined to hear the *Mangwiwo* confirmation case and accepted technical arguments that were raised on behalf of Government. This raised concerns on how remedies for constitutional breaches are usually considered as '*brutum fulmen*'. A detailed research is therefore needed to justify why adversarial approach must be shunned in such cases. In the *Mangwiwo* case, the applicant is still prejudiced close to \$US1. 5 million was confiscated by the Police.

in this dissertation seek to answer the questions and confirm or disaffirm the objectives in this research. The relationship between avoidance doctrine and impact litigation is explained through the lens of the judicial impact and normative theories. In applying the two theories, this researcher seeks to understand the merits of the doctrine, both to the Court and to the litigant. While the lack of a clear avoidance test is felt across the juridical terrain, the benefits of impact litigation are fairly understood by the general populace. From an institutional point of view, the avoidance doctrine is both a court's technique and a litigant's remedy, usually interpreted as such in most jurisdictions.

The legitimacy theory, as part of the judicial impact theory, uses the decisions that end on technicalities as proof of the test for the legitimacy of such decisions. Cognizant of the fact that judges of the superior courts are not a uniform lot, this dissertation examines the way in which the various judicial interpretations have on the development of constitutional doctrines, particularly in terms of test case litigation. In light of the interpretations of the avoidance doctrine, explained in various jurisdictions, attention is given to the many instances in which the judges have interpreted the doctrine, both as a technique to avoid constitutional issues, and as a remedy. An insight into those two dominant pillars requires the recognition of the judiciary as custodians of the management of case and courts in Zimbabwe. On the basis of the experiences of the strategic litigants that are shown in the decided cases, this dissertation examines how case studies, selected from the three courts, reveal the impact of court cases on the national and international normative frameworks.

Because the relevance of this research is dependent on historical development of the court structure in Zimbabwe, the ultimate variable of any development is considered from the fact that knowledge is the '*key to the directionality of history*'.²¹⁶ At the Constitutional Court, knowledge on the Constitution must be broadened, for there is the culmination of public interest. The findings by the judges of the Constitutional Court must testify to the fact that besides being an apex court on constitutional issues, it remains a court of law and a court of justice. This research is relevant because it buttresses the theoretical arguments that have been explained from a policy standpoint. On one hand, Zimbabwe is becoming increasingly exposed to a crop of judges who draw their judgments from various local and international developments, which raises crucial

²¹⁶F. Fukuyama, '*The End of History and the Last Man*' (1992) page 72, New York, NY: Press

issues on judicial activism. On the other hand, superior courts face an increasing pressure from active citizens and oversight institutions to improve the jurisprudence on the constitutional framework under the Constitution.

Because theories are largely assumptive or abstract in their explanation, it is specifically important to focus on theories that can be used to describe legal problems using an interdisciplinary approach. This is because law is regarded as one of the most interesting and complex social phenomena of our culture²¹⁷. It attracts scholarly attention from a wide range of different fields; historians, theologians, sociologists, economists, each equipped with his or her methods and theoretical objectives.²¹⁸ Because of the evolution in applied legal research in Zimbabwe²¹⁹ and the world over, this dissertation also takes cognizance of the importance of avoiding the risk of overly relying on methods and theories from other disciplines to explain legal phenomena.

There are different legal philosophers, who have understood law differently such as John Austin, Hans Kelsen, Hart, and Professor Ronald Dworkin. Their differences, described as *theoretical* disagreements (*as Dworkin calls them*), are disagreements over the *conditions of legal validity*.²²⁰ The dissertation accepts that it is difficult for academics to unanimously agree on certain legal points. As such, this dissertation, explains why there are differences on the conditions of legal validity of the avoidance doctrine. The disagreement is theoretical, and ‘*practical*’ arguments can only be reliably used to an extent that their validity has been quantitatively tested. Critics can then agree on the conditions of validity, and disagree as to whether or not those conditions actually obtain in a given case or not.²²¹

2.8.1 Judicial Impact Theory

From an institutional perspective, this research locates the role of the superior court judge as behavioural or contextual in nature. The judicial impact theory can best be located under the broad theoretical framework known as the institutional rational choice theory (IRC). In

²¹⁷Andrei Marmor, ‘*Interpretation and Legal Theory*’ (2005), Oxford and Origen.

²¹⁸ibid

²¹⁹There is a Centre for Applied Legal Research which is devoted to doing legal research in Zimbabwe.

²²⁰See supra note 206, page 3 where the author refers to Dworkin’s expression ‘*grounds of law*’ to capture those propositions that are taken to constitute the conditions of legal validity in a particular legal system.

²²¹See ibid, where he refers to Dworkin’s ‘*empirical*’ disagreement because it is problematic. For instance, ascertaining the facts in a case is not necessarily ‘*empirical*’ type of inquiry.

institutional rational theory, institutions are created on the understanding that two or more people can be better off by acting together (i.e. cooperating), within an institutional setting.²²² Basically, although used from a business or economic sense, the benefits of any institutional design include (i) the increments of productivity resulting from division of labour (e.g. information-processing); (ii) the new possibilities of trading mutual benefits as a result of a more heterogeneous pool of tastes and preferences (markets, civil organizations); (iii) the benefits of increasing returns of scale (knowledge sharing, friends, languages, hierarchies); (iv) the smoothness of uncertainties over time (trust, contracts, family); and (v) the reduction of transaction costs (agreements, laws, constitutions).²²³

From a legal perspective, the three superior institutions under research can best be described as functioning under tension between cooperation and self-interest. Generally, the interconnection between (or among) institutions themselves, clarifies the critical role that the rule of law (i.e. mechanisms for enforcement and adjudication), plays for a well-functioning of formal and informal institutions.²²⁴ Embedded in this thinking is the argument that randomness rather than rationality is the key factor in institutional survival.²²⁵

Judicial impact theory melds the empirical and psychological aspects on judicial research. In the USA, empirical aspects began in the 1950s and 1960s with a descriptive focus.²²⁶ The theory under judicial impact theory which is used in this research is the legitimacy theory.²²⁷ Put simply, legitimacy in some jurisdictions such as the USA has been conceived as one of the variables that affect a lower court judge's willingness to accept a higher court decision.²²⁸ The theory has several facets which relate to either of two things: the institution making the policy

²²²See J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1965), Ann Arbor, University of Michigan Press.

²²³See E. Beinhocker, *The Origin of Wealth: Evolution, Complexity, and the Radical Remaking of Economics*: Harvard Business School Press', cited in ACBF, *The Retention of Highly Skilled Returnees in Mozambique: An institutional Approach* (2013), Occasional Paper No. 20, ACBF.

²²⁴See D. North, *Institutions, Institutional Challenge and Economic Performance*, New York: Cambridge University Press, cited *ibid*.

²²⁵H. Kaufman, *Time, Chance, and Organizations: Natural Selection in a Perilous Environment* (1995), Catham, Catham House Publishers.

²²⁶See C.A Johnson and B.C Canon, *Judicial Policies: Implementation Impact* (1984) page 189, Congressional Quarterly.

²²⁷This theory is distinguished from cognitive dissonance theory, a theory from psychology which has been linked to the legitimacy theory, see *supra* note 216 page 190.

²²⁸See *supra* note 216.

(the court) and the substance of the policy.²²⁹ Because there is no approval rating of the decisions of superior courts, and the existence of a court hierarchy in Zimbabwe, this research accepts the argumentation that legitimacy is not synonymous with approval or even with correctness. Rather, legitimacy is gauged using the recipient's concession that the court's proper function in society is to make such a decision and that the decision itself is not grossly biased or totally absurd.²³⁰

The theory explains an individual's acceptance of and response to institutional policies as a function of their attitudes toward the institution's authority and role in the governance of society. In some societies such as the USA, a Supreme Court can for instance secure the psychological acceptance of and appropriate behavioural responses to its decisions. The theory is relevant in this research because it is quite comprehensive in the sense that it can be applied to explain the behaviour of persons in the interpreting, implementing, consumer and secondary populations.²³¹ It is also relevant because its thrust is not to explain acceptance or, more particularly, behavioural responses completely.

By way of illustration, Johnson and Canon (1984)²³² argue that most people may accept the legitimacy of highway speed limit, but many people exceed 55 miles an hour on the interstate when they are in a hurry to get somewhere. Conversely, even those who deny the right of the federal government to set a maximum speed limit may proceed at 55 miles an hour when a state trooper is cruising behind them. As such, the theory is presented as a meant to create a social distance. In this way, courts try to maintain a social distance from other participants in the political system.²³³

Under the inventive myth of the court approach, legitimacy also extends to the findings on the law. Courts must not be involved in making policy, but must simply serve as vehicles by which the law is determined and applied. This myth was extensively analyzed by the legal scholar and former Federal judge of the USA, Jerome Frank in the 1930s and 1940s. The nub of his argument was that a nation's citizens impute to the judges wisdom, concern, and capabilities beyond those possessed by other political actors. The broadly framed myth is that courts are

²²⁹ibid

²³⁰ibid

²³¹Ibid, page 191.

²³²Ibid

²³³Such as the legislature and the executive. If they do not show this social distance, their decisions may not be considered to be legitimate.

transformed from instruments of naked power to legitimate authorities that are capable of proclaiming and implementing policies without the use of force.²³⁴ Further, legitimacy also looks to the need for courts to act fairly and realistically. If they are perceived as ‘not ruling fairly on a subject or on the basis of adequate knowledge’ then the reception given to the decision may be negative.²³⁵

Because of the existence of judgments that bear on policy making by other institutions of government in Zimbabwe, this dissertation also locates the applicability of the legitimacy theory under one its facet known as comparative legitimacy. Comparative legitimacy envisages a situation where people may perceive the courts as more legitimate than other institutions, such as the legislature and executive. In the USA, the Supreme Court had sufficient legitimacy in the public mind to withstand President Franklin Roosevelt’s attempt to pack it-although it gave ground to the political dispute during the process.²³⁶ Drawing from consensus that there is paucity of empirical research on legitimacy theory even in advanced jurisdictions such as the USA, this dissertation uses empirical research to determine the knowledgebase of the citizens on the role of the superior courts, their functions, people’s attitudes on policy-making powers of the court.

2.8.2 The Normative Theory

This theory is broadly understood and is not capable of being defined narrowly. Its major thrust depends on a particular society’s values. A society is not simply a conglomeration of individuals in a single monolithic organization; the individuals also join smaller organizations as their interests or business dictate.²³⁷ The absence of public opinion surveys about the superior courts call for an in-depth inquiry into the attitudes or measured knowledge on the courts’ specific decisions, not just what the people regard to be the role of the courts. The normative theory is important in this regard because the judges of the superior courts are appointed under a normative framework which is steeped in the need to respect the sovereignty of the people.²³⁸ Although the general populace may not accord special legitimacy to superior courts, the

²³⁴See G. Casey, ‘*The Supreme Court and Myth: An empirical Investigation*’ (1974), Law and Society Review

²³⁵S. Wasby, ‘*The Supreme Court in the Federal Judicial System*’ (1978) page 234, New York; Holt, Rinehart and Winston.

²³⁶See Johnson and Canon supra note 226 page 194.

²³⁷Sugwong Kang, ‘*The Philosophy of Locke and Hobbes*’ (1962) page 50, Monarch Press, University of New York.

²³⁸The courts derive their judicial authority from the people. The people are sovereigns who vest their legitimate authority in the judges.

normative framework as contemplated by the Constitution tilts in the people's favour. Judges are not elected and their decisions must reflect the norms that are consistent with the general principle of legality and must be attuned to the rule of law. The normative content of the rule of law was clearly determined in Zimbabwe in the following manner:

*'The rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally. Viewed from this perspective, the role of the State is to maintain law and order and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law must, in my opinion, be viewed as a national and a societal ideal'*²³⁹

In essence, individuals must be allowed to protect their interests using impact litigation. Because the rule of law is a norm and a democratic ideal, this theory is important in instances where avoidance is used to oppose impact litigation cases if regard is had to the four elements of a valid law which are usually supposed to be canvassed by the merits of impact litigation cases: parity, non-arbitrariness, precision and accessibility. Parity envisages a situation where 'First-among-Equals' type of Orwellian democracy is avoided. Zimbabwe is a constitutional democracy which respects equal protection of the law and equal benefit of the law.²⁴⁰ Similarly situated persons must be treated alike and both the governor and governed must be accorded the same privileges.²⁴¹

The pillar of non-arbitrariness is both philosophical and constitutionally important. Legal philosophers such as John Locke shunned the arbitrary exercise of power. This was notwithstanding the fact that Locke subscribed to the notions of positivists and their argument that law is 'what it is'. John Locke was different from 'command' philosophers such as John Austin who saw law as nothing other than the commands of a sovereign which must be obeyed, failure which punitive sanctions must be imposed. Locke's conception of arbitrariness is also close to John Rawls' theory of justice where a society must agree to certain norms that work for the common good of the society crafting them.

²³⁹ *Commissioner of Police v CFU* 2000 (1) ZLR 503 (H)

²⁴⁰ See section 56, the non-discrimination section under the Bill of Rights

²⁴¹ *CFU* supra note 228 @ 525E-526A. See also *Pharmaceutical Manufacturers Association: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) @ para 40.

Constitutionally therefore, the rule of law as a tenet of democracy demands that those who enforce the law, that is, the executive or the judiciary, to the extent that its decisions may not only be interpretive, but policy-oriented,²⁴² must do so in terms of a discernible normative standard. For instance, limitations that are applied for purposes not sanctioned by the Constitution must be declared wholly unconstitutional and void.²⁴³ Precepts such as reasonable justifiability in a democratic society, though elusive, must be interpreted using the standard that is provided by the Constitution or other methods of constitutional interpretation drawn from across global common law jurisdictions.²⁴⁴ From a normative perspective, the Zimbabwean Supreme Court adopted a pragmatic approach in determining what is reasonably justified in a democratic society. In considering a three-pronged criterion²⁴⁵ in determining whether a limitation is permissible or arbitrary, it stated that it will ask whether:

- i) *The legislative objective is sufficiently important to justify limiting a fundamental right;*
- ii) *The measures designed to meet the legislative objective are rationally connected to it;*
and
- iii) *The means used to impair the right or freedom is no more than is necessary to accomplish the objective.*

Put simply, what is loudly clear from the criteria above is that limitations that are used and are argued in this dissertation to be considered by courts in invoking the avoidance doctrine must be measured in terms of the above test. This is also related to the legitimate aims of limitations of rights that are explained by the legitimacy theory that is preferred in this research. The legitimate aim has also been decided in relation to constitutional rights in Zimbabwe.²⁴⁶

The two other pillars are quite self-explanatory. Precision speaks to the need for the law to be clear enough to enable individuals to conform their conduct to the dictates of the law. Accessibility speaks to the need to allow the citizenry to participate in the promulgation of the

²⁴²The *Bond Notes* case gave the government the green light to introduce bond notes without a proper consultative engagement with citizens. The court had used the doctrine of ripeness to deny the litigants the right to protect the greater public by stopping the introduction, supra note 9.

²⁴³See *Chavhunduka* supra @ 564D, see also *Pharmaceutical* case supra @ para 85-86

²⁴⁴See *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and Others*, @ 268E, *Woods and Others v Minister of Justice and Others* 1994 (2) ZLR 195 (S) @199B-C.

²⁴⁵This was laid out in *Nyambirai v NSSA and Anor* 1996 (1) 636 (SC) @ 647B-D

²⁴⁶*Chavhunduka* supra note 98 @ 564 B-C, and *Chimanikire and Ors v The AG of Zimbabwe* SC 14/2013.

law.²⁴⁷ The law must be available *ex ante* in order to avoid the appearance that its application and its execution are selective.

Those values have to be questioned through litigation. This is because they maybe, as for Zimbabwe, include in the constitution. The Constitution is popularly referred to as the Grund norm or the highest norm. The application of the doctrine of avoidance is based on the fact that Zimbabwe's legal system is adversarial in nature. The theory is applicable in this research taking into consideration the definition and constituent elements of a legal system. The normative aspect is dependent on what the society values. This is because a legal system is usually described as a sum total of the rules and values that form a particular society. Zimbabwe for instance has values that must always be respected by the courts and other State institutions.²⁴⁸

The theory is also applicable to this research from a definitional position of the legal system. A legal system is also simply defined as a system of norms.²⁴⁹ The validity aspect of legal issues is considered to be a logical property of norms in a way akin to that in which truth is a logical property of propositions.²⁵⁰ A statement about the law (in a given legal system) is true if and only if the norm it purports to describe is a valid legal norm. Because the avoidance of constitutional issues in strategic litigation is considered in light of the Constitution as the Grundnorm, it follows in this dissertation, as in other legal researches, that, there must be certain conditions which render certain norms, but not others, legally valid.²⁵¹ For instance, it was once held that the rule of law means that:

*'Everyone must be subjected to a shared set of rules that are applied universally and which deal even-handedly with people and which treat like cases alike. It means that those who are affected by official inaction should be able to bring actions, as did the respondent in casu, on the basis of the official rules, i.e. the law, to protect their interests'*²⁵²

The theory is also applicable because superior courts, as part of the area of focus in this dissertation, are believed to possess unique legal power which raises two main normative questions: One is about the moral legitimacy of the institution itself, and the other is about the

²⁴⁷See *De Reuck v DPP, Witwatersrand Local Division and Others*, CCT 5/03 @57

²⁴⁸Section 3

²⁴⁹See supra note 217,

²⁵⁰*ibid*

²⁵¹Based on the arguments of Andrei Marmor, *ibid*

²⁵²See CFU supra note 230

ways in which it ought to be practiced.²⁵³ The latter seems to be utilitarian on account of its link to what Jeremy Bentham moved for, that is, distinguishing the law from ‘*what is?*’-as emphasized by positivists, from ‘*what it ought to be*’, of which the ‘*ought*’ is based on legal value-based system. This dissertation acknowledges the fact that a written constitution has five main features²⁵⁴ which include:

(i) Supremacy-the Constitution is the supreme law of the land and its provisions prevail over ordinary legislation, (ii) longevity-they are enforceable for a long time, setting out the basic structure of the legal system for future generations. Ordinary statutes may be in force for a very long time, but, longevity is not an essential feature for ordinary legislation²⁵⁵, (iii) Rigidity-the constitution must provide for its own methods of change and amendment, making it relatively much more difficult to amend than ordinary democratic legislation. The more difficult it is to amend the constitution, the more ‘rigid’ it is²⁵⁶, (iv) moral content-this speaks to two main issues, the basic structure of government with its divisions of political power²⁵⁷, and the area of human and civil rights, and (v) generality and abstraction-they have a general application particularly in respect of human rights and similar matters of principle.

However, its major propositions, which relate to the preamble, national objectives, founding values, bill of rights and vertical accountability are usually ignored by the courts of law in some cases. This dissertation surveys the norms that are disregarded by the courts of law and thereafter discuss the pitfalls that are occasioned by such judicial approaches.

The theory is also applicable considering the norms of democracy that are laid down as part of the founding provisions or values.²⁵⁸ The Constitution lays down founding values and provisions as alluded to above. With a clear constitutional provision guaranteeing a value-based approach to

²⁵³Ibid page, 141.

²⁵⁴Ibid page 142

²⁵⁵Laws can be repealed, aligned with the Constitution, or consolidated, or codified depending on the legal and political spirit of the times. Similarly, rules and regulations may be made through delegated legislation. This ultimately affects the longevity of an ordinary statute. Constitutions are not frequently amended. The American Constitution has very few amendments. The Lancaster House Constitution 1980 was amended a record 20 times, perhaps because it was a ‘given’ constitution. The 2013 Constitution is again in danger of being amended, barely for years after its adoption. There however been heated debates between ZANU PF and the two MDC formations on the feasibility of amending the Constitution to allow for the appointment of the Chief Justice by the President. The amendment will also have the effect of having one Judge President for the High, Labour and Administrative Court.

²⁵⁶Andrei Marmor, supra note 217

²⁵⁷This is where the intervention by the *Law Society and Madam Beatrice Mtetwa* as *amicus curiae* in the appeal by the JSC is considered to be important to strategic litigation. They made sure that they would demonstrate their expertise which warranted their inclusion in the matter as friends of the court. Cumulatively, the court was enjoined to deal with the merits of the case using the norms that are laid out in the Constitution as part of Zimbabwe’s democratic ethos.

²⁵⁸Section 3 of the Constitution

constitutional issues such as human rights, there can be no “*constitutional avoidance*” that is casually alluded to by courts of law- whether directly or not. Public interest litigation usually demands that norms from international human rights must apply in Zimbabwe. It was held by the Supreme Court before the adoption of a Constitution that entrenched human rights as values that international human rights norms will become part of Zimbabwe’s domestic human rights law’.²⁵⁹

The use of or need to frequently use the Constitution in human rights cases can never be underestimated because it lists various founding values which must also measure up to the courts for want of compliance with other provisions such as the supremacy clause of the Constitution. The presence of a normative protection clause amounts to a deliberate stance by Zimbabweans to recognize the Constitution as highly normative in nature. At national level Zimbabwe has a normative framework that affects judges. The judges are enjoined to acquaint themselves with the values and give them a more systematic analysis. There has in fact been little analysis of the doctrine of avoidance, at any rate in Zimbabwean literature, and this research, though not primarily a comparative study of constitutional systems, naturally considers normative aspects by drawing some comparisons the world over on a per functionary basis.

Most writings on the constitution are explanatory and factual. There is need for a respectable body of normative oriented research, which is primarily based upon the study of court decisions. Professor Lovemore Madhuku and Greg Linington can be credited with the leading micro-analytic works on the constitution, Professor Lovemore Madhuku touched on the subject of the role of judges under a constitution with a normative framework.

2.9 The suggested conceptual model of interpretation

From the literature and theoretical frameworks that are preferred in this dissertation, it is important to indicate a suggested model that will ensure that the avoidance doctrine is not invoked as a way of opposing Strategic impact litigation. Because a conceptual framework is treated in this dissertation as being different from a theoretical framework, the model depends on the demerits of a ‘casual’ approach to invoking the avoidance doctrine. As such, the study

²⁵⁹See, *A Juvenile v The State* (1990) 4 SA 151 (ZSC).

concepts, that is, are treated- as concepts that are different from established theories such as legitimacy or normative frameworks.

At the basic level, the dissertation contemplates a situation where the two concepts supposed to be treated as *sui generis* in that their nature and extent must be different from ordinary litigation. The use of avoidance, as a remedy or as part of the exercise of a judicial discretion or presumption of constitutionality, must always inform Strategic Litigation lawyers and judges of the superior courts to craft a model of constitutional interpretation that is peculiar to Strategic Litigation. Because constitutional avoidance has a rich comparative history, the general components that are discernible in this doctrine have been shown to include the need to state with precision the constitutional issues that are referred to superior courts; and the need for litigants to demonstrate the absence of other remedies before expecting a superior court to ventilate on referred constitutional issues that arise in a case brought before them.

In *Anaritn Karimi Njeru v Rep*²⁶⁰, Trevely and Huncox JJ remarked that:

“we would however again stress that if a person is seeking redress from the high court or any order which involves a reference to the constitution, it is important (if only to ensure that justice is done in the case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed on the manner in which they are alleged to be infringed”.

This dissertation moves for the adoption of a **Strategic Impact Avoidance Model (SIAM)** that serves as a checklist on what judges can do when, (i) interpreting impact cases that bear on the constitutionality or otherwise of laws and practices that are brought for judicial review in superior courts; (ii) when providing alternative remedies such as approaching another court by way of appeal or review; (iii) when dealing with technical arguments that prevent them from dealing with the merits of impact cases; and (iv) when dealing with the presumption of constitutionality impliedly or expressly. This model must be informed by the ethos that is drawn from the judiciary itself such as the Judicial Service Commission’s strategic plan. It has been observed in this dissertation that under the Judicial Service Commission’s Strategic Plan, the

²⁶⁰ (1970) KLR154,Q 156

public image and confidence in the courts is low.²⁶¹ A 2013 institutional overview on the strategic review of the Plan sought to achieve inter alia:

'The establishment of a unified Judicial Service, headed by the Chief Justice and under the management of the JSC, provides the opportunity to establish a truly independent world-class Judicial Service. ..By having clear goals shared and known by all stakeholders, all efforts can be directed towards achieving such goals'.²⁶² (Emphasis added).

The review also indicated that the Judicial Services Commission has a mission whose fulfilment can only be efficiently done through innovation. In this regard, the mission can be used to craft a checklist on how the superior courts can invoke constitutional doctrines that may work to the detriment of impact cases. The mission refers to the *purpose, cause and calling* of the JSC as being the need to act:

'in accordance with the laws of Zimbabwe and best practices, to provide administrative support to the judiciary in the promotion and maintenance of a justice delivery system that inspires public trust and confidence in the rule of law'.²⁶³ (Underlining is intentionally mine).

From what is expected in the mission statement, it is considered in this dissertation that impact cases must inspire the superior courts to apply the avoidance doctrine sparingly because SL cases are usually human rights-related. Human rights are correctly perceived as an instrument of defence of the vulnerable.²⁶⁴

The Suggested model also seeks to enable superior courts to follow the constitutional interpretation that is envisaged by section 46 of the Constitution. The provision is significant in relation to SL. It is meant to demonstrate that judges must do either when they deliver a progressive judgment or when they avoid dealing with the constitutional issues in SL cases. There have been instances where the superior courts delivered progressive judgments but did not follow the section 44 interpretation model. For instance, the *Mudzuru*²⁶⁵ decision did not consider international law aspects which believably should have been referred to. It however referred to values that are found in section 3 of the Constitution such as the supremacy of the

²⁶¹ Judicial Services Commission Handbook, 'Training Handbook for Assistant Registrars: Superior Courts' (2013) page 3, JSC.

²⁶² Per Chief Justice Godfrey Chidyausiku (as he then was) as cited in the Handbook supra note 114.

²⁶³ See Handbook supra note 68, page 10.

²⁶⁴ TRG Van Banning, 'The Human Right to Property' (2002) at 7

²⁶⁵ Supra note 31.

Constitution²⁶⁶. The supremacy value allowed it to declare as invalid the statutory provisions that worked to the detriment of the girl child.

Alternatively, Justice Mushore made a very progressive judgment over statutes of limitation²⁶⁷ which was supposed to be properly referred to the Constitutional Court. She however failed to take into accounts other relevant factors in the interpretation of a Constitution such as that it is interpreted holistically.²⁶⁸ Rather than striking or removing impact litigation cases from the roll for want of compliance with the rules of the Court, this model argues that impact litigation can be postponed with clear instructions to remedy the concerns. This is because impact litigation cases are not supposed to be overly subjected to the rigorous rules governing the rigmarole of civil procedure.

Conclusion

This chapter has shown that the Constitutional Court's dedication to the avoidance doctrine is hardly an innovative way of improving the jurisprudence of the Constitution. Nor, of importance, is it a way of innovatively improving the common law or impact litigation jurisprudence. While the High Court has been trying to improve constitutional common law by dealing with statutes of limitation, the Constitutional Court has been quite stagnant in this regard. The next Chapter deals with comparative approaches on how the avoidance doctrine was used in impact litigation cases in other jurisdictions.

²⁶⁶Section 3 (1) (a) of the Constitution

²⁶⁷The *Mangwiro* case, supra note 1, where she was dealing with the State Liabilities Act which does not allow litigants to execute state property.

²⁶⁸The Constitutional Court refused to entertain the confirmation of the *Mangwiro* judgment, supra note 1 arguing that the judge had not followed the proper procedure. It struck off the matter from the law.

CHAPTER 3

The Doctrine of Constitutional Avoidance, Public Interest Litigation and Strategic Impact litigation in other Countries: Comparative Approach

Introduction

This Chapter sets out the general doctrines that are used in other jurisdictions to enable courts to decide on the merits of cases. As a spinoff to the discussion on the avoidance doctrine, perhaps the starting point is that accepting a case on the merits goes a long way into establishing what can best be described as the '*law of the case*'. Whereas the problem of technical decision-making is often used in general litigation, it seems much more prevalent in strategic impact litigation. The resort to technical arguments serves as a way of discouraging litigants from anticipating that judges can exercise their discretion to hear technical arguments together with the merits of constitutional cases. In her article, '*Law of the case: a judicial puzzle in consolidated and transferred cases and in multidistrict litigation*', Professor Joan Steinman, dealt with various doctrines that can shed light on how courts ought to exercise their powers such as the ability to regulate their own processes.

She refers to doctrines such as '*law of the case*', *collateral estoppel*, *res judicata/claim preclusion*, *stare decisis*. A proper discussion of the avoidance doctrine can only be done by drawing comparisons from literature on how it affects other legal doctrines in a jurisdiction. Steinman (1973) argues for instance that:

Res judicata, or claim preclusion as it is often called today, differs from law of the case as does collateral estoppel and in additional respects. It applies only when there is a final judgment on the merits, and precludes subsequent suits on the same cause of action, preventing re-litigation not only of every ground of recovery, or defense, that was actually litigated, but also of every ground or defense that might have been presented

The interplay between law of the case and constitutional avoidance is important in Zimbabwe since there is the distinction between striking matters off the roll, removing them from the roll and dismissing a matter. Steinman focused on how law of the case could be used to fit multidistrict litigation. This study focused on how the doctrine should be used to promote

various constitutional rights that are filed under impact litigation. This study analyses how the superior Courts can contribute to the development of impact litigation by considering various doctrines in a way that brings finality to litigation. Although the Constitutional Court usually strikes matters from the roll, and litigants do not have to go through arguments such as *res judicata* in subsequent proceedings, it is argued that the 30 day period to remedy the technical arguments is not practically useful in impact litigation cases for the simple reason that: they are complex and difficult to handle, especially when it comes to client management.

Constitutional avoidance was first expressly referred to in the *Chawira* case²⁶⁹ but it became more than academic for this researcher who had noticed paucity in research on constitutional doctrines and methods of interpreting the Constitution in Zimbabwe. The Zimbabwean Constitutional Court's decision is a disappointing one that adds little if no impetus to a perennial attitude of avoiding the merits of impact cases. Further, no country-specific or comparative researches on constitutional avoidance have been published in Zimbabwe. The doctrine, in its variant forms discussed in chapter two, notably appears in several reported decisions of the superior courts.

This comparative chapter outlines the various juridical approaches to the avoidance doctrine across the world. The researcher found that constitutional avoidance is superficially considered in Zimbabwe, and is optimally applied by the superior courts in most impact cases. This is notwithstanding that the superior courts do not expressly refer to it. Against this background, this chapter is very important in that it enabled the researcher to come up with tailor-made recommendations as to how the superior courts in Zimbabwe can enhance their judicial reasoning on the doctrine as it relates to impact litigation.²⁷⁰ The researcher also established the recommendations on how impact lawyers ought to understand the attitude of the Constitutional Court judges and impress upon them the need to appreciate the comparative aspects which will persuade them to hear the merits of cases.

²⁶⁹ Supra note 1

²⁷⁰ The researcher immensely benefited from advanced constitutional law in that his knowledge on various approaches to constitutional reasoning in different have to be considered at an advance level. Judges, as the primary arbiters in terms of the Constitution, must always consult sources from relevant common law jurisdiction and countries such as Kenya and South Africa which share similar constitutional provisions.

Most of these aspects form part of the foreign law. The comparative literature may also give the court specific guidance on the international law that may have been used by a foreign court. The Constitution now obliges courts to use foreign and international law in human rights or social justice cases. The end result is that the court should use other sources of law in a more efficient way than is currently the case in some of the important judgments.

3.1. Scanning the Avoidance-impact litigation dichotomy

The relationship between constitutional and alternative remedies is usually situated in the above-named dichotomy. While the Zimbabwean Constitutional Court has often been seen as preferring alternative remedies than constitutional remedies, some countries have been seen to engage in strategic avoidance and other stages of avoidance. However, as was discovered in this research, courts in most common law jurisdictions prefer to use the avoidance doctrine in constitutionally related impact cases than ordinary civil or criminal cases. Judges oppose an activism way of exercising their judicial review discretion in impact litigation and prefer to benefit from the approach of lower courts in dealing with constitutional provisions.

3.2 The Use of the Avoidance Doctrine in the USA and other countries.

The legitimacy theory that was chosen in this research speaks to the need to have judges who are innovative in line with the needs of the society which they serve. Legitimacy is largely perceived as not being synonymous with approval or even with correctness.²⁷¹ Legitimacy is part of social distance and courts engage in various activities that by design or coincidence enhance the perceived legitimacy of their decision-making role by maintaining a social distance from other participants in the political system.²⁷² The corollary to this is that superior courts are always bound to demonstrate their custodial astuteness over the Constitution. The Constitutional Court must be perceived as having a constitutional right to do what it does as long as it maintains a visible social distance from other political actors.

The doctrine of avoidance plays a very important role in giving legitimacy to judicial decisions. This is because another facet of legitimacy involves people's perceptions of how courts

²⁷¹ C. A. Johnson, 'Judicial Policies Implementation and Impact' (1984), page 191 Congressional Quarterly Inc.

²⁷² *ibid*

function.²⁷³ Courts are simply supposed to serve as vehicles by which the law is determined and applied according to the myth of the courts doctrine. The avoidance doctrine is loosely situated in the myth of mechanical jurisprudence which states that judicial decisions must not be acts of policy making or even discretion, but are preordained and mechanical impositions of enduring constitutional principles. In the USA, Justice Owen Roberts was the exponent of classical avoidance doctrine or mechanical jurisprudence when he wrote that:

*When an Act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty-to lay the article of the Constitution which is invoked beside the Statute which is challenged and to decide whether the latter speaks with the former. All the Court does, or can do, is to announce its judgment upon the question. This Court neither approves nor condemns any legislative policy.*²⁷⁴

Perhaps it is important to state boldly that the use of the doctrine of the avoidance doctrine cannot be considered transcendent in most jurisdictions. While in many instances the doctrine

²⁷³ Ibid, page 192. A.N Steinman discusses the three types of avoidance based on E. F Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016), Duke Law Journal. These types include *ex ante* avoidance which occurs before a court weighs in on the substantive merits of a particular issue; *in medio* avoidance which occurs in the midst of the court's consideration of a case after the arguments on the merits have been aired but without directly deciding the merits; and *ex post* avoidance which occurs at the remedies phase, after the court has rendered the decision on the merits. *Ex ante* methods include the elements of justiciability such as standing, ripeness and mootness. The Constitutional Court of Zimbabwe seems to have been frequently using this type of avoidance as seen mainly in the *Chawira* case in supra note 1. This type of avoidance is also used for agenda setting prerogatives. The Zimbabwean explanation for this is to be found again in the *Chawira* case where non-judicial remedies such as presidential pardon or commutation of sentence were used to deny applicants the chance to have their right to life protected by the Constitutional Court. The Constitutional Court ended up using the non-judicial remedies as part of or as a way to understand the justiciability elements such as ripeness. This is why *ex ante* avoidance is criticized on the basis that it scores quite low in that judges can afford to give no explanation at all. Further, the elements of justiciability are used as paradigmatic tools of strategic avoidance. This is done notwithstanding the fact that the elements have developed into independent areas of constitutional law. The Zimbabwean Constitutional Court has however failed to consider the fact that they are constitutionally obliged to consider the elements of justiciability. Zimbabwe has a Constitution that makes all the three generations of rights justiciable as it protects CPR, ECOSOC and collective rights. A court that frequently uses the *ex ante* avoidance is largely left, lie the Supreme Court of the United States of America, on the sidelines when it comes to the dialogue that avoidance is supposed to facilitate. For instance, it was disingenuous for the Constitutional Court to deny the applicants effective constitutional remedies by justifying a State policy on an executioner or the existence of non-judicial remedies such as presidential pardon and commutation of sentence. In *medio* avoidance includes express avoidance and deference doctrines, or governmental immunities. The essence is to prevent judicial second guessing by giving the government a margin of appreciation. These have been commonly practiced by the European Court on Human Rights. Contextually, this research can locate in *medio* avoidance on matters of State Policy as was done in the *Chawira*, supra note 1, and *Mujuru* case supra note 9. *Ex post* avoidance allows the courts to rule on the merits without providing remedies. Delaney argues that Canadian and South African Courts score well in this regard and in terms of encouraging judicial candor. They do not use *ex ante* tools that have been used by the Supreme Court of the United States. The practice in South Africa and Canada is to limit or delay the remedies that will be imposed in the event of a counter-majoritarian ruling.

²⁷⁴ *United States v Butler*, 297 U.S. 1 (1936) @63

has been used in South Africa, mostly linked to subsidiarity,²⁷⁵ its use in the USA has been famously associated with Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*. Generally, the avoidance doctrine has been canonized by the courts as a “‘cardinal principle’ of statutory interpretation.”²⁷⁶

Metzger and Morrison (nd) also argue that in common, there can be a single avoidance canon, but in fact, there are two different versions of the rule. There two are attributed to Adrian Vermeule who described the first canon as “classical avoidance,” which provides that, “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court’s] plain duty is to adopt that which will save the Act.” The other pillar is called “modern avoidance,” which is most frequently invoked by courts today. The first ‘applies only when the otherwise preferred reading of a statute is in fact unconstitutional, while modern avoidance applies whenever there is serious doubt about the constitutionality of that reading’.

The classical doctrine is based on the early practice of the USA Supreme Court which used classical avoidance for two major reasons: (i) that due respect for a coordinate branch of government entails assuming that its work product was intended to pass constitutional muster; and (ii), that unelected federal courts should minimize, to the extent consistent with their *Marbury* duty, the occasions on which they invalidate the work of the political branches. This position was changed in 1909 following the *United States ex rel. Attorney General v. Delaware & Hudson Co.* decision.

The decision led to the popularization of the modern form of avoidance. The doctrine was popularized by Ernest Young who describes it as “designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to [the] normative values” that are “embodied in the underlying constitutional provisions that create the constitutional ‘doubt.’” The doctrine is important because constitutional provisions become too Young “resistance norms”— constitutionally grounded “rules that raise obstacles to particular governmental actions

²⁷⁵See Lourens du Plessis, ‘*Subsidiarity: What’s in a name for Constitutional interpretation and Adjudication?*’ University of Stellenbosch. See also *S v Mhlungu*, supra note. The Zimbabwean CC has also referred to this doctrine in the *Majome* case, supra note 2.

²⁷⁶See Metzger and Morrison supra note 121.

without barring those actions entirely.” The canon in its modern sense becomes a tool of both statutory construction and constitutional implementation.

There has been debate in the USA on whether the justifications of using avoidance doctrine as a rule of construction and not interpretation. Proponents of the use of doctrine as an interpretive tool include Eric S. Fish. He sees this doctrine both as a tool of interpretation and as a remedy.²⁷⁷ In the USA, it is seen as a rule of thumb that guides courts deciding congressional issues. As a canon used to rewrite laws, legal scholars, jurists, and commentators have criticized the landmark decisions that are based on the doctrine, claiming that they amount to unaccountable lawmaking.²⁷⁸ Such a line of thinking is very important in Zimbabwe where judges are not voted for, but are appointed by the President. This means that their decisions get their legitimacy from the people who give them their mandate through the President.²⁷⁹

There are several instances where the USA courts seem to have used the doctrine as a constitutional remedy. Important cases where the doctrine has been used in the USA include those where the court did not expressly acknowledge that it was doing so such as the individual poisoning case.²⁸⁰ In that case, a woman who poisoned her neighbour upon discovering that the neighbour had an affair with her husband was not found guilty of contravening the Chemical Weapons Convention (CWC). The court, in its majority decision, invoked the doctrine of avoidance in making a finding that the Convention did not apply to individual acts of poisoning. Accordingly, the court dodged the thorny question of whether the federal government could criminalize such acts through a treaty.²⁸¹

After the individual citizen benefited from its adopted line of reasoning, the court was heavily criticized in the Bond decision for inventing an interpretation which discarded the plain meaning of the CWC. This was particularly so because the implementing legislation of the said Convention plainly forbade ‘*any person knowingly-to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use or threaten to use, any chemical weapon*’. The argument against Mrs. Bond was that she had put arsenic in her

²⁷⁷Eric Fish, ‘*Constitutional Avoidance as interpretation and remedy*’ (2016), Michigan University

²⁷⁸*ibid*

²⁷⁹This is so if the view is taken that the President of Zimbabwe is directly appointed by the people.

²⁸⁰*Bond v United States*. 134. S. Ct. 2077 (2014).

²⁸¹See Fish, *supra* note 277.

neighbour's mails and as such, her actions fitted into the use or possession of the chemicals concerned. This has led critics to consider the interpretation to be implausible.²⁸² Similarly, the same cannot be said in the *Makoni* case²⁸³ where Patel JCC gave a partial remedy to the applicants who were challenging the death penalty. His interpretation is considered plausible considering that the practice in most jurisdictions is to consider the death penalty is part of cruel and inhumane treatment.

Unlike the *Bond* decision which worked in the interests of individual citizens, there are instances where the USA courts have also protected Congressional powers. These include court challenges to the Affordable Care Act.²⁸⁴ The said Act required individuals to either purchase health insurance or pay a fine. Although the court remarked that the US Congress had no power to command such a requirement, the Court again invented an implausible interpretation which had the cumulative effect of protecting the '*Commerce Clause*' in the statute. It stated that the Congress had the power to tax individuals who failed to purchase individual insurance. In essence, this case worked to the detriment of public interest litigation in that the Court was simply empowering Congress to '*command*' individuals through the alternative route of tax payments.

Apart from the above case, the USA court also adopted implausible interpretations in cases where it sought to avoid constitutional questions.²⁸⁵ For instance, in the case of *Northwest Austin Municipality Utility Number Development (NAMUDNO) v Holder*²⁸⁶ the court departed from the plain meaning of the phrase '*political subdivision*' from that which was provided in the Voting Rights Act. The Court included utility districts in the definition of the phrase when in actual fact the relevant Act clearly defined county or parishes to exclude utility districts. Constitutional avoidance was in that instance used to the detriment of strategic litigation. The *Robert Court*, as Chief Justice Roberts' court was frequently referred to as, essentially interpreted the statute by incorporating new words into a major Statute in order to avoid holding the Statute unconstitutional.

²⁸²Ibid

²⁸³Supra note 1

²⁸⁴*National Federation of Individual Business v Sebelius*, 132 S. Ct. 2560 (2012).

²⁸⁵Ibid.

²⁸⁶537 US 193, 210-11 (2009)

Besides the USA courts, there are other countries that use the doctrine of avoidance as a constitutional remedy. Countries that do so include the United Kingdom, and New Zealand. The judges in these countries cannot invalidate laws, and as such, creative reinterpretation of statutes is the only judicial mechanism for remedying violations of constitutional rights.²⁸⁷ In Canada, the Courts divide the doctrine into canon and remedy. The doctrine is premised on the fact that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other statute upon which the case may be disposed of. In other words the Constitution is the last authority not the first.

The doctrine has been heavily criticized as representing the greatest threat to self-governance and abandonment of the Constitution. Because the Constitution is the supreme law of the land and a beacon of the rule of the law in all countries that have written constitutions, it is antithetical to constitutionalism for the courts to rule from precedent or statute while consciously avoiding the Constitutional question. Its development is expressed in the case of *Ashwander vs TVA*. In that case Justice Brandeis in placing his views into a broad context listed a series of rules that are used up until now by the courts to avoid most of the Constitutional questions that are put before it before it. These are the rules:

- (1) *The court will not pass the constitutionality of a legislation in a friendly and no adversary proceedings. This rule is usually referred as the rule against feigned and collusive lawsuits.*
- (2) *The court will not anticipate a question of constitutional law in advance of necessity of deciding it. It is basically called the principle of ripeness.*
- (3) *The court will not formulate a rule of Constitutional law broader than is required by the precise facts to which it is being applied. It is often referred to as judicial minimalism.*
- (4) *The court will not pass upon a constitutional question although properly presented by the record if there is also present some ground upon which the case may be disposed of. Generally called the last resort rule.*
- (5) *The court will not pass upon the validity of a statute upon complaint of one who has failed to prove that he is injured by its operation. It is generally referred to as standing or mootness.*
- (6) *The court will not pass upon the constitutionality of a statute at the instance of the one who has availed himself of its benefits. This principle is known as Constitutional estoppel.*

The *Ashowander* test, if applied to Zimbabwe, will yield the following results that are discussed below. The first test is applicable to inquisitorial proceedings. The legal system in Zimbabwe is

²⁸⁷Fish, supra note 282.

adversarial in nature. Bhunu JCC was thus wrong in casually applying the doctrine in the Chawira decision.²⁸⁸ The starting point should have been to show why the Constitutional Court would consider a death penalty lawsuit to be collusive or feigned. Further, a finding was not made on why the proceedings would not be considered adversarial as is envisaged under the Zimbabwean legal system.

The second and fourth pillars in the *Ashwander* test have also not been properly canvassed in instances where the Zimbabwean courts used them. Admittedly, Zimbabwe operates on a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking higher courts are loath to intervene in incomplete proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities. This position was explained in the recent case of *Munyaradzi Chikusvu v Magistrate Mahwe* HH – 100 – 15, when the High Court had occasion to observe that:

“It is trite that judges are always hesitant and unwilling to interfere prematurely with proceedings in the inferior courts and tribunals. In the ordinary run of things, inferior courts and tribunals should be left to complete their proceedings with the superior courts only coming in when everything is said and done”

In *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 where it was observed that a higher court will intervene in incomplete proceedings of a lower court:

“Only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained.”

A constitutional caveat needs to be made here. Although the above judicial pronouncements were made by the High Court on review, they are equally relevant to this Court’s criteria for intervention in incomplete proceedings before lower courts, tribunals and administrative authorities. Those sentiments find expression in the words of Gubbay CJ as he then was in the leading case of *Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors* 1993 (1) ZLR 243 (S) at 250G – A, where the learned Chief Justice had this to say;

“Clearly it (Supreme Court) has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights

²⁸⁸Supra note 1

and particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) (My emphasis).”

As it has already been seen in the normal run of things, courts are generally loath to determine a constitutional issue in the face of alternative remedies. In that event, they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. This has given birth to the doctrine of ripeness and constitutional avoidance ably expounded by Ebrahim JA in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) at p 505 G where the learned judge had this to say:

“There is also merit in Mr. Nherere’s submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.” (See also Zantsi v Council of State, Ciskei & Ors 1995 (4) SA 615 (CC).

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. That conceptualization of the law as previously stated finds recognition in the leading case of *Catholic Commission of Justice and Peace in Zimbabwe* (*supra*) heavily relied upon by the applicants. In that case the applicants waited until they had exhausted their alternative remedies before approaching the Constitutional Court for relief.

3.3 The pillars of the doctrine of Constitutional Avoidance: synthetic approach

The thesis on constitutional avoidance is two-pronged. The first one relates to the general principle of abstention, that is, *if* one reading of the statute would force the courts to confront hard constitutional questions, *then*, the courts should prefer the alternative interpretation that lets them duck that interpretation. This narrow conception of the principle simply tells the courts to avoid interpretations that would raise hard questions of the constitutionality of the statute itself. It should be noted in this research that the use of the doctrine of constitutional avoidance has

several consequences to the development of jurisprudence to any given legal system. One of the notable negative effects of the principle is that it leads to sloppy and cursory constitutional reasoning. It has been stated times without number by the American Supreme court that “those who invoke the doctrine must be sure that the alternative is a serious likelihood that the statute would be held unconstitutional”.²⁸⁹

As a result of the invocation of this doctrine, case law is rife with instances where the Constitutional Court has avoided by Construction, only to later hold that when forced to confront the questions under a different statute that the constitutional claim should not prevail. Constitutional avoidance principle is a canon of statutory interpretation. The principle in certain instance has been crudely but aptly labelled as “a lot of trouble, indeterminate, leading to unpredictability if not arbitrariness of judicial decisions”²⁹⁰. The American Supreme Court over the years has developed the time honoured presumption that a congressionally enacted law is constitutional and as a general rule courts should not pass decisions on questions of constitutionality.

Secondly in Zimbabwe, the doctrine is known as the presumption of constitutionality, that is, the law maker always intends to act constitutionally. The presumption has found expression in a number of cases in our jurisdiction. So if a statute is capable of two meanings, one of which would render it unconstitutional and the other one would bring it within the Constitution, then the judiciary would prefer the latter interpretation.²⁹¹ In America and Zimbabwe as well the courts have established a host of loosely related rules known as Constitutional avoidance that discourage the courts from issuing broad rulings on the matters of Constitutional law.

The USA situation can be determined using the *Ashwander* decision. In *Ashwander*, George Ashwander and other preferred shareholders of the Alabama Power Company, after unsuccessfully petitioning the company, sued the corporation and the TVA over a contract between the government agency and the power company. Specifically, the plaintiffs challenged the legality of a contract that the company had entered into with the government Agency to (1) purchase the company’s property and transmission facilities and (2) sell the company surplus

²⁸⁹ *Almendarez –Torres vs United States* 523 US 224 (1998)

²⁹⁰ Scalia, *A Matter of Interpretation* at 29

²⁹¹ *Zimbabwe Township developers Pvt Ltd v Lou Shoes* 1983 (2) ZLR 376

power generated by the government-owned Wilson Dam in northern Alabama. Among the legal theories espoused by the plaintiffs was that the TVA acted in excess of the federal government's constitutional authority when it entered into the contract. A plurality opinion, written by Chief Justice Hughes, ruled against the plaintiffs, upholding Congress's constitutional authority to both construct the Wilson Dam and dispose of electric energy generated at the dam based on Congress's war power, the commerce power, and the power to dispose of property belonging to the United States.

The importance of this decision fits into the suggested model in this dissertation that was referred in Chapter 2. This is because the judge found that the Justice Brandeis's rules and the entire avoidance doctrine are not unitary nature, but rather consist of seven loosely related principles and canons that allow a court to avoid making broad rulings on constitutional grounds. Some of the *Ashwander* rules, such as the rule against feigned or collusive suits or the rule of constitutional estoppel rarely arises in constitutional law litigation. This point will guide Zimbabwean courts to determine the extent to which constitutional litigation can be treated as being different from civil cases where for instance, the existence of alternative remedies have to be considered rigidly.

In Zimbabwe, the *Chirwa* case (supra note 11) linked to the doctrine of ripeness. It is however important to state in this research that the principle of ripeness has been clearly distinguished from other doctrines in other disciplines in jurisdictions such as South Africa. Chaskalson et al in **Constitutional Law of South Africa para 8.3 at 8.12 - 8.14** observe that:

"While the "ripeness" doctrine is concerned with cases which are brought too early, the "mootness" doctrine is relevant to cases which are brought, or reach the hearing stage, too late, at a time when the issues are no longer "live". A matter will be moot where the dispute between the parties has been resolved or the prejudice, or threat of prejudice, to the plaintiff no longer exists.'

The doctrine of ripeness was explained by Kriegler J in *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199 said;

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that

the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones.

Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."

In *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* . . . [2000] ZASCA 137; 2001 (2) SA 872 (SCA) para 9, Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded at 930g:

"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved".

In a similar vein, in *Western Cape Education Department v George* . . . [1998] ZASCA 26; 1998 (3) SA 77 (SCA) at 84E, Howie JA stated;

"Finally, it is desirable that any judgment of this Court be the product of thorough consideration of, inter alia, forensically tested argument from both sides on questions that are necessary for the decision of the case."

South African jurisprudence also clearly provides explanations on avoidance and subsidiarity. The principle of avoidance stipulates that common law and legislative remedies must be resorted to before resorting to constitutional redress whereas that of subsidiarity postulates that norms of greater specificity should be relied on before resorting to norms of greater abstraction.²⁹² The net effect is that reliance cannot be placed upon a constitutional right if relief is available through statute or the common law.

It is also clear in countries that a matter cannot become constitutional if there is a way of resolving it by the civil law of the land. In *S v Mhlungu* 1995 (3) SA 867 (CC) it was held that,

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is, the course which should be followed"

²⁹²Currie I and de Waal J in the Bill of Rights Handbook- Juta & Co Ltd 6th Edition at pages 649-650.

In *S v Dlamini* 1999 (4) SA 623 (CC) it was held:

“As a matter of judicial policy, constitutional issues are generally to be considered only if and when it is necessary to do so”

In *MEC for Development Planning & Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) it was held that:

“Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this court”

See also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC). This indeed was the position of the High Court in *Deputy Sheriff, Harare v Kingsley & Anor* HH-507-14²⁹³ where it refused an application for referral on the basis that the ordinary civil law of the land provided full remedies.

This approach has received the imprimatur of this Court in *Zinyemba v The Minister of Lands & Rural Resettlement & Anor* CCZ-3-16 where the Court said:

“Two principles discourage reliance on the constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to constitutional remedies. The second principle is one of subsidiarity which holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction.”

Zimbabwe now has a home grown Constitution that has a broad founding provision which contains values that form the basis of its constitutional democracy. The 1980 Constitution did not have a broad statement of the principles of democracy.²⁹⁴ The transition from a ceasefire charter to a home grown Constitution saw the inclusion of such principles. This recent development was a product of the assimilation of constitutional principles from other juridical systems. Countries such as South Africa, Namibia and Mozambique articulate crucial aspects of their visions of democracy albeit in less detail than that of Malawi.²⁹⁵ In South Africa, PIL was shaped mainly by

²⁹³Fidelis E, Kanyongolo, supra note 73, page 2

²⁹⁴Fidelis E, Kanyongolo, supra note 73, page 2

²⁹⁵Fidelis E, Kanyongolo, supra note 73, page 2.

three cases which related to right to housing²⁹⁶, LGBTI rights²⁹⁷ and the treatment to prevent mother-to-child transmission of HIV/AIDS²⁹⁸.

3.4 Lessons from the developments in the USA

Constitutional avoidance is located as a tool that judges use to exercise judicial restraint in impact litigation cases. The writings of scholars in the USA show how they have made a huge attempt to show the impact of judicial restraint. This dissertation will draw vital lessons from Posner (2012) whose scoping presentation of the various schools of thought on judicial restraint is doubtlessly useful to this study. He locates the rise of constitutional theory in Thayer's claim that judges should uphold a statute unless its invalidity was clear beyond doubt (*as it would very rarely be*), and constitutional theories that claimed to dispel doubt and yield certifiably right answers in all cases.

Posner considers the term "judicial self-restraint" to be a chameleon since it has several meanings. He however used three which he considered to be the most serious:

(1) judges apply law, they don't make it ("legalism"-though "formalism" is the commoner name--or, better, "the law made me do it"); (2) judges defer to a very great extent to decisions by other officials-appellate judges defer to trial judges and administrative agencies, and all judges to legislative and executive decisions (called "modesty," or "institutional competence," or "process jurisprudence"); (3) judges are highly reluctant to declare legislative or executive action unconstitutional-deference is at its zenith when action is challenged as unconstitutional (call this "constitutional restraint"). Type (3) (constitutional restraint), which is a subset of (2) (modesty), but as a rule is differently motivated; because (2) is motivated by notions of comparative institutional competence, and (3) by respect for the elected branches of government, although that respect is sometimes based on a belief that legislatures do policy better than courts do, which is a form of judicial modesty.

The third pillar, of constitutional restraint, can see judges adopting, advocating, and amplifying doctrines-such as standing, ripeness, avoidance of constitutional rulings where possible, refusal to issue advisory opinions, and refusal to decide political questions-that eliminate or at least postpone occasions on which a federal court deems itself authorized to declare a legislative or executive measure unconstitutional.

²⁹⁶Government of South Africa & Others (2000) 1 CHRL

²⁹⁷The National Coalition for Gay and Lesbian Equality case

²⁹⁸The Treatment Action Campaign case on treatment to prevent mother-to-child transmission (MTCT or PMTCT) of HIV/AIDS.

He further argues that none of these doctrines can be found in the constitutional text or its English antecedents; but they are the invention of American judges. Judges like Brandeis had their own inventions and were uniformly restrained. For instance Posner considers that Brandeis participated in decisions that invalidated New Deal legislation and that by doing so got the Supreme Court into political trouble in the 1930s. He could however be an activist judge for instance his dissent in *Olmstead* was activist in locating a constitutional limitation on wiretapping in a right of privacy nowhere hinted at in the constitutional text.

Posner cited Wallace whom he considers as having offered a refreshingly precise formula for restrained judicial decision making. When a case is in doubt, he says, the judge should:

1. Clarify only as much of the statute as is necessary to decide the case before the court.
2. Clarify the statute in the fashion that the legislature probably would have, had the ambiguity been brought to its attention.
3. Follow common-law principles of statutory construction.
4. Clarify the statute in a manner that innovates the least against the background of prior law--especially in regard to extending causes of action.

To support the role that is played by judicial restraint on judges who invoke the avoidance doctrine, Young (2010) used the example of Chief Justice Roberts who grounded the avoidance doctrine in a restrained view of the Court's role vis-à-vis Congress. He argues that:

In assessing [serious constitutional] questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is —the gravest and most delicate duty that this Court is called on to perform. —The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. The Fifteenth Amendment empowers —Congress, not the Court, to determine in the first instance what legislation is needed to enforce it.

Conclusion

This Chapter has dealt with various approaches in other countries. It showed that casual reference to constitutional avoidance doctrine or its variants can create a grim constitutional tradition, particularly to the extent to which impact litigation has not been distinguished from general litigation. The Chapter also showed that constitutional avoidance can complicate issues when related to other doctrines. This is particularly so if matters are dismissed. The next chapter presents the practical challenges of invoking the avoidance doctrine or its variants in Zimbabwe.

CHAPTER 4

Litigation Surgery on the Challenges of the Avoidance Doctrine in Impact Litigation Cases in Zimbabwe: A Scoping Analysis

Introduction

This Chapter deals with the application of the avoidance doctrine by the Zimbabwean Constitutional Court. Its purpose is to ensure that the cases it decides must justify its existence as the apex Court on constitutional matters. Further, it must promote access to justice by ensuring that matters are brought to finality. The widely publicized decisions of the High Court on statutes of limitations as well as its frequent use of the Constitution to protect human rights cast a revealing light on the dangers of avoiding the constitution in impact litigation cases. Whether the Constitutional Court can transform its rising culture of avoidance by considering the approach by the High Court remains to be seen when it decides on cases that the High Court has referred to it for confirmation.

The major challenge, as indicated in detail below, the many cases in which the Constitutional Court invoked the avoidance doctrine or other like doctrines demonstrate that it remains dedicated to delaying the impact of impact litigation, and in a large sense, the protection of public interests. This challenge can readily be drawn from instances of express reference to the avoidance doctrine, or honest assessments of the effect of other doctrines that are used by the Constitutional Court to have constitutional matters removed from either getting struck off the roll, or dismissed. The cases are discussed below in terms of brief factual backgrounds, the technical issues raised and the impact of the cases.

4.1 An Analysis of the Decisions that Bear on the Avoidance Doctrine and its Variants

Zinyemba v Minister of Lands and Rural Settlement and Another, CCZ 3/16

This is the first case that bears on the avoidance doctrine after the adoption of the Constitution. In this case, the applicant had been allocated land which was subsequently subdivided by way of withdrawing her offer letter to a certain piece of land. The Applicant first applied to the High

Court challenging the ministerial action in terms of the right to administrative justice as protected in section 68 of the Constitution. The application in the High Court was withdrawn on the basis that she should have lodged the application with the Administrative Court. Instead of lodging an application with the Administrative Court, the applicant approached the Constitutional court in terms of section 85 of the Constitution, the *locus standi* provision. Four preliminary points were raised against the application.

The technical arguments that were raised

The first was that the application was in the wrong forum as it should have been made to the Administrative Court. The second ground was that s 291 of the Constitution is not part of Chapter 4 and did not enshrine a fundamental right. The contention was that s 291 did not guarantee to the applicant a fundamental right the infringement of which entitled her to approach the Constitutional Court for appropriate relief in terms of s 85 (1) (a) of the Constitution. The third ground on which the application was opposed was that s 71 (3) of the Constitution had no bearing on the legality of the decision of the Minister because it was concerned with compulsory acquisition of property by the State and not the withdrawal of rights to occupy, hold and use State land given to a person in terms of an offer letter. The fourth ground on which the application was opposed was that the existence of the Administrative Justice Act [Cap. 10:28] gives effect to the fundamental rights enshrined in s 68 (1) and (2) of the Constitution and provides an effective remedy for their protection and enforcement.

The Finding by the Court

Essentially, Malaba DCJ (as he then was) referred to two doctrines, the avoidance doctrine and the subsidiarity doctrine to dismiss the applicant's case. After discussing the effect of the Promotion of Justice Act (PAJA) as explained by Currie et al, the learned judge abruptly stated that:

Two principles discourage reliance on the constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to constitutional remedies. The second principle is one of subsidiarity which holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction. The applicant is not challenging the constitutional validity of any provision of AJA (Administrative Justice Act) nor is she seeking to use the constitutional rights to

administrative justice to interpret the provisions of AJA. The exceptional circumstances in which an applicant can rely on the constitutional rights to administrative justice do not apply to the applicant. She ought to have used the remedies provided for under AJA to enforce her rights to just administrative conduct.

Critique

This case was strategically instituted in terms of section 85 of the Constitution. It is respectfully submitted in this research that the author of the judgment, Malaba DCJ (as he then was) was wrong in making a finding that the preliminary points that were raised by the Respondents were unassailable. While this researcher may not belabour with a discussion of the second and third preliminary points, it is the determination of the first and the fourth points that he strongly argues raise an urgent need for critical reflections in this research. Further, the Court did not even attempt to justify its reference to the avoidance doctrine. That doctrine was not explained in any way. Even the invocation of its variant, the subsidiarity doctrine was not explained. The latter was explained in detail in the *Majome* case.²⁹⁹ There was no explanation on the norms of specificity and abstraction that were referred under subsidiarity and this researcher can only argue that there was no attempt to embark on judicious avoidance in this regard.

In relation to the avoidance doctrine, it is quite axiomatic that avoidance limits the expressive and broader enforcement potential available under constitutional adjudication.³⁰⁰ Further, potential implications of uncertainty may lead to protracted round of litigation or may leave litigants in a great deal of legal uncertainty as to the scope of their rights.³⁰¹ The Court first created a serious mistake of treating avoidance as distinct from subsidiarity doctrine. This failure was the epitome of the passive virtues of judges since both doctrines are both expressive of judicial restraint. Even the argument that courts should try to interpret statutes so as to avoid raising questions of constitutional law is difficult to sustain where the doctrine is simply suspended on nothing but mere judicial sentiments.³⁰²

²⁹⁹ See supra note 2.

³⁰⁰ See A.N Steinman, 'Comparative Avoidance' (2017), JOTWELL, available at <http://www.courtswell.com/comparative-avoidance>, accessed on 19 August 2017.

³⁰¹ Ibid.

³⁰² See C. Nelson, 'Avoiding Constitutional Questions v Avoiding Unconstitutionality' (2015) 128 Harvard Law Review Forum 331.

Because the author of the judgment did not explain the basis of the avoidance doctrine in this case, his approach amounts to the passive virtues of judicial reasoning where a judicial officer simply decides not to decide the merits of contentious constitutional issues in order to preserve the Constitutional Court's institutional legitimacy in the face of the judicial branch's counter-majoritarian difficulty.³⁰³ Although it has been argued that, '*avoidance is everywhere*', its ubiquity has to be justified. Although in such instances scholars have attempted to move towards strategic avoidance which enables further dialogue over the avoided issues, allowing for resolution of disputes through the political branches than judicial intervention,³⁰⁴ it was clear that this route was clearly futile on the part of the applicant since the responsible minister has already shown his intention to subdivide the land. He had consummated his intention by withdrawing the offer letter to the part of the land that she formerly held title to.

Furthermore, in stretching the need for the court to embark on judicious avoidance, this research argues that the Court wrongly decided on the wrong forum argument. The first point on the wrong forum could, put in other words, have the effect that the applicant was barking the wrong tree because she had not chosen to apply to the Administrative Court. At a basic level, one can argue that by abandoning the Administrative Court route, the applicant went for forum shopping to the Constitutional Court. This may take this argument to the argument that where a claim may succeed on constitutional or non-constitutional grounds (which typically means choosing statutory interpretation or administrative law instead of constitutional remedies, the Court should, under the circumstances of serious uncertainty, prefer the non-constitutional remedy.³⁰⁵

However the argument does not end there. This case shows the inherent danger in considering preliminary arguments in an armchair way. This is particularly so if the first preliminary point is linked to the fourth point. The Court's argument was that South Africa first had a Constitution, and then an Act which gave effect to the provisions of the Constitution. Admittedly, this argument cannot be used to draw a comparison with the effect of the Administrative Justice Act in Zimbabwe. The effect of the Administrative Justice Act was to codify natural justice

³⁰³ The same approach has been preferred by E. F. Delaney, '*Analyzing Avoidance: Judicial Strategy in Comparative Perspective*' (2016) 66 *Duke Law Journal* 1.

³⁰⁴ *ibid*

³⁰⁵ See J. King, '*Judging Social Rights*' (2012) Cambridge University Press.

principles such as the right to be heard and legitimate expectation.³⁰⁶ This Act was promulgated in 2004, some 9 years before the adoption of a Constitution which makes the right to administrative justice justiciable. Neither does it give effect to the provisions of the Constitution. Nor has it been aligned with the Constitution. There was no basis for upholding the fourth preliminary point in this regard.

Discussion on the implications of the case

Because this case was dismissed, albeit with no order as to costs, it doubtlessly produced serious implications on judicial research on constitutional doctrines and for the future of impact litigation in Zimbabwe. With regards to proper research, it can be argued that the Constitutional Court has not made any serious research finding on whether the invoked doctrines are rules of law or construction. In contradistinction, it has been shown that American courts and scholars have shown how the avoidance doctrine is both a rule of interpretation and construction. The other obvious implications were that the author of the judgment in this case had occasion to invoke the subsidiarity doctrine in a matter that avoided both the constitutional questions raised and the issue of the constitutionality of a statute in the *Majome*³⁰⁷ case.

Further, the casual reference to the avoidance doctrine was also subsequently used, albeit by a different judge in expressly referring to the avoidance doctrine in the *Chawira*³⁰⁸ case. Although there is still uncertainty in countries such as the USA on whether the avoidance doctrine is a rule of law or construction, it is argued that the courts in that country have tried to deal with the merits and demerits of the doctrine³⁰⁹. Against this background of no clear discussion on the nature of the doctrine, this dissertation looks at the cases mentioned to explain how the Constitutional Court has unsatisfactorily avoided the merits of constitutional cases.

Further, despite their potential to improve on the constitutional jurisprudence of the country through innovative judgments, the Constitutional Court judges have been, contrary to expectations, not always been willing to decide the merits of constitutional cases. As such, crucial aspects relating to the interpretation, implementation, and consumption of the judgments

³⁰⁶ See section 3 of the Administrative Justice Act.

³⁰⁷ Supra note 2

³⁰⁸ Supra note 1

³⁰⁹ *Edward J. De Bartolo Corp. v Fla. Gulf Constr. Bldng and Constr. Trade Council*, 485 US 568, 575 (1988).

have largely been left out by the Constitutional Court. Even the secondary population such as academics and the media have not been made to understand the basis of the use of the avoidance doctrine in this case. The other two serious issues relate to how decisions taken by generality of the Zimbabwean population: the acceptance factor, and the behavioural consideration.

The other implication is that the avoidance doctrine has been invoked in a manner that appears to ignore the three-pronged reference to what constitutes a constitutional matter. The research found that the Constitution defines a constitutional matter as shown in fig 4a below. The diagram shows that over the years after the adoption of the Constitution, the decisions on both technicalities and the merits should have been overwhelming. All the judges who would have dealt with the merits of constitutional matters would have enabled the general populace as the consuming population to keep themselves up to date with how these decisions would have empowered them to be more of policy influencers than takers.

This is just one great way of the demerits of judicial passivity under a transformative Constitution. In addition to upholding technicalities, the judges of the apex court could be an amazing lot for the coming years. They however provide researchers with a chance to gauge their performance in the three areas that are shown under fig 4.a.

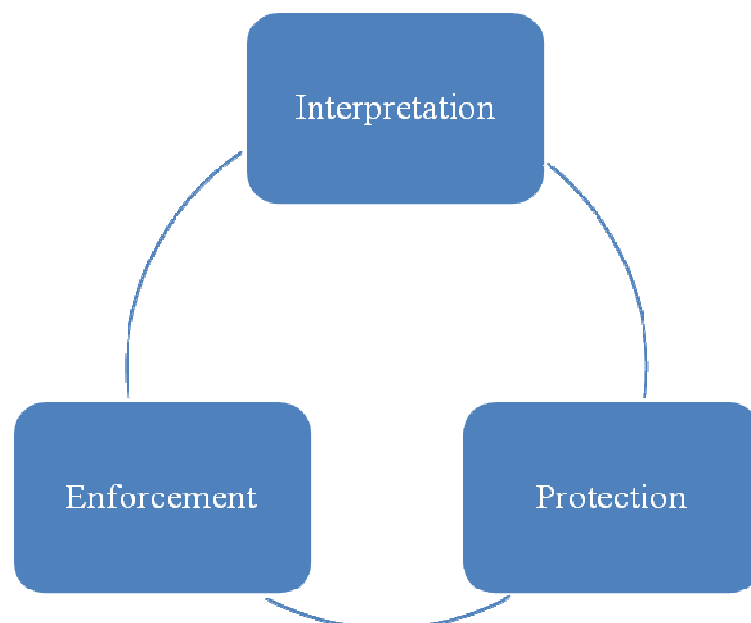


Fig 4a

From the above diagram, it is hoped that the Constitutional Court should deal with constitutional matters using the three aspects considered by the Constitution. The cases show that the margin of propensity to interpret is greater than the margin of the propensity to protect and enforce the provisions of the Constitution. Put simply by borrowing from economic principles:

MPI = MPP=MPE where

MPI=Margin of propensity to interpret the Constitution

MPP is margin of propensity to Protect the provisions of the Constitution, particularly the Bill of Rights and

MPE is the margin of propensity to enforce the provisions of the Constitution through providing the constitutional remedies in section 85 (declaratory orders and compensation).

4. 1.1 The implications on the variants of Constitutional Avoidance Doctrine

Fig 4b below shows the other ways, beside avoidance and subsidiarity have been employed by the Constitutional Court to invoke the avoidance doctrine as a way of avoiding the merits of constitutional matters.

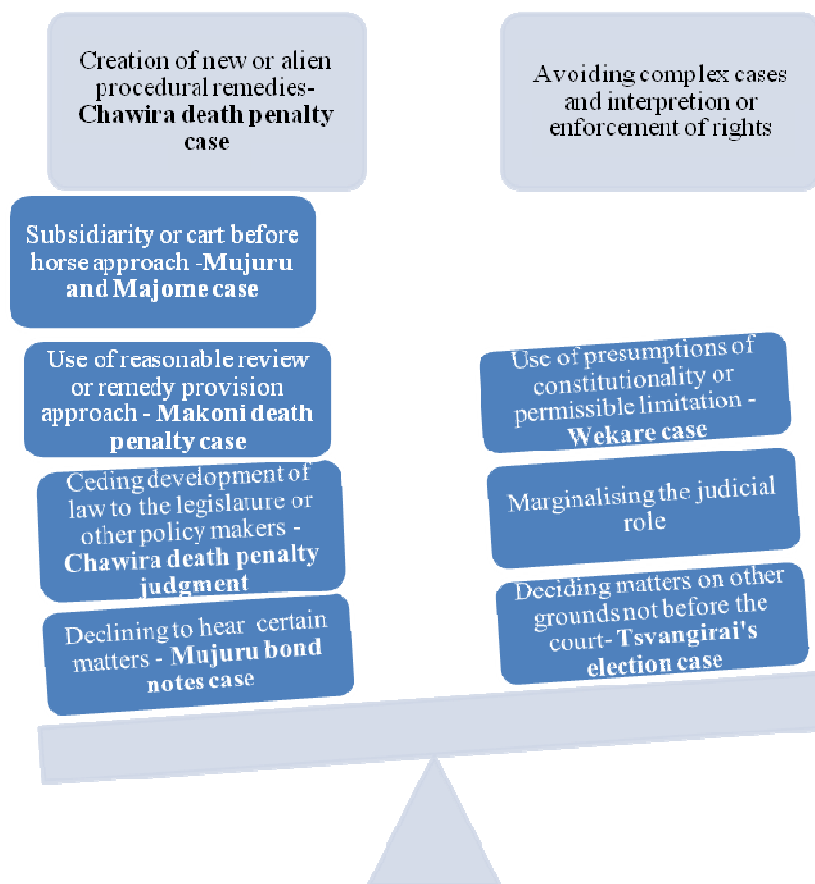


Fig 4b.

As shown on fig 4b above, avoidance doctrine was invoked in the cases that are put in the boxes. The illustration shows how it is difficult to rely on the various instances where the Constitutional Court flirts with the doctrine to develop the jurisprudence on the Constitution. For the avoidance of doubt, pictorial presentation has been used to show the number of judges who agree with the author of a constitutional judgment that invokes the doctrine either expressly or in its variant forms as shown in *fig 4b*. The research arguably considers the *Chawira*³¹⁰ decision because it also expressly refers to the avoidance doctrine as a way that was used to the detriment of the right to life and its possible enforcement. It was also in turn used as a precedent to invoke the avoidance doctrine in labour matters such as the *Katsande* case³¹¹.

³¹⁰ Supra note 1

³¹¹ Supra note 16.

4.2 Chawira and others v Minister of Justice and Others, CCZ3/17

The whole facts in the *Chawira* case can be found electronically on Veritas Zimbabwe. The founding affidavits, heads of argument as well as supplementary heads of argument and the amended draft order in the case can also be found on Veritas. The brief facts were that:

*The applicants were awaiting execution for lengthy periods, some as long as 18 years. The argument was that the prolonged wait, coupled with the appalling conditions under which the applicants have been incarcerated, amount to cruel and inhuman treatment or punishment for the purposes of section 53 of the Constitution of Zimbabwe*³¹².

The matter was heard on 13 January 2016 and the judgment was delivered in 2017. This researcher, as a newspaper columnist, first shared some of his findings on the avoidance doctrine through a case review of the *Chawira* judgment which had expressly mentioned the avoidance doctrine.³¹³ The judgment was authored by Justice Bhunu as shown in fig 4c. Eight judges of the Constitutional Court concurred. Put differently, there was no single judge who dissented. Those who concurred did not write separate judgments to buttress how they had come to the same conclusion with Bhunu JCC. The judgment refers to the applicants, who were death row inmates as '**condemned prisoners awaiting execution**'. This language was found by the researcher to be at variance with the language of constitutional rights and in essence showed that the Constitutional Court was not prepared to preserve the sanctity of human life.³¹⁴

³¹²See Veritas Zim, <http://veritaszim.net/node/1832> accessed 4 July 2017.

³¹³S. Hofisi, '*Chawira Judgment: Some Reflections*', the Herald, Zimbabwe, April, 2017, available at <http://www.herald.co.zw/the-chawira-judgment-some-reflections/> accessed 4 July 2017.

³¹⁴Ibid

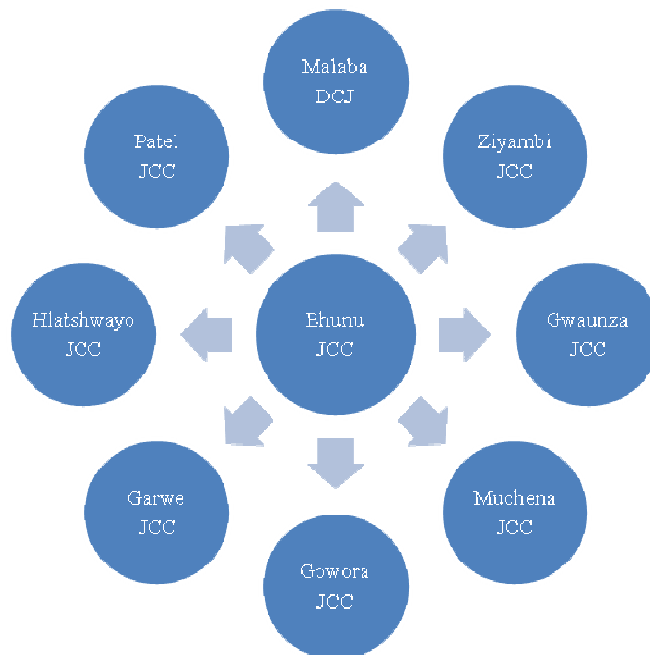


Fig4c

Criticism of the case

The court simply referred to the avoidance doctrine without explaining the rationale for invoking this doctrine. This research argues that the Court's use of the alternative remedy and ripeness arguments was wrong. These two arguments are factors that are linked to legal standing. Most importantly, it is argued that this was a case where the Constitutional Court was supposed to appreciate the fact that the Constitution equips it with the power to discard the dirty hands doctrine in that a person who has contravened a law is not debarred from approaching a court for relief³¹⁵ under the methods of approaching the Court in the event of a constitutional breach.³¹⁶ In other words, the Constitutional Court was deal with the propriety of the remedy that was being sought rather than be seen like it was using the alternative remedies argument or the ripeness doctrine to bring the dirty hands doctrine through the backdoor.

The liberal nature of the legal standing was not properly utilized to protect the applicants. This was notwithstanding the fact that the Supreme Court had already made a finding well before the adoption of the Constitution that liberalizes legal standing. In *Catholic Commission for Justice and Peace v Attorney General and Others* 1993 (1) ZLR 242 (S), a public interest group was

³¹⁵ Section 85 (2) of the Constitution.

³¹⁶ See section 85 (1) of the Constitution

allowed to represent four convicted murderers and to have their sentence of death set aside on the ground that the delays in carrying out the sentence together with the conditions that they found themselves in violated their fundamental rights. The Court did not end on technicalities but innovatively argued that the applicant had *locus standi* because the four condemned men had applied to be joined as additional applicants. Because of the significance of the *Chawira* case to the development of the jurisprudence on right to life, the Constitutional Court was supposed to deal with the appropriateness of the remedies such as the declaration of unconstitutionality of the administrative actions of the prison officials or the declaration that their freedom from cruel, inhuman and degrading treatment had been infringed.

The Supreme in the *CCJP* case (supra) did not justify executive policy. It held that the delay by the Executive in carrying out the death sentence imposed by the courts, together with the conditions under which the prisoners were incarcerated and the anguish that they were subjected to rendered the proposed executions contrary to s 15 (1) of the Lancaster House Constitution as being inhuman and degrading punishment and treatment. Surprisingly, the Constitutional Court in the *Chawira* case avoided making a constitutional determination. It simply chose to avoid the matter by referring to the need to exhaust all remedies. This finding saw it linking the case to the ripeness doctrine which allows the courts to dismiss matters that they feel are brought to court too early. The approach that was taken in this case was more surprising if regard is made to the argument that the Constitutional Court believed that the applicants had prospects of success on appeal. This was an opportunity of the Court to deal with the matter considering the fact that there were other issues that were not linked to the appeal such as the seeking of Presidential pardon. Presidential pardon is not a matter of procedure but of rights enshrined in the Constitution. As such, the court was wrong in lumping it together to the need for the applicants to exhaust internal remedies.

The same holds for commutation of sentence which is a matter of right and not legal procedure that must be satisfied before one approaches the Court. In *CCJP* (supra page 283 para. F), it was stated that:

‘the power to ‘commute’ sentence of death is an executive power. Though it exists essentially for the protection of the condemned prisoner he has no right to be heard in the deliberations of Cabinet. He may only submit a mercy petition. He has a de facto right to expect the lawful exercise of the power but no legal remedy is available to him save

where an infringement of one or more of the protective provisions of the Declaration of Rights can be shown’.

Implications of the case

Some of the implications have been shown above that the death row inmates continue to be denied the right to constitutional protection because of the avoidance principle. The Constitutional Court deliberately avoided the use of its protective role to enforce the right to life. The researcher also benefited from the email feedback on some of his findings on the doctrine to understand the implications. The email and whatsapp responses were sent as feedback by the readers of his newspaper articles.³¹⁷ The whatsapp feedback was sent by lawyers in impact litigation. The researchers compared the feedback in this case with the email feedback from some avid readers. For instance, One Professor, a senior lecturer in the Political and Administrative Studies commented on the article on the doctrine that dealt with the High Court’s approach in the *Nyika*³¹⁸ and *Mangwiro*³¹⁹ cases that:

*I was very much interested in the article of 19 July 2017 (on statutes of limitations: separate and unequal. I was very much impressed by the ‘empty noise’ explanation. I think you should write an article on State liability. I believe students would be very much interested in it.*³²⁰

Because this dissertation focused on the normative and legitimacy issues flowing from the actions of justice, the Professor, as part of the consumer population was able to follow through the argument that was presented in the newspaper article. Two cases were used to illustrate why claims against the State amount to an ‘empty noise’. The reader was therefore quick to observe the need to write an article that speaks specifically to state liability.³²¹ The first case, the *Nyika* decision, showed that the applicants had been allowed to challenge the constitutionality of the

³¹⁷ See S. Hofisi, ‘Statutes of Limitation: ‘Separate and Unequal’, the Herald, Zimbabwe, 19 July 2017. See also, S. Hofisi, ‘The Avoidance doctrine: Arguments and Analysis’, Herald Zimbabwe, 26 July 2017. See also *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) where the Constitutional Court of South Africa struck down section 113 (1) of the Defence Act (1957) which limited the claims against the Minister of Defence to a period not exceeding six months after the cause of action arose. It also spoke to the need to give notice to the Minister one month before the commencement of the action. See also *Brummer v Minister for Social Development and others* 2007 (5) SA 323 (CC).

³¹⁸ Supra note 42

³¹⁹ Supra note 1

³²⁰ Personal email feedback from Professor Zhou

³²¹ This is perhaps because the professor is aware that there is a law related case in POLAD that is known as State Legal Liability. The doctrine of empty noise or *brutum fulmen* is commonly discussed in that case. Interestingly, students also become part of the consuming population and secondary population in legitimizing the decisions of judges.

Police Act which imposes an eight months period within which one can sue police officers for constitutional breaches.³²² Even though the case was instituted by a private law firm, the case fits under impact litigation because the lawyer seized the opportunity to file a case that strategically developed the case law on constitutional rights such as the right to equal protection and equal benefit of the law.³²³ Further, the lawyer who represented the applicants, Tendai Biti, has been bringing strategic cases before the superior courts.³²⁴

The researcher purposely chose to publish some of the findings in the newspaper because he wanted to create a research narrative on the avoidance doctrine. This narrative allowed him to get feedback from lawyers who work for law based organizations and those who are member lawyers of law based civil society organizations.³²⁵ It also enabled the researcher to solicit the views of academics and students from institutions of higher learning. Ultimately, the researcher had occasion to discuss the benefits of impact litigation on media forums because of his writings on the Constitution.

His discussions with those who gave feedback helped him to make a finding on the need for impact litigation lawyers to always be prepared to address judges on the demerits of the avoidance doctrine in constitutional matters. It also showed that the lawyers who appreciate that doctrine can even implore the Court to discard the doctrine when they exercise their judicial discretion.³²⁶ For instance, the judges in the *Nyika*³²⁷ and *Mangwiro*³²⁸ cases discussed above considered the realities that obtained in the cases to avoid serious technical arguments that were mounted on behalf of the respondents, but still proceeded to protect the applicants whose rights had been violated.

³²²*Nyika* case supra note 42

³²³Section 56.

³²⁴For instance, he represented the applicants in the *Loveness Mudzuru* case supra note 26. The *Mudzuru* case was a catalyst for legal reform on discrimination statutes such as the Marriages Act and the Customary Marriages Act.

³²⁵For instance, David Hofisi responded on the Zimbabwe Lawyers for Human Rights Whatsapp group that the review on *Chawira* judgment supra note 1 was fairly dealt with and the Constitutional Court had not canvassed the avoidance doctrine well. The researcher had posted the soft copy of the judgment on the group as part of information sharing. Fortunately, responses were made which also demonstrated how each human rights lawyer took the Constitutional Court's approach. The researcher understood the need to gain from the abilities of human rights lawyers to mount expressive constitutional deliberations.

³²⁶See L. Madhuku who implored the Court in the *Mujuru* case supra note 26 so that the court would not be pushed to avoid constitutional issues. Although DCJ Malaba (as he then was) was not swayed by the lawyer, the case shows how a lawyer can use his knowledge on the doctrine or the attitude of the Court to make submissions in court.

³²⁷Supra note 42

³²⁸Supra note 1

From the lawyers who provided feedback on reviewed articles, the crosscutting idea was that judges need to develop their jurisprudential capacity by including views of legal scholars in their judgments. They also showed that where judges would have indicated to lawyers that they do not want to be addressed on certain issues, they should not reserve judgments. For instance the *Chawira* judgment³²⁹ came a year after the hearing of the case. The case was subsequently dismissed on technicalities. This practice psychologically affects impact litigants and their legal representatives. Some lawyers indicated the need to always share judicial precedents before filing them to allow for inputs on the avoidance doctrine. They also suggested that there should be sharing of precedents using online platforms as has been done by some civil society organizations like Veritas. This allowed the researcher to also visit the Veritas page in this regard to verify the suggestions.

The visit to the Veritas page revealed that the institution clearly indicates the nature of the case that they want the members of the public to support. For instance, as the researcher was looking for material on the *Chawira* judgment on Veritas, he found that there were two PIL cases that had been instituted by Veritas relating to the death penalty. There was information on the court pleadings such as founding affidavits of the applicants, draft orders and the call for members of the public to support the case through court attendance.³³⁰ Under Constitutional watch 5-2016, it was indicated that the carrying out of death sentences is unconstitutional. The date for the hearing of the case was given as 27 January 2016. The venue was given as Constitutional Court, Mashonganyika Building, Harare, (next to the High Court building). The time for hearing was given as 9:30am. The cases were clearly given as *Ndlovu & Anor v Minister of Justice & Another* (CCZ50/2015) and *Makoni v Commissioner of Prisons & Another* (CCZ48/2015).

4.3 *Makoni v Commissioner of Prisons & Another* CCZ48/2015

In this case, the researcher found that JCC Patel also used the constitutional avoidance as a remedy but again eight Constitutional Court judges concurred with his finding. This clearly demonstrated how the judges are acquiescing to the views of the author of constitutional judgments. In this wake, the study showed the benefits of always taking impact litigation seriously as is done by organizations such as Veritas. This organization clearly demonstrated the

³²⁹ Supra note 1

³³⁰ *Dolosi v Minister of Justice and Anor*, which was clearly posted on the Veritas home page as a PIL case.

reason why the *Makoni* case was important. It also showed the constitutional issues that were expected to be canvassed in that case as a public interest litigation case. The Veritas page for instance indicated that:

Please attend the court hearing to support these cases. Both these public interest cases have been instituted by Veritas and we urge all those who have been working to abolish the death penalty and to secure humane conditions for prisoners to attend the hearings. It is not known which case would be heard first.

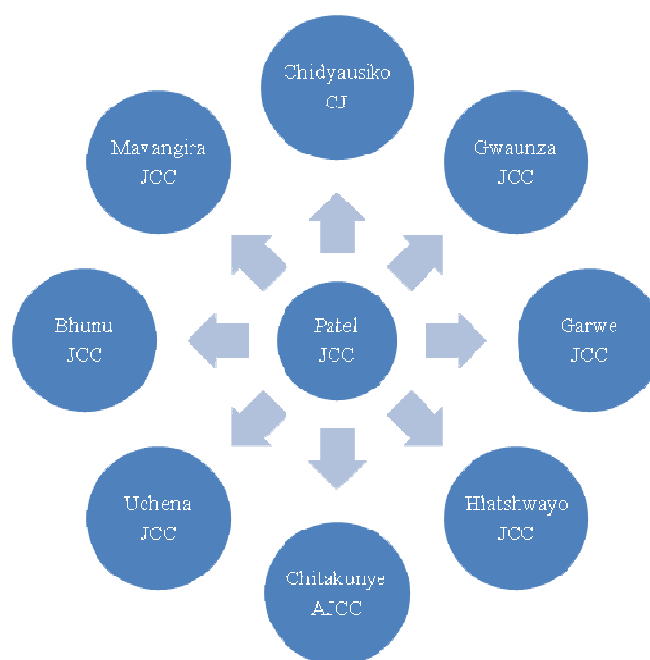


Fig 4d.

It is clear from the above that the general populace who have access to internet would frequently visit the Veritas home page or circulate information on various platforms. The home page also shows the importance of constitutional issues in PIL cases. It indicated that:

The Constitutional issues in the cases:

Ndlovu and Another v Minister of Justice & Another

Both Applicants in this case were sentenced to death for murder before the present Constitution came into force. They argue that their right to life under section 48 of the Constitution will be violated if they are executed now because the current law providing

for the carrying out of the death sentence does not conform with the Constitution. They contend that no prisoners can be executed and no convicted criminals can be sentenced to death until the law is amended to bring it into line with the Constitution and any such amendment cannot apply retrospectively. To apply to people such as the applicants who have been convicted before the amendment is passed, an order is sought that to execute the applicants would violate their right to life under the Constitution.

Makoni v Commissioner of Prisons and Another

In Zimbabwe a sentence of life is imprisonment for the rest of that person's life: he or she cannot be released on parole. Convicted murderers who are not sentenced to death are often sentenced to life imprisonment, the applicant, who is serving a life sentence, after sentence, argues that it amounts to cruel and inhumane punishment to keep him in prison without any hope of release on parole, however many years he has served, however good his behavior and however much he may have repented and reformed. Prison conditions in Zimbabwe are so severe that a long sentence may be tantamount to a death warrant. Put another way, the applicant's argument is that it would be cruel and inhumane to execute him-which it would be-it is equally cruel and inhumane to imprison him until he dies through neglect or starvation.

The site search also revealed the expectations of the Public Interest Litigation lawyers and the organization which had instituted the case which they hoped would be heard on the merits relating to the constitutionality or otherwise of the cases. Veritas had this expectation that it was:

Important to bring this case as, if as hoped, the death penalty is abolished and sentences commuted to life imprisonment the prisoners concerned will be hardly better off. The Constitution not only endorses the right to life but also the right to human dignity. It also prohibits cruel and inhumane punishment. The European Court of Human Rights made a strong ruling against life imprisonment without parole as condemning a prisoner to life without hope. This case argues that life imprisonment without parole is contravening the International Covenant on Civil and Political Rights (ICCPR) and other international agreements to which Zimbabwe is a party. An order is sought that life imprisonment without hope of parole amounts to cruel, inhumane or degrading punishment.

Critique and implications

The Court in this case used reasonable review to grant the applicants some of the remedies that it thought were properly laid out while denying the others. However, the implication of the case was that it did not add to the pronouncement on whether the death penalty is unconstitutional. Litigants can however use this judgment to frame the remedy which can lead to the striking down of the death penalty and ultimately the protection of the sanctity of the right to life as

enshrined in the Constitution. The need to preserve the sanctity of life is premised on international best practices and on the argument that the God who gave humans life also gave them the right to live free of inhuman, degrading and cruel treatment.

4.4 Arguments on judicial deference as a variant form of the avoidance doctrine

The most important aspects that were addressed in this chapter dealt with the extent to which constitutional issues are either ventilated in impact cases which affect the generality of the Zimbabwean society. Zimbabwe is a society which prescribed constitutional norms that are ultimately used to legitimize the decisions of judges. Because this dissertation is part of the requirements of the Masters in law degree, it was important to carry out this research with the view that the point of law school is to serve society, not simply to advance expert knowledge systems and the states of those with expertise.³³¹

Further, legal research equips the student with analytical tools on both qualitative and quantitative legal research. This mixed method, particularly when applied to empirical research, has been discussed by Martha Minow in detail when she stated that it allows researchers to ask: *How well are we doing? How well does a given rule or practice work? Who is helped and who is not? Does a particular institution work? Do people really need a lawyer in situations when it might be just as effective to give them access to easily understandable information about the law?*³³² The cases that affect the generality of the population are listed below.

Mujuru v Minister of Finance CCZ 75/17

This is a case in which the Constitutional Court invoked the avoidance doctrine to allow for the judicial deference of a constitutional question. It was found in this research that the Court in fact allowed government policy to sail through without being challenged by the consumer population, the citizens. The Court threw out the Bond Notes challenge by first deferring the hearing of the constitutionality of the bond notes until such a time when they were introduced. The Constitutional Court was of the view that the applicant had not pointed out the alleged illegalities before the notes had been introduced. She had to demonstrate at such a time when the Notes

³³¹E. Newburger, 'What Justice Demands of Us, No One Person Can Do Alone: Looking Back and Ahead with Martha Minow', Harvard Law Bulletin.

³³²ibid

would have been introduced how the legal framework for their introduction would violate the Constitution.

To show that the general populace was not acquiescent to the Constitutional Court's deference approach, people responded to the online media publication on this case in the Herald of 28 September 2016. One interesting comment was from one Tichayana who instated that:

Hiding behind a technicality until a fait accompli has been committed and the damage is inevitable before any action can be taken. Simply reflects how insecure and unsure Government and Mangudya are of their obscure and non-transparent policy decisions that will certainly send all the wrong messages to potential investors, who now will have no option to continue sitting on the fence until this mess is sorted and incoherent Zanu-PF is removed from office (underlining is intentionally made).

Another commentator identified as Gambarenyika remarked that:

The case for bond coins wins on a legal technicality but scores zero on the economics test. Sadly, it's our lives in the big experiment.

He was supported by another commentator who remarked that:

@Gamba Re Manyika how very right you are. Truth is whether Bond notes are introduced now or whenever IT IS ZIMBABWE'S ECONOMY THAT IS GOING TO TAKE A TURN FOR THE WORST...Mirai Muone (wait and see). Mujuru should not even waste her valuable time fighting zvemaBond notes izvi. Even if they are called any other name it will not make a difference

The debate and questions which were raised have a bearing on the legitimacy of a judicial decision. While the commentators who felt that the Constitutional Court had legitimized an illegality were in the many, there were some who were also focusing on the personality of the litigant and the President. For instance, one commentator on the Herald post who was identified as eliare marked that:

I think Madam was seeking relevance for nothing. This thing was approved by the President a long time ago and I don't know why people want to make funny out of themselves when they know very well that once something has been approved at high level, they (sic) is no going back. Wait until you get into power if you are lucky and you introduce your own policies, currencies etc. and that is what you must fight for now or never.

His views showed how some members of the consumer population thought that the Presidential approval of the bond notes settled the issue on the legality of introducing the bond notes. To elia,

the litigation was steeped in high level politics. This clouded his views on how even the powers that be must act within the bounds of the law, particularly the Constitution. His conclusion, as a fractional representation of the general citizens, was that the litigant, a politician, was using the bond note case as a linchpin of her power politics and as a result, government had the green light to introduce whatever policy that they want as long as they are in power.³³³

Synthetically, this research states that the views by the online commentators above bear a lot on how the Constitutional Court has been getting a buy-in from some members of the public. It has however been shown by one of the commentators that there was a '*fait accompli*'. This clearly pointed to the fact that some of the citizens also felt that the avoidance doctrine deprived them of the opportunity or right to be heard. This view is buttressed by the opinion piece that was given by Veritas which argued that the Government was not supposed to use the Presidential Powers (Temporary Measures) since, besides being unconstitutional, added to the belief that Government had a sinister motive in introducing the bond notes.

After this decision, the Minister of Finance and Economic Development, Hon. Patrick Chinamasa, who had also been one of the respondents in the *Mujuru* case, issued a five-point Press Statement on the release of the Bond Notes, on 31 October 2016. The Statement was issued on the same day when the Bond Notes Regulations were gazetted. The Statement showed that the Reserve Bank of Zimbabwe (RBZ) would start the process through issuance of Bond Notes as a legal tender. The RBZ would issue the Notes once it is satisfied that the members of the public would have been sufficiently conversant with the salient features of the Bond Notes. The RBZ had the power to issue the Notes. The purpose of the Notes was meant for the recovery of the economy and this was beyond a measure of doubt. The Minister appealed to the general populace to embrace the Bond Notes.

Essentially, the Minister was directly responding to the concerns that were raised in the *Mujuru* Case, which concerns had also been debated by the members of the public through media responses. For instance, When Veritas opined on the legality of the Bond Notes as only having a

³³³In Administrative law, or any other branch of public law, the green light theory allows administrative bodies to take decisions without limits. If the Constitutional Court had adopted this view, as reflected in the commentator's opinion, the Constitutional Court would have invoked the doctrine of subsidiarity. The litigant would have been ordered to follow the remedy in the Administrative Justice Act that is, approaching the High Court for remedy.

six months lifespan that was occasioned by the use of the Presidential Powers Regulations,³³⁴ members of the public responded to an online article by Ngobani Ndlovu that was published in the *Newsday* of 3 November 2016. One commentator identified as Anti-bond commented that the opinion by Veritas ‘*makes a lot of sense. Why skip Parliament*’.³³⁵ However, another commentator explained why he felt Parliament was skipped. He remarked that: ‘*Mugabe didn’t want any debate on bond notes hence the back door approach*’.

Although the other *Mujuru* case was heard in February 2017, the Constitutional Court again upheld a preliminary point that hinged on the manner in which the application had been brought before the Court. The respondents raised a preliminary point to the effect that the applicant was supposed to first challenge the constitutionality of the Presidential Powers Act before approaching the Constitutional Court. It was also contented on behalf of the Respondents that section 167 (2) of the Constitution was not properly utilized to determine whether Parliament or the President had failed to fulfil constitutional obligations. The applicant, through her counsel, L. Madhuku argued that the preliminary was meant to push the court to avoid the matter based on a technicality. DCJ Malaba (as he then was) felt that this was a personal opinion since no cause of action had been shown.³³⁶ CJ Chidyausiku also felt that the applicant had put the cart before the horse since she had not exhausted internal remedies.³³⁷

From the above, it becomes clear that the avoidance doctrine prevented the Constitutional Court from getting to know why the litigant felt that the bond notes were prejudicial. The Press Statement from the Minister, presented as an appeal, clearly shows why members of the public should have been allowed to challenge the bond notes on merits. *Mujuru*, as a political party representative, stood a percentage of public interest ability to represent his supporters and the

³³⁴Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, SI 133-2016, gazetted on 31 October 2016.

³³⁵Perhaps Zimbabwe would also have benefited had someone went back to court in this regard. In the United Kingdom, a citizen, one Miller went to Court to challenge the UK Government for wanting to pull out from the EU using the royal prerogative and without involving Parliament, see *R (Miller) and Another v Secretary of State for Exiting the European Union and Another*, 2017. The same happened in South Africa where the South African Government wanted to pull out of the International Criminal Court without having gone to Parliament. In Both cases, the Courts ruled that Parliament was supposed to have been involved.

³³⁶See T. Kamhungira, ‘*Con-Court Throws out Mujuru’s Bond Notes Case*’, Daily News, 16 February 2017.

³³⁷This case clearly shows how the avoidance doctrine is located within the doctrine of subsidiarity. It was also not surprising to hear the then DCJ stating that the Constitutional avoidance reference was a personal opinion since he himself is a fan of the doctrine.

generality of the citizenry. Further, the argument on the lifespan of the bond notes was meritoriously presented.

4.5 The contribution of the lower and High Court to the jurisprudence on constitutional avoidance

The Evan Mawarire case (unreported magistrates case)

The Magistrates Courts in Zimbabwe have been using the Constitution to protect the rights of citizens in strategic cases. The Harare Magistrates Court for instance used the constitutional provisions in an impact case to promptly release accused persons who were either not advised of the charges that were altered in court³³⁸ or who had been arrested beyond the constitutional 48-hour limit.³³⁹ Based on the impact presented by the two cases to the jurisprudence on the rights of arrested persons, the researcher had a court visit where he searched the court records on the two critical cases on strategic litigation. The two cases were heard by the former Provincial Magistrate for Harare, Esquire Vakai Chikwekwe. From an analysis of the judgment, this researcher found that there is a great deal of reasoning in the two cases as they proceed from using the Constitution even where an accused person is facing a seemingly serious offence. Once an allegation of a constitutional breach by the State institution such as the Zimbabwe Republic Police is successfully made by a litigant, the lower courts have been seen to protect the citizen's right in such cases.

For instance, the State prosecutors had sought to amend, in court, the charges of Pastor Evan Mawarire from the one preferred at the Police Station, that is, public violence to subverting a constitutionally elected government. It was strategically and rightfully submitted on behalf of the accused, that the stance that was adopted by the State was improper because the charge that the accused was not originally charged with the crime that the State sought to prefer. The Court made a landmark ruling that had its basis in the Constitution. The Accused was promptly released before the preferred charge could be canvassed in a court of law.

Generally, the finding that was made by the lower Court affirms the constitutional argument that the reach of constitutional rights is expanded by an approach wherein rights are generally

³³⁸*S v Evan Mawarire*

³³⁹*S v Bernard Manyenyeni* CRB 9079/16

construed in favor of the individual and derogations from rights and freedoms receive a strict and narrow construction.³⁴⁰ Added to this is the generous and purposive interpretation which considers the spirit as well as the letter of the constitutional provision in question and seeks to give full recognition and effect to the fundamental rights stated therein.³⁴¹

S v Manyenyeni, CRB 9079/16.

Apart from the *Mawarire* case, the Harare Magistrate Court has also been quick to use the constitutional provisions in the *Manyenyeni* case. The mayor for Harare was arrested by the Zimbabwe Anti-Corruption Commission (ZACC) beyond the prescribed. It used the records from the ZACC to affirm the constitutional position. That position was also made in light of the conventional legal positions which seek to protect the rights of accused persons in instances where the evidence presented on behalf of the State amounts to nothing but a version which has the same weight as the accused person's version. The raising of the constitutional breach of the 48 hour period was strategically done and the jurisprudence on the right to liberty was remarkably developed by a lower court.

The *Manyenyeni* case affirms the argument in constitutional rights that the Constitution is construed as a whole, taking each provision in context as human rights are interactive values aimed at achieving similar goals.³⁴² The research also made a finding that the *Manyenyeni* criminal case also dovetails with the method of interpreting the Constitution using a dynamic approach which treats the Constitution as a living instrument, taking full account of changing conditions (the 48 hour statutory limit), social norms (rule of law requirement and the need to believe the accused person's version where the evidence against him is 50-50) and values (rule of law as envisaged in section 3 of the Constitution) so that it remains flexible enough to meet newly emerging problems and challenges.³⁴³ The refusal by the lower court to place the accused on remand upon making a finding of the breach of the 48 hour statutory limit gives credence to

³⁴⁰ *Minister of Justice v Bickle and Others* supra note, @446-447, *In Re Munhumeso and Others*, supra note @559D, *Rattigan and Others v Chief Immigration Officer* supra note @185F

³⁴¹ *Smyth v Ushewokunze and Another* 1998 (3) SA 1125 @1134E

³⁴² *Rattigan* case, supra note 343 @185F, *R v Lyons* (1987) 2 SCR 309@ 326.

³⁴³ *Minister of Home Affairs v Bickle and Others* 1984 (2) SA 439 (ZSC) @447G, see also *Smyth v Ushewokunze and Another* 1998 (3) SA 1125 (ZSC) @ 1134E and *Rattigan and Others v Chief Immigration Officer* 1995 (2) SA 182 @ 185G-186A.

the need to treat constitutional rights as primary, and the limitations placed on them as secondary.³⁴⁴

4.5.1 Analysis on the contribution of the lower and High Court to the jurisprudence on Constitutional avoidance

This dissertation made a finding that there is great reference to the constitutionality or otherwise of laws by the High Court. There are two cases that were chosen in this research to demonstrate how the Court has been proactive in determining the constitutionality of laws that are not in tandem with the Constitution.³⁴⁵ Further, a scoping examination of a plethora of cases that bear on the Constitution reflects that the judges of the High Court seem to have brought a positive impact on the constitutional rights trajectory. This has enabled the general citizen to lead a normal life either due to temporary relief or final relief.

In addition to the two cases, the research also referred to other progressive judgments such as on referring constitutional cases for confirmation³⁴⁶ or otherwise by the Constitutional Court are a positive step in the development of constitutional jurisprudence. However, there are challenges that are still faced by litigants in impact litigation at the High Court. The above cases have been widely publicized in the media, both in the State and privately owned media. The publicity cannot be separated from the proactive role of the High Court. This augurs well with the argument for the need of going beyond single test case to:

*‘A litigation program aimed at accumulating a series of favourable decisions changing constitutional law. An incremental approach emphasizes narrow factual issues and specific claims, and groups with large legal staffs and cooperating attorneys are strategically positioned to conduct litigation in this way. Litigation of this kind has achieved changes in the constitutional doctrine governing racial segregation, criminal procedure, selective service, religion and employment’.*³⁴⁷

Added to the above are issues that revolve around the courts such as the timing of the applications³⁴⁸, the lack of consensus on what amounts to grounds of appeal³⁴⁹; the descending of

³⁴⁴See *Rattigan* case supra note 343.

³⁴⁵*Nyika and Another v Minister of Home Affairs and others* supra note 42 and *Mangwiro v Minister of Home Affairs and Others* supra note 1.

³⁴⁶*ibid*

³⁴⁷Hakman Nathan, supra note, page 127.

³⁴⁸In many instances, this researcher was asked by judges as to why most strategic cases are brought as ‘nocturnal applications’, a reference to cases that are brought at night. Most of the clients travel for long distances and lawyers

the presiding judge into the arena; the issue of costs of litigation and the role between fission and fusion of the profession. Linked to this is the fact that the order of the court usually becomes a *brutum fulmen* because the order is not respected by the police³⁵⁰; the litigant lawyer does not go back to court to confirm the final order. This finding was made through a face to face interview with a senior human rights lawyer who felt that strategic litigants are sometimes to blame and contribute to situations where judges dismiss constitutional matters based on technicalities. They are satisfied with temporary relief and abandon the case which in essence, should be heard on the merits. Temporary relief is usually given on an interim basis without occasion by the Court to deal with the merits of the case³⁵¹.

Despite instances where the Constitutional Court has made huge strides in declaring certain statutes to be invalid³⁵², very little has been made in speeding up the determination of the constitutionality of limitation statutes. Even the respondents in the academia whose attachment to constitutionalism is not wholly legal-the political science students³⁵³ and those that are not very familiar with the rigmarole of court procedures-were typically able to register their concern with the seemingly ineffective way in which the progressive judgments on limitation statutes are taking time to be confirmed. More than three out of four students felt that the judgments were not considering the challenges that were faced by the applicants who were still in pain or had been brutally attacked.

in strategic litigation usually get instructions and late and prepare the application towards the end of the day to avoid having the matter lose its urgency.

³⁴⁹The judges of appeal at the High Court seem to be entangled in this mantra. They simply force litigants on strategic litigation cases to withdraw on the basis that grounds of appeal are not clear. The rules of the Court that are referred to are not explained. In situations where the PIL lawyer tries to explain his case using the case law, the presiding judges usually do not allow the lawyer to do so. The end result is that they resort to literal interpretation of the so called 'bad grounds'.

³⁵⁰ In the case of *In re Prosecutor General* the Court had to threaten the then Prosecutor General with the revocation of his practising certificate to force him to comply with the court judgment. Further, the delays by the Constitutional Court in confirming or declining to confirm matters that are referred to it by the High Court are saddening.

³⁵¹ In an interview with a senior lawyer who chose to be anonymous, he indicated that the gains of progressive judgments that are made when temporary interdicts are given are ultimately reversed by the failure by lawyers to go back to court to have the matter heard on the merits. As such, this is not health to the development of strategic cases that bear on the Constitution. This in a way also clothes judges with the feeling that some strategic cases are only done to burden the courts with a backlog of incomplete cases. As such, they feel that they are justified in dismissing some cases on technicalities (Chapter 5:11)

³⁵² Such as the Marriages Act (Chapter 5:11), and the Customary Marriages Act. (Chapter 5:23)

³⁵³ The students were asked to indicate their views when they were asking the researcher about the 'empty noise' doctrine as related to claims against the State. The researcher, a lecturer at the Department of Political and Administrative Studies, asked them to show their comprehension of the time lapse between the judgment of the High Court and the time that has been taken by the Constitutional Court to confirm or decline to confirm the two cases.

In essence, their concern was that the Constitutional Court is deliberately avoiding to confirm the orders in the two cases because one of them has a lot of bearing on State assets and vertical accountability. Even without having detailed cue of court procedures, many respondents, considered as part of the secondary population, identified themselves with the applicants who were injured or had their property confiscated by the Police. They also placed themselves on the constitutional strata and were more concerned with the role of the Constitutional Court judge in affirming the roles of the High Court judges in developing the Constitution. As their responses indicated, this dissertation found that the delays occasioned by the Constitutional Court may in turn affect the future of strategic litigation in that litigants who have been affected by the conduct of state actors or members of the security forces would be reluctant to go to court. In fact, they consider the court to be abdicating from its role of ensuring that there is both vertical and horizontal application of the Constitution.

4.6 Analysis on the role of interest groups in advancing the constitutional jurisprudence through impact litigation

This dissertation found that interest groups such as Veritas have been on the forefront in laying out the constitutional issues in key cases such as the death penalty on their home pages. In that way, the finding from case law gains dovetails with the finding from literature on the role of impact litigation. It has been argued that:

*‘When litigation is controlled by interest groups, constitutional issues are likely to be advanced and developed at the trial level. The ‘perfecting of a trial record’ also gives adversaries an opportunity to debate broader issues that are likely to be considered on appeal’.*³⁵⁴

The implications of utilizing public interest litigation in human rights cases are clear. All lawyers, whether trained in strategic litigation or not, now enjoy the benefits of not discharging the onus to show that their client is a proper candidate for bail.

Through a review of a judgment of the Constitutional Court, this research made a finding that sometimes the judges of this Court are not immune from criticisms, based on their unanimity in conceiving the avoidance doctrine. And the strategic lawyer and his litigant are not the faulty party or the contributors of the case’s downfall. The Constitutional Court could not win this

³⁵⁴Hakman Nathan, *supra* note 126, *ibid*

researcher's admiration judging from its line of reasoning in the *Chawira*³⁵⁵ judgment, for, despite the reference to the doctrine, they neither canvass the doctrine, nor justified why it was linked to other doctrines such as ripeness and judicial review. The doctrine of ripeness that was referred to by the court is indeed crucial in situations where cases are brought too early before a court of law, but all the judges, none of which, in their concurrence, showed why they accepted the fact that the litigants were supposed to wait for the determination of their appeal, approach the President for pardon or commutation of their sentence from the death penalty to life imprisonment.

Ripeness as a doctrine was not applicable because the Constitutional Court failed to demonstrate in the entirety of the judgment how the litigants, who were referred to as condemned prisoners awaiting execution, could be said to have been suffering from no prejudice. From a constitutional perspective, they have the right to life.³⁵⁶ The Court did not demonstrate that the applicants deserved a criticism-proof condemnation: it ended on labelling them condemned prisoners awaiting execution yet indicated that the doctrine of ripeness was not tilting in their favour; the Supreme Court, which the Constitutional Court wanted to give them a remedy which it believed would be successfully granted, is not the apex court in constitutional issues.

Further, it was not ingenuously sufficient to recognize the success or otherwise of the applicants' case at the Supreme Court as the basis to disclaim its powers of judicial review. That, of course, is what strategic litigation entails? If the Constitutional Court sloughs of its responsibility: the rigmarole of civil procedure, the pain of uncertainty in waiting for death, the anxiety occasioned by the delays in passing judgment, the amount of the cost of litigation-then how come the litigants are condemned prisoners? On the basis of the armchair reasoning and undue flirtation with the ripeness doctrine and avoidance doctrine, this dissertation argues that the *Chawira*³⁵⁷ decision is a 'tragedy' to the right to life. This is because the avoidance of the determination of the constitutionality or otherwise of the death penalty remains clothed in a measure of policy than law.

³⁵⁵Supra note 1.

³⁵⁶Section 48 of the Constitution

³⁵⁷Supra note 1

The judgment was premised on the fact that there is no executioner, and as such, the death-row inmates may not be hanged soon. The approach amounts to perceiving the right to life through the ‘*traditional*’ or general litigation lenses on the need to exhaust internal remedies. It abandons the modern and growing conventional jurisprudential analogy that the Constitution is an extraordinary statute whose interpretation is generous, holistic, and innovative. It also defeats the very ethos of the Constitution which broadens the *locus standi* provision. That provision also empowers a competent court that is chosen by the litigant to grant the remedy of a declaratory order-which was a practical remedy in the *Chawira* instance.

A reading of the decision also reveals that the Constitutional Court got obsessed with the procedural dimension of court applications than the need to give effect to the provisions of the Bill of Rights Chapter as is contemplated by the Constitution. The judges relied on a conventional test of the avoidance doctrine in such an important case that bears on constitutional law and state policies relating to the sanctity of human life. At least a dissenting judgment would have justified why the avoidance doctrine would be exceptionally used in this case. In fact, the judgment had been delayed because the litigants had to wait for another case that was similar to theirs. This case was not pursued with the zeal demonstrated by the litigants.

Notwithstanding the above fact that the judgment appreciates, and provides the emotional and legal background in this case, the court considered the litigants to have come with an unripe case. It was clear that they had waited for long to have their matter decided. They were wrongly at the deep end since the Court appreciated the fact that they had an arguable matter. The reasoning could inevitably set for a scrutiny of the doctrine of ripeness. This led to an overreaction from some academics who felt that:

From the foregoing, the Constitutional Court’s unanimous decision in dealing with the pillar of the avoidance doctrine which deals with the need for courts to skirt constitutional issues is considered to be wrong in this research. As the *Chawira* judgment hinted, it is sad to note that 8 judges, statistically representing a 100% approval rating of the application of avoidance doctrine, chose to sacrifice the right to life at the altar of technical expediency. The need to avoid proffering an explanation of the relevance of the avoidance doctrine to this case mattered slightly more, compared with the comprehensive treatment of the need to exhaust internal remedies.

Documentary research criticized this judgment as a biggest letdown to the development of jurisprudence on the basis of avoiding constitutional issues in matters that involve the sanctity of human life. It showed that the doctrine of ripeness and *locus standi* are elements of justiciability that are used by courts to exercise their powers of judicial review. It was found in this dissertation through scrutinizing the judgments of the Constitutional Court that the skirting of the constitutional issues was improperly linked to other elements of justiciability such as ripeness. It is in this regard that the apex court on constitutional issues, the Constitutional Court, is urged to adopt the High Court approach in constitutional reasoning.

To buttress this view, the researcher interviewed a constitutional law expert on 6 June 2017 who had this to say:

“My friend, the constitutional court is no ordinary court. Those who go to the court thinking along those lines do so at their own peril. Seriously you think a whole judge of the Concourt would rush to confirm the Mangwiro decision which says that state property is not immune from attachment. You must be joking. What if the litigant says honourable judge of the constitutional court let me start by attaching the bench?”

The above concerns were buttressed by the concern of state lawyers referred to the need to have judges who adopt middle- of the road stance. His concerns were that: “remember this counsel, judges are moulded differently. They can make an impulsive decision today, and dissociate themselves with it tomorrow, it is normal. There are clear cases which pose serious problems for the judges. The bond note is one such case. Do you think the judges did not know that bond notes were coming? And do you think the judges did not read the possible outcomes of a successful bond notes challenges? He played the politics of waiting but it worked. Sadly this is a worst case scenario in impact litigation”.

4.7 Discussion and implications of the involvement of interest groups

As highlighted above through interviews with key respondents, documentary search and scrutinizing judgments, it was shown that the benefits of impact litigation do not come easily. They must be obtained through persistent resort to the Constitution and innovative litigation. The must ensure that the benefits from impact litigation and determination of constitutional issues in various cases are realized depend on both the litigant and the judge. The strategic litigation lawyer and his client must always be prepared to meet the liberal and orthodox judge. Similarly,

the judge must be prepared to refer to the Constitution when dismissing or granting the relief that would be sought by the strategic litigant.

As indicated in this dissertation, there are several instances where litigants in strategic or public interest litigation at the High Court have successfully managed to obtain progressive relief that bear on constitutional rights. The judge at the High Court has been an epitome of judicial activism and a constitutional guardian. It is thus not a mountainous task for the Constitutional Court to attain this remarkable feat. However important steps need to be taken by both the litigant and the court. For instance, on the part of the litigant, this research argues that the implication of this finding bear on the way that superior courts receive impact litigation cases.

The litigant must address the peculiarities of the averments; must always furnish the judge with the relied constitutional cases to avoid excuses from the judge; and must understand the individual judge. There is also need for litigants to be familiar with the rules of practice in superior courts; rules of courts; and being equipped to deal with the bench which frequently descends into the arena. Of importance is also the need to consider the reporting of impact litigation cases at various forums such as the ZIMLII platform on the internet and on Veritas. A scrutiny of sources of law such as law reports also revealed that there is selective acceptance of various cases.

On the part of the Court, there is need to develop the capacity of judges to appreciate the role of interest groups and to encourage them to deal with both the technical and merits of the case. This would ultimately equip the presiding judge with the necessary information to bring matters to finality using access to justice as the measure. Judges must also improve their level of education on judicial reasoning. This enables them to independently ventilate on the merits of issues without resorting to emotions or rules of the thump. The judge would be able to appreciate the merits of the case; properly weigh their constitutional worth; and assess their worth with the failure to adhere to the rules of the court or other such rules that amount to technical arguments.

4.8 Findings on the link between constitutional interpretation and the doctrine of constitutional subsidiarity in impact cases

The subsidiarity doctrine has been yielding negative impacts in constitutional matters. The doctrine whose origin was in South Africa was also used by the Constitutional Court of

Zimbabwe in key impact cases as has been shown in Chapter 1 above. It may be important to also consider the views from constitutional lawyers so that this court can test between fact and expert opinion as regards the effect of some of the cases that are decided on technical arguments. Because the Constitutional Court has been vacillating in its jurisprudential approach, a constitutional lawyer who was interviewed in this research, whose identity cannot be divulged for professional reasons remarked on 6 June 2017 that:

“We thought that the Constitutional Court was going to adopt the “no hands must drip with blood” ad infinitum. Maybe it was because the timing of the case was made during an election year. Jealous Mawarire played his cards well. Constitutionally speaking, he was very right in approaching the court under section 85. He asserted his right to vote under the political rights in section 67. An election date was pronounced by the president’ (underlining is mine).

The constitutional lawyer further remarked that judges of the Constitutional Court are now reluctant to adopt the “Mawarire approach”. He stated that:

“If you think all Concourt judges think the Mawarire way, well, wait a bit. You need to consider the bond notes challenge where you are told there are not yet in circulation, come back here later when the legal framework is established or when the bond notes are out. What do you do? Go back to the court to worst your time-you will be told that it’s the national policy, it’s now academic, a moot exercise’.

The above finding puts to rest the need for litigants to think outside the fact of seemingly bad cases. Litigants can forget the constitutional losses that were brought by the Mawarire decision such as those on lack of security sector reforms, electoral reforms, alignment of electoral laws with the constitution and so on. They need to argue around the principle of “no hands drip with blood” to force the Constitutional Court to reach the merits of impact cases. The views expressed above also shed light on how avoidance can be used to continuously allow the Constitutional Court to decide matters on technical arguments such as ripeness or mootness. Ultimately, the gains of the liberal language and form of legal standing under the Constitution are not being realized. In utilitarian argument, the legal standing ought to maximize pleasures of liberalism and minimize the demerits of conservatism. The following cases show how the constitutional court has been using strange interpretations to create variant forms of the avoidance doctrine:

Majome v Minister of Justice, CCZ 14/16

In refusing to entertain the case which was based on the need to protect freedom of choice of the media to listen to, the DCJ Malaba (as he then was) referred to the doctrine of subsidiarity and alternative remedies. This case went to the extremes and it is better if the important aspects are exclusively reproduced. For instance, the court found that:

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

While the use of foreign law or persuasive authority is allowed by the Constitution, this is usually done where there is a lacuna in our law. The lacuna cannot be simply an absence of a previously decided case on subsidiarity. The court was supposed to embark on the need to distinguish between substantive and adjectival subsidiarity. The Court did not make a finding in this regard and clearly created a bad precedent that ignored the substantive arguments that were raised by the applicant. While ending on adjectival or procedural subsidiarity, the Court also made a finding that:

Disguising an attack on the validity of conduct as an attack on the constitutionality of legislation governing that conduct cannot save the applicant from the requirements of the principle of subsidiarity. What the applicant is complaining about is the alleged violation of the right to fair and unbiased administrative conduct by the ZBC. That right is protected by para. (d) of Part 1 of the Seventh Schedule as read with s 3 of the Administrative Justice Act. The Administrative Justice Act provides the remedy for the enforcement of the protection of the right in question.

With the exception of para. 1 of the relief sought which relates to the constitutional invalidity of the specified provisions of the Act, there is no declaration sought to the effect that the conduct of the ZBC is unconstitutional in that it infringes any of the fundamental rights and freedoms listed. The Constitution confers power on a court under s 85(1) to grant appropriate relief to an injured person who has approached it for relief. It is not the business of a court to grant relief to an applicant whose fundamental rights or freedoms have not been violated. He or she would be an uninjured applicant. A court does not grant relief to an uninjured applicant. A relief that does not contain a declaration of a finding of infringement of a fundamental right or freedom and ipso facto constitutional invalidity of the conduct or legislation under attack has no legal justification.

The substance of the relief sought by the applicant is the exhortation by the court to the respondents to discharge their constitutional obligation to respect, protect, promote and fulfill the applicant's fundamental rights and freedom. It is not the duty of a court to remind other duty-bearers to observe their duties in the absence of proven infringement of a fundamental human right or freedom.

The above can never be bettered. The Court is the national arbiter and custodian of the Constitution. The Constitution now enjoins the State and its institutions to respect, protect, promote and fulfil their obligations on fundamental rights. Surely the Court was disingenuous in making a finding that it cannot remind other institutions to observe their duties when the same court accepted that or at least read into the argument that the applicant was challenging some of the provisions of the Act concerned. This was supposed to have been done considering the fact that the applicant had also included the effect of the Act on her political party.

Even if it is to be admitted that the basis for the above finding was also made after consulting South African cases and authors Woolman and Bishop, the Court's approach flies in the face of the alignment exercise that Zimbabwe is currently involved in. The Act concerned was promulgated before the Constitution and there is need for Courts to always interpret the Constitution as the supreme law. The South African position is premised on the fact that administrative laws such as the Promotion of Administrative Justice are constitutional statutes. Zimbabwe's Administrative Justice and the Broadcasting Services Act are not constitutional statute. The approach that was used below gives the impression that the Constitutional Court is interpreting the Constitution using ordinary statutes. The Court stated that:

The question of the validity of conduct which falls within the ambit of a law of general application cannot be determined by reference to the Constitution. It must be determined by reference to the provisions of the law of general application unless the constitutionality of that law is itself being attacked. Woolman and Bishop- "Constitutional Law of South Africa" 2 ed Juta Vol. 2 at pp 34-47-34-48 comment as follows: "To say that only "law of general application" may justify the impairment of a fundamental right means that conduct- public or private- that limits a fundamental right but which is not sourced in a law of general application cannot be justified."

The Constitutional Court's finding on alternative remedies can also not escape scrutiny. In relation to alternative remedies, the Court stated that:

The court has proceeded to examine the matter further on the basis of the principle that an application falls or stands on the founding affidavit and that "appropriate relief" under s 85(1) of the Constitution gives a court wide discretionary power to grant relief that is different from that claimed. The determination of appropriate relief calls for the balancing of various interests that might be affected by the remedy. The balancing must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right, secondly to deter future violations, third to make an order that can be complied with and fourth achieve the objective of fairness to all who might be affected by the relief.

The four aspects that were considered were simply left floating in thin air. The liberal standing provision in the Constitution allows courts to grant remedies in form of a declaration of rights. It also exhorts courts to grant the remedy even where it feels that the applicant has contravened a law. The Court in this case had wrongly ended on the fact that the applicant had disguised wrong conduct as an attack on the constitutionality of the Broadcasting Services Act. In simple terms, this case demonstrates that the applicant had already been affected when she was made to pay a license that she felt did not prejudice her interest or those of her political party. The 'Mawarire' approach (supra note 3) was supposed to be considered in this case. Just like the Court called the executive to call for an election, the Court was also supposed to lead in the provision of lasting solution to the arguments on the constitutionality of the case.

In the CCJP case (supra) the court cited section 24 (4) of the Lancaster House Constitution which empowered the Supreme Court to:

'...make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or seeking the enforcement of the Declaration of Rights'.

The Court in that case also considered the use of its discretion in providing an appropriate remedy. Citing In re Mlambo 1991 (2) ZLR 339 (S) at 355 C (1992) (4) SA 144 (ZS) @ 155J, the Court refused to use the proviso that empowered it to decline to exercise its powers where other and adequate means of redress are available to the complainant on the basis that it was not mandatory. Even when the Constitutional Court felt that a law of general application had not been followed, the Constitution is clear that the dirty hands doctrine is no longer part of Zimbabwean law. The Court was supposed to use its protective role to protect the applicant and her political party in terms of the fundamental rights. In Fig 4e below, 9 judges did not consider the doctrine what appropriate remedy was.

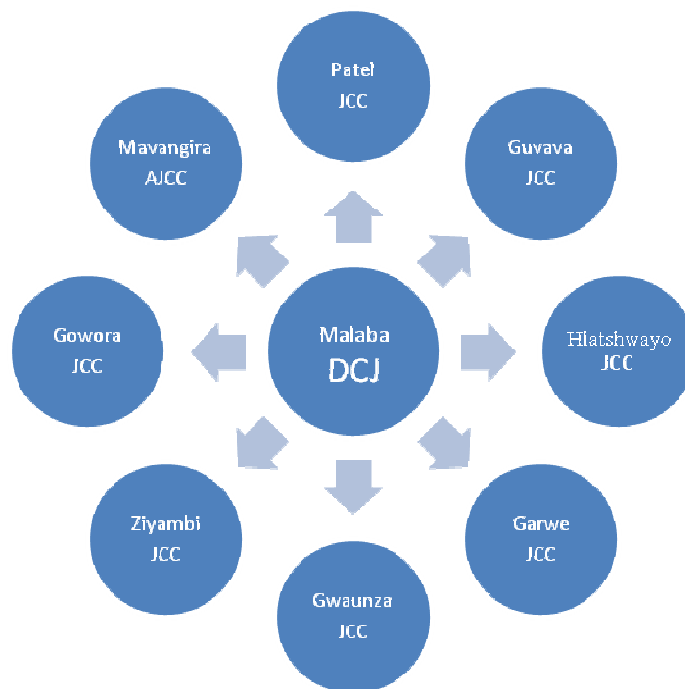


Fig 4e above shows again that the 8 judges agreed with the DCJ in using the subsidiarity doctrine to avoid the merits of the Majome case. The end result was that all citizens have been forced to pay ZBC licenses even in instances where they do not listen to ZBC. The line of argument that the applicant had not first challenged the constitutionality of the Broadcasting Services Act was neither here nor there. The Constitutional Court was simply supposed to use the strategic implications of this case to make an informed decision that would have properly allowed for a win-win situation between ZBC and the general citizen. For instance, those who have modulators and use various frequencies to play their music have to be treated differently from those who play music on cassette tapes or compact discs.

From the *Majome*³⁵⁸ cases, documentary search revealed that the normative framework under the Constitution must fit well into the methods of constitutional interpretation that have been avoided as by the Constitutional Court as shown above. Surprisingly the Court has been prepared to use other methods of interpretation such as purposive interpretation³⁵⁹. This method of interpretation:

³⁵⁸*Majome v Minister of Justice*, CCZ 14/16

³⁵⁹See the Mujuru decision, *supra* note 9

*‘Pinpoints a legal meaning that realizes the purpose of the constitutional provision. It recognizes the presumption that the language of a norm provides information about its purpose. To be sure, purpose must remain within the limits of language. The interpreter need not necessarily learn the purpose from reading the language of the text’.*³⁶⁰

*In particular, purposive interpretation has three components: **language, purpose, and judicial discretion**. Interpreters must rely on both language and purpose in the hard cases and they must exercise judicial discretion... According to the social needs, a clear knowledge of comprehensive and general provisions of the Constitution refers to the interpretation that can be adapted to changes of the social. After all, the essence of constitutional interpretation is the selection of the most appropriate interpretation regarding to the purpose of constitutional provision. Because if we rely upon only the operation of logic nearly to ignore the constitutional reality, it is difficult to fully reflect the purport and purpose of the Constitution’.*³⁶¹

The finding above also dovetailed with documentary search from Marmor (2005) which revealed that there are a multifarious uses of ‘interpretation’ which might be adopted. The Deputy Chief Justice, as he then was, preferred the purposive interpretation because it suited the provision that related to marriage and founding a family.

Although the Government wanted the court to adopt an ordinary meaning, documentary search showed that judges are allowed to discard ordinary meanings in some instances where the pursuit of justice requires a careful approach. In essence, ordinary meanings must not be ignored, but must also be used with caution. This is because:

*‘The concept of interpretation is vague due to borderline cases of ‘interpretation’; and there are broad and narrow senses of interpretation-the broader calling for an ‘explanation’, or ‘understanding’, or ‘theorizing’ as such, and the narrow sense that needs no explanation. In the narrow sense, judges interpret the law, they do not purport to explain it.’*³⁶²

As such, the academic, as part of the consumer population of the judge’s reasoning, has to grapple with the permissibility or otherwise of a narrow interpretation of the Constitution.

The judgment is however silent on when the laws that were inconsistent with the Constitution became first became invalid. It has been argued that an unconstitutional law becomes invalid at

³⁶⁰Hoa, supra note 67

³⁶¹Ibid, ‘The Korea Constitutional Culture and Constitutional Court’s Interpretation – The Comparative Study of U.S. Supreme Court’s Constitutional Interpretation’ (2016) page 341-42, Journal of American Constitutional Law, Vol. 27. No.1.

³⁶²Andrei Marmor, supra note 217, page 9.

the moment the Constitution comes into effect.³⁶³ The rationale for this reasoning comes from the supremacy clause in the Constitution which invalidates all law, practice, custom or conduct that is inconsistent with it. When making an order of invalidity a court simply declares invalid what has already been made invalid by the Constitution.³⁶⁴ Illustratively, the judge in the *Mudzuru* case did not make this finding but was simply making an order of invalidity by simply declaring the inconsistent legal provisions in the Marriages Act and Customary Marriages Act as well as Unregistered Customary Law Unions invalid, but they had already been invalidated by the Constitution.

Because the law was challenged in litigation under the Constitution, its invalidity was correctly assessed in terms of the Constitution. Some jurisdictions such as South Africa allow litigants to either have their disputes decided by the courts using the interim or final constitution under the doctrine of objective constitutional validity.³⁶⁵ In other words, nothing prevents an applicant whose cause of action arose after the commencement of the 1996 South African Constitution came into force from arguing that an old-order law was invalidated by the interim Constitution.

In interpreting the *Mudzuru* decision, the Constitutional Court did not also prescribe a method of for dealing with constitutional challenges to legislation. This research found that some courts in South Africa such as the Supreme Court of Appeal have had occasion to set out a standard formula for dealing with constitutional challenges to legislation. This formula is to be used by judges and magistrates. It was laid out in *Govender v Minister of Safety and Security*³⁶⁶ and includes the fact that the judges are required to:

- (a) *Examine the objects and purport of the Act or the section under consideration*
- (b) *Examine the ambit and meaning of the rights protected by the Constitution*
- (c) *Ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms to the Constitution, i.e. by protecting the rights therein protected*
- (d) *If such interpretation is possible, to give effect to it, and*
- (e) *If it is not possible, to initiate steps leading to a declaration of constitutional invalidity.*

The Constitutional Court however dealt with the above factors as it is clear that there were Acts referred to above which were considered. These Acts were considered in light of the marriage

³⁶³ I Currie and Johan de Waal 'The Bill of Rights Handbook' (2013) Page 43, 6th Edition, Juta.

³⁶⁴ *ibid*

³⁶⁵ Following the reasoning of Currie and de Waal, *ibid*

³⁶⁶ 2001 ZASCA

rights in the Constitution which set eighteen as the age of marriage.³⁶⁷ The court preferred a purposive approach and rejected an ordinary meaning. The preferred method was given full effect as per the case law cited and also in line with the interpretation section in the Bill of Rights.³⁶⁸ The net effect of the above is explained in this study as helping to show that constitutional interpretation involves the power of the judiciary (typically the supreme or constitutional court) to determine issues of profound moral and political importance, on the basis of very limited textual guidance, resulting in legal decisions that may last for decades and are practically almost impossible to change by regular democratic processes³⁶⁹.

Through a perusal of the judgments of the judges of the superior courts, this research found that the problem with constitutional interpretation is that most judges have not been introduced to new methods of constitutional interpretation, which involve distinguishing statutory methods from constitutional methods. If the courts which seat as competent constitutional courts and the Constitutional Court were to open up to the new methods of constitutional interpretation, they were going to adopt or go beyond the approach that was adopted in the *Mudzuru* decision. Furthermore, the purpose of the Constitution is found in key provisions such as the preamble,³⁷⁰ supremacy clause³⁷¹, founding provisions³⁷², obligation clause,³⁷³ and the application provision of the Bill of Rights³⁷⁴, interpretive provision,³⁷⁵ rights-responsibility provision,³⁷⁶ general limitation clause³⁷⁷, special limitation clause³⁷⁸ and definitions section³⁷⁹, common law or self-

³⁶⁷ See section 78 of the Constitution

³⁶⁸ Section 46 of the Constitution

³⁶⁹ Ibid, page 141. In Zimbabwe however, it is important to bear in mind the importance of section 176 of the Constitution which allows superior courts to regulate their own processes.

³⁷⁰ Reflected by the, '*We the people of Zimbabwe*' clause.

³⁷¹ Section 2 of the Constitution shows that the Constitution is supreme and any law, practice, custom or tradition that is inconsistent with it is invalid to the extent of its inconsistency.

³⁷² Section 3 of the Constitution lists various principles such as rule of law, separation of powers, constitutionalism, good governance and so on. The Constitutional Court in the *Chawira* judgment was not supposed to rely on the failure to appoint an executioner to prejudice the death row inmates who could have had such a practice declared invalid.

³⁷³ Section 44 of the Constitution places four duties on state institutions, including the courts which are: to protect, promote, respect and fulfil the obligations in the constitution.

³⁷⁴ Section 46 obliges the courts to use international law in interpreting the Bill of Rights.

³⁷⁵ Section 45 of the Constitution

³⁷⁶ Section 47 envisages a situation where rights are enjoyed in light of the responsibilities that the individual right-holder has to other right-holders.

³⁷⁷ Section 86 places general limitations to the rights found in the Bill of Rights, from section 48 to 84. These limitations include public morality, public health, defence, town planning and so on.

³⁷⁸ Section 87 is a special provision which speaks to the need for right-holders to bear in mind that a state of public emergency may limit the citizen's rights.

regulation provision³⁸⁰. In contrary, the purpose of the Statute is found in its long title³⁸¹ or the Schedule or some conventional rules.

Using the *Mudzuru* judgment to illustrate the importance of constitutional interpretation, it becomes clear that the court had the methods in mind, although they were not referred to in express terms. The Marriages Act³⁸² is a law, in form of a statute, which states that a 16 year old girl can be married. The Customary Marriages Act³⁸³ is a law which does not even mention a minimum age of marriage. As such, practices such as levirate, *in utero*³⁸⁴, and religious marriages were at variance with the age of majority that is stated in the Constitution. Clearly, the court was using the supremacy clause to arrive at its well-reasoned judgment that bears on the protection of the rights of women. It ultimately led to the Constitutional Court being recognized internationally³⁸⁵ and receiving progressive reviews in established human rights journals.³⁸⁶ Further, the Court also set the pace of the alignment of criminal laws with the Constitution, though still at a snail's pace.³⁸⁷ In addition, the judgment that used the purpose of a supremacy clause also invigorated the role of oversight institutions in dealing with the rights of women.³⁸⁸

In situations where the avoidance doctrine was invoked, this research found that the Constitutional Court has also been progressive in setting the pace for the aligning of laws with the constitution. However, it has been skirting constitutional issues in many ways,

- a) *It refuses to accede to the requests to interpret the functions of respondents in PIL cases*
- b) *It links human rights to the rigmarole of civil litigation procedures so as to enable it to skirt constitutional issues.*

³⁷⁹Section 332 of the Constitution

³⁸⁰Section 176 obliges the superior courts in Zimbabwe, the High Court, Supreme Court and Constitutional Court of Zimbabwe to develop the common law and to regulate their own processes. In this light, the CCZ was supposed to develop the common law position in relation to invoking the doctrine of ripeness in constitutional issues.

³⁸¹For instance, the Administrative Justice Act (Chapter 10:28) has a long title and a schedule as explained below.

³⁸²CAP 5:11

³⁸³CAP 5:23

³⁸⁴Commonly called *kuzvarira* in the Shona vernacular or pledging in the criminal Law (Codification and Reform) Act, CAP 9:23.

³⁸⁵It received an award in 2016 in Uganda where Chief Justice Malaba, then the deputy Chief Justice, was the recipient on the CCZ's behalf.

³⁸⁶The African Journal of Human Rights published by the University of Pretoria.

³⁸⁷For instance the *Mudzuru* judgment was made in January 2017 but up to now, there are laws that still consider girls who are 16, but are below the age of 18, to be treated as adults.

³⁸⁸Rights-institutions such as the Justice for Children's Trust (JCT) have been visible on Broadcast media such as Star FM, discussing the importance of the strategic judgment such as the *Mudzuru* judgment on the program, 'Issues'. They have also attended the programs with parliamentarians such as the Epworth MP to discuss issues that still affect women such as child prostitution.

- c) *It deliberately invents a nexus between the doctrine of constitutional avoidance and elements of justiciability*
- d) *It “swings out” from the many of its judgments. This has also been utilized by other courts such as the electoral court.*

4.9 Link between policy and the Avoidance Doctrine

A survey of cases that were dismissed by the constitutional court showed that the court decision produced deleterious policy results. Although it is axiomatic that, “*law is not policy and policy is not law*”, this research observed that impact litigation usually precedes a policy that is made as a direct response to judicial developments. Firstly, the bond notes case is similarly understood just like the *Mawarire* case, bond notes were not in circulation. The court did not deal with the merits of the case. Surprisingly, the policy became the law. Secondly, the issue of resources has been used to justify why constitutional rights such as the right to life continue to be trampled upon on the basis that there is no executioner. There has not been an attempt to show the citizens if the job has been advertised and if so, how many applicants have applied for the job. Although this is not considered in this research as a way of showing that the death penalty is constitutional, the failure to do so also buttresses the argument that the Constitutional Court did not even consider this before it chose to invoke the avoidance doctrine in the *Chawira* judgment.

4.10 Implication of the findings

Direct reference to the avoidance doctrine in the *Chawira* case allowed Constitutional Court judges to use this decision as a precedent in avoiding constitutional issues. In the *Katsande* case, JCC Gwaunza expressly referred to the finding in *Chawira* case. This referral provides a time point of departure for any serious and health discussions on the role of judges in developing impact litigation. The Constitution creates the Labour Court. It also makes labour rights part of the Bill of Rights. Labour issues clearly become part of what constitutes a constitutional matter as contemplated by the Constitution. The Constitutional Court did not even attempt to follow the line of reasoning that was adopted in some jurisdictions like South Africa where judges and researchers have gone a long way in determining whether labour matters are part of constitutional matters or not in terms of the Constitution.³⁸⁹

It was stated in *Nehawu v University of Cape Town* that:

³⁸⁹See *Nehawu v University of Cape Town*(2003) 5 BLLR 409 (CC), see also an article by Dawn Norton, ‘What is (and what isn’t) a “constitutional matter” in the context of labour law? *University of Witwatersrand*.

*“What must be stressed here...(is) that we are dealing with a statute which was enacted to give effect to s 23 of the Constitution, and as such, it must be purposively construed. If the effect of this requirement is that this court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy...”*³⁹⁰

Professor Halton Cheadle as cited in Norton (nd) was used in showing how the approach in Nehawu could be considered ‘ an extensive interpretation of the Constitutional Court’s jurisdiction’ and can potentially undermine the specialist structures to determine labour disputes established by Parliament through the LRA.

He states that:

*“The argument is that, although the Constitutional Court is the ultimate arbiter of the right to fair labour practices, it should consider carefully before “second guessing” a system designed to balance the contending views of fairness through a system that encourages agreement within the confines of protective legislation. Where the legislature has itself created machinery to determine the fairness of a fair labour practice – whether in the form of the CCMA, the Labour Courts or the Employment Standards Commission – the Constitutional Court ought to defer to that forum’s determination.”*³⁹¹

4.11 The use of bad avoidance precedents in derailing constitutionalism

Katsande and Another v Infrastructure Development Bank of Zimbabwe, CCZ 9/17.

This case was made in terms of section 85 (1) of the Constitution. The applicant sought an order affirming the first applicant’s constitutional right to belong to a trade union of his choice in terms of section 65 (2) of the Constitution. Applicant also sought an order declaring as unconstitutional and a violation of this fundamental right the conduct of the respondent to refuse the first applicant permission to belong to and participate in the lawful interests of Zimbabwe Banks and Allied Workers Union (ZIBAWU); and giving the ultimatum to choose between his job and the trade union. In addition, an order quashing any disciplinary proceedings against the first applicant was also sought.

The brief facts in this case were that between the years 2010 and the time the proceedings arose, the applicant had been promoted from loans officer to senior loans officer. He was then appointed the interim President of ZIBAWU. The argument that then arose was that he was now part of the managerial employees and could no longer represent the interests of non-managerial

³⁹⁰See also Norton ibid

³⁹¹ibid

employees. Justice Gwaunza upheld the two preliminary grounds that were raised against the application. The first related to two cases that were pending before the labour court and the other related to the impermissibility of the application which had been occasioned by the pendency of the other two cases.

Criticism

The first criticism relates to the use of the jurisprudence that was laid in the South African case of *Wahlhaus v Additional Magistrate Johannesburg*, 1959 (3) SA 113 (A). In as much as the use of foreign cases is of persuasive value in Zimbabwe, and courts are at large to use foreign law in Zimbabwe³⁹², the manner in which Zimbabwean courts have been quick to rely on South African cases is astonishing. Essentially the case lays down a salutary general rule that appeals in civil and criminal cases are not entertained piecemeal. The case also establishes the common law principle relating to the powers of superior courts to intervene in incomplete proceedings. The common law principle subsists in the South African Constitution in that the Constitution creates a hierarchical court structure that distinguishes between superior and inferior courts. Although Justice Gwaunza also referred to the Chawira judgment which dealt with a hierarchical system of Zimbabwean courts, she failed to make a determination that the common law principle enunciated in the *Wahlhaus* case does not subsist in the Constitution of Zimbabwe.

The net effect of this failure seriously attacked the virility of the common law in Zimbabwe. It is now axiomatic that the superior courts of Zimbabwe are enjoined to develop common law.³⁹³ The case that justice Gwaunza referred to is not distinctively Zimbabwean courts. The need for courts to develop distinctive common law cannot be ignored especially when the Constitution imposes a duty on a superior court to do so. The upholding of the two preliminary points also failed to appreciate that the common law position, developed close to 6 decades ago, does not take away a superior court's power to ensure that there is quality control of the proceedings that are pending in the lower court. A superior court can supervise the manner in which the lower court discharges its functions.³⁹⁴ There was nothing wrong in the Constitutional court engaging in innovative procedural management of constitutional cases or cases that have a constitutional appeal.

³⁹²Section 46 of the Constitution

³⁹³Section 176 of the Constitution

³⁹⁴See *Van Rooyen & Others v State and Others* 2002 (5) SA 246, @ 1146 (CC)

The *Katsande* decision simply shows the dangers of resorting to foreign precedents in an endeavour to fill the lacuna in our common law. The Constitution creates a fertile opportunity for Zimbabwean superior courts to start from the common law of England, South Africa, and end up with enunciating a distinctly Zimbabwean common law. Surprisingly, the Gwaunza decision got an approval rating from the Constitutional Court judges but is at odds with the constitutional democracy that is envisaged by the Constitution. The Constitutional Court was supposed to understand that:

- *Labour rights are part of the Constitution and are protected under the Bill of Rights*³⁹⁵
- *Human rights form part of the values of democracy protected in section 3 of the Constitution*
- *Courts are obliged to protect human rights and must resort to the values in section 3*
- *The Constitutional Court is the apex court in constitutional issues and was supposed to treat the Katsande case from that perspective*

Invariably, the decision in *Katsande* affirmed the *Chawira* decision.³⁹⁶ Because Zimbabwe does not have an executioner, the Constitutional Court must take judicial cognizance of the fact that the death penalty is being abolished in most countries. Researches on international law reveal that the preference of the death penalty as a mode of punishment is waning. This research argues that the failure by the Constitutional Court to deal with various international law issues that are related to the abolition of the death penalty has enabled policy formulators to tarry on abolishing the death penalty.

The court was enjoined in the *Chawira* judgment to follow the Constitution rather than divert its attention to human capital and matters of procedure and rights, at the expense of individual rights.³⁹⁷ The cumulative failure by the Constitutional Court to resort to the Constitution is difficult to accept if due regard is had to the doctrines that were given ancillary treatment by the court. For instance, the doctrine of ripeness as an element of justiciability of human rights disproportionately affects citizens if it is casually applied. Prisoners, who have very little means to afford legal representation are the least able to benefit from *pro-deo* or public interest litigation.

³⁹⁵ Section 65 of the Constitution

³⁹⁶ Supra note 1

³⁹⁷ For instance, it was argued by this researcher in the newspaper article on the *Chawira* decision that Presidential pardon is not a matter of procedure but a constitutional entitlement on the part of prison inmates who are on death row.

Further, they lack the opportunity to get detailed feedback from the PIL lawyers or the financial resources to access experts who could help them recover from emotional shock.

In an interview with a prison officer who chose to remain anonymous, he stated that:

“Prisoners sometimes maintain their innocence. They always want to approach the courts to ascertain their freedom. Their papers are usually thrown out by judges if they go as self-actors. A lot of them cannot afford lawyers. Those who benefit from pro deo lawyers see the lawyers as their Messiahs. It is most devastating for a prisoner to be told that nyaya yako yaraswa nedare case closed translated by the researcher to mean “your case has been dismissed by the court”

There are no methods of estimating the psychological impact of constitutional avoidance. PIL lawyers normally use their experience and activism to extend their assistance to vulnerable groups or marginalized communities rather than waiting for walk-in clients who in most cases are willing to follow through the advice by lawyers in cases where they are not the successful litigant.

When the inmates in the *Chawira* judgment are compared to Mr. Mangwiro in the two *Mangwiro* cases, it becomes clear that the litigants who utilize impact litigation are highly prejudiced in many ways. Mr. Mangwiro lost a lot of money and property to the Police. He lost US\$78 900.00 and US\$1 537 833.33 being the United States Dollar equivalent of ZW\$46 135 000 000.00 he had been prejudiced. Oversight organizations also make urgent efforts to improve the primary beneficiaries’ wellbeing as well as the secondary population. The secondary population is also affected by lack of innovation in judicial reasoning. The increase in popular interest on the constitution, at least through the press, social media platforms, metro papers, radio dialogues and academic, suggests that generally every Zimbabwean has some knowledge about the constitution. Although they may not cite the provisions of the constitution when contributing to debates on various forums, most citizens seem to question the extent to which constitutional provisions are given credence by state institutions, courts included. For instance, by way of general illustration in this research, the public outcry around the introduction of the bond notes in 2017 may well have been in large parts expressive of the frustration and fears of every Zimbabwean, but it was bolstered by the bond notes challenge that was filed at the constitutional court.

Although some citizens were highly suspicious of the intention of the litigant, former vice president Joice Mujuru, few seem to question the importance of the case in expressing the negative effects of the bond notes to an ailing economy. There appears to be a general and popular sense observed by this research that: *“whether or not the bond notes were not in circulation, the courts knew that their circulation would come as soon as the litigants would leave the court room.”*

Conclusion

From the foregoing analysis, the frequent use of technical arguments in impact cases, shows the need for an inclusive approach to legal reform. A lawyer in private practice who was interviewed on 6 July 2017 had this to say:

“I do not know the extent to which the judicial code of conduct speaks to the need for judges to adopt certain positions when dealing with constitutional issues. There is an urgent need for a model law on constitutional interpretation. Maybe, judges believe a constitution is interpreted just like any other statute”.

The above sentiments were echoed by a constitutional critic who requested anonymity. He stated that:

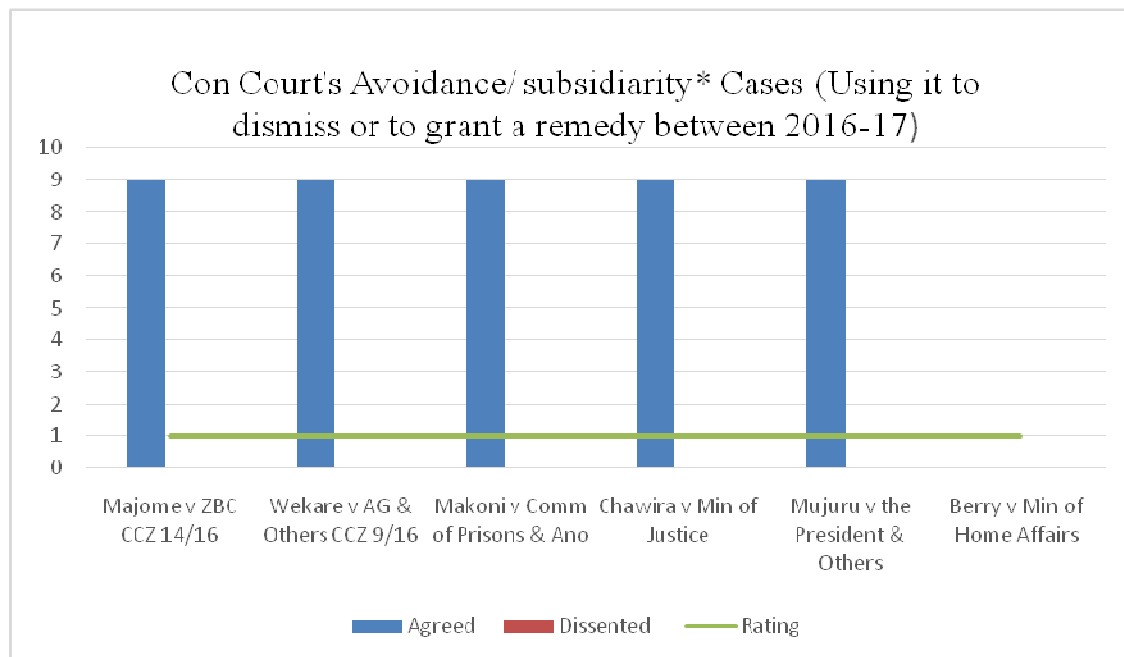
“There is need for a complete audit of the curriculum on statutory interpretation. In as much as the constitution is a statute-it is ranked higher than ordinary statutes. There is need to separate general statutory interpretation from constitutional interpretation”

As a result, this research has shown the likely implications of the Constitutional Court’s reasoning through fig 4f below. The diagram shows that there is no judge who has been dissenting in the cases where avoidance doctrine was invoked. The judges who agreed with the views of the authors of different avoidance judgments have created an approval rating that shows that:

- The likely scenario to continue to obtain at the Constitutional Court is that it will continue to invoke the avoidance doctrine to the detriment of impact cases
- The best case scenario is that judges who use avoidance doctrine as a remedy would do so sparingly and only to provide palliative remedies to litigants or their legal representatives.

- The worst case scenario is that the Constitutional Court will have no theory of change and will influence the Legislature to find a way to clip the innovativeness of the High Court.

Fig 4f.



*This concludes the presumption of constitutionality and limitation

CHAPTER 5

Reinstatement of arguments, Conclusion and Recommendations for future research

Introduction

It cannot come as a surprise that the judges of the Constitutional Court have fallen in love with the avoidance doctrine in recent years. This must however raise hackles of many critics. Judges and critical researchers must also learn from this research. The importance of the role of the judges of the superior courts in developing the jurisprudence on the Constitution was shown in Chapter 4. The Constitutional Court was also shown to be the apex court in constitutional issues. It has been leading other courts in upholding the technicalities of on public interest and strategic impact cases. The argument in this research was that the Chief Justice also leads the other judges in invoking doctrines that lead to the avoidance of the merits of cases. The dominant doctrine is the subsidiarity doctrine. Effectively, the doctrine was shown to be stalling the development of constitutional jurisprudence. This development can only be done by a judge of the superior court. A judge cannot effectively fulfil this role without being innovative in his reasoning or in exercising his discretion to hear technical arguments together with the merits of constitutional cases.

The one instance where the avoidance doctrine was used as a positive remedy reflects the unique effort of a judge at protecting and promoting the right to life.³⁹⁸ If the judges of the Constitutional Court invest considerably more in innovative judicial reasoning, the this Court will empower the other superior courts, the High Court and Supreme Court, to use their discretion actively without the burden of the avoidance box as a tool to dismiss impact litigation cases. Using the avoidance doctrine both as a discretionary tool and remedy can go a long way in strengthening diversity in judicial reasoning among the three superior courts.

³⁹⁸*Makoni* case, supra note 1.

It was inspiring to make a finding in this research that the High Court has shown innovativeness in areas such as constitutional breaches on personal security, liberty and human dignity³⁹⁹. It was particularly less enthrusting to see the Constitutional Court delaying the gains of transformative constitutionalism by either employing various avoidance techniques even in cases that had come before it by way of referral and only needed to be confirmed as contemplated by the Constitution.⁴⁰⁰ The corollary to this was that the judges of the Constitutional Court largely decided not to weigh the possibilities of using a rights-based approach together with the challenges posed by the ‘*dilemma*’ of judges that was explained in the introductory chapter. This made it difficult to legitimize its decisions that were instituted through strategic litigation. In this wake, judicial researchers, judges, law and policy students and legal researchers or scholars must eagerly strengthen research partnerships on constitutional doctrines. Such a serendipitous approach of diverse people will allow judges to tap from a wide pool of approaches when making their determination in constitutional matters.

5.1 The research in a nutshell

This dissertation has examined the many instances where the superior courts in Zimbabwe have been grappling with the avoidance doctrine either explicitly or by way of implication. It identified various pillars of the doctrine to include the skirting of constitutional issues and avoiding the determination of the constitutionality of laws. The dissertation noted the jurisprudential connotations of the difference in dimensions to judicial activism mainly between the High Court and the Constitutional Court. The former has been quite innovative in deciding on the constitutionality of statutes; referred some of those cases to the latter for confirmation. The cases include those on statutes of limitation, and human dignity.

Largely significant in this dissertation was the detrimental effects of extant reasoning of the Constitutional Court on state policy responses that bear on constitutional rights. Without casting aspersions on the Court, but at the same time without ignoring the chagrin of the general populace, the effects include the naked fact that the Constitutional Court has been seen to be justifying the onerous effects that the lack of human resources has caused on the protection, promotion, and respect of the sanctity of human life. This limitation has caused the Court to give

³⁹⁹*Nyika* case, supra note 42 and *Mangwiro* case, supra note 1.

⁴⁰⁰*Ibid*

a narrow interpretation on the Constitution which focuses on resource constraints, rather than, alongside the setting of the pace for urgent alignment of criminal laws with the Constitution, or protection of the right to life; broadly interpreting the Constitution by emphasizing on right-based strategies and initiatives to judicial reasoning.

In broad outline, the dissertation made respectful submissions that there must be a continuous academic assessment of the contribution of the judges of superior courts to the development of constitutional jurisprudence in Zimbabwe, in terms of dealing with the merits of constitutional cases. The ‘merits’ element enables the general citizens to understand the reason why a case falls or succeeds; the extent to which the technical arguments are ventilated or discarded; their bearing on the merits of the case; and the judicial rationale for not hearing the technical arguments together with the merits of constitutional cases. Ultimately, this study showed that there is need to move towards adopting flexible research methodologies in legal research. The judges of the superior courts have different legal backgrounds, different approaches to judicial reasoning, different narratives on the avoidance doctrine and mixed research can assist researchers to test the validity and reliability of the decisions of the judges using various personality and professional considerations. Another powerful lesson in this research was that impact litigation cases reflect the extent, dynamics, and innovation required from the citizen to effectively address the constitutionality of state laws and practices.

Endemic in this reflection is the need to understand the attitude of the competent court towards impact litigation cases and how that impact on the line of thinking of the particular judge in his or her adjudication on such cases. The study showed that regard must be had to the fact that most of the impact cases capture the citizen’s daily realities, and as such, must be filed after giving due regard to important considerations such as: *What is the likely judicial attitude? Who is the client? And, what is the likely benefit that the public can get from the case?* Although there is generally a missing link between the innovativeness of most judges of the High Court and the seemingly ‘orthodox’ approach of the Judges of the Constitutional Court, there is hope that the depth of reasoning that these judges show in invoking the avoidance doctrine can inform litigants

in case selection and presentation in future cases. The precedent that buttresses this viewpoint was set out in the *Mudzuru* case⁴⁰¹ that was alluded to in Chapter 1 above.

5.2 Major highlights

The major highlights in were premised on an assessment of the role of the judges of the superior courts in Zimbabwe. In the absence of specifically developed monitoring tools; a judicial index of the indicators of proper judicial reasoning, a feedback mechanisms by the citizen, or availability of a checklist on the avoidance doctrine as a means of disposing with constitutional matters, six major aspects were observed in this dissertation and served to illustrate the role of the general citizen, academia, and civil society organizations in deciding on the legitimacy of judicial decisions that are based on impact litigation cases. It also showed that there Chief justice is the leading exponent of the avoidance doctrine. His decisions on technical arguments, though reasoned, sometimes fail to appreciate that the Constitution defines what a constitutional matter is and should be the starting point in deciding to skirt constitutional issues or to invoke other variants of the doctrine such as deference, subsidiarity and so on.

The six aspects in the findings include: (1) *the interpretive role of the Court which allows courts to resort to the Constitution or to avoid it when resolving disputes between and amongst litigants*; (2) *the policy implications of the decisions which empower the executive or legislature to decide to implement the decisions hurriedly for political expedience purposes, or grudgingly, to make the decision an unpopular one*; (3) *the ultimate role of, and the extent to which the consumers of the decision (the consumer population) are both affected by the illegitimacy of a decision and the deleterious effects of a State policy which emanates from such decision*; (4) *the extent to which the secondary population such as the media discusses the legitimacy of the decisions of the court or allows members of the public to do so*; (5) *the effectiveness of the mechanisms that are available to the citizen who is aggrieved by the decision of the less-innovative judge*; and (6) *the impact of the above factors on the future capacities and training needs of the respective judge who makes a seemingly illegitimate decision*. This would in turn

⁴⁰¹ Supra note 31.

solicit responses from the population on what they think on the qualities of the individual constitutional judge⁴⁰².

5.3 Reaffirmation of the Objectives

This study sought to:

- ✓ *Examine the extent to which Superior Courts in Zimbabwe, particularly the Constitutional Court, have been resorting to the normative Constitutional framework before avoiding constitutional issues in impact litigation cases*
- ✓ *Assess the developments on the avoidance doctrine in impact litigation across various jurisdictions and to determine the differences in approaches between the Zimbabwean superior courts and other superior courts across those jurisdictions*
- ✓ *To determine the dichotomy between the legitimacy of judicial decisions and State policy responses that emanate from decisions where the avoidance doctrine would have been invoked.*

5.4 Reaffirmation of methodology and framework of analysis

This research used a mixed research methodology to collect, present and analyze the data that were collected on avoidance doctrine. The various ways that were used by the judges of the Constitutional Court to avoid constitutional issues in impact cases were considered through case study review. A ‘pick and choose’ technique was discovered. The use of the authors of the Constitutional Court judgments to determine the general approach of the Constitutional Court judges in invoking the avoidance doctrine helped explain why the judges usually concur in various impact litigation cases. The author’s role is serves to direct the other judges to find a way of deciding to end on the technical arguments without showing why they cannot exercise their discretion to hear the preliminary points together with the merits of the impact litigation cases. This is notwithstanding the fact that there has been a growing innovativeness in judicial reasoning on the part of the High Court judges. Their reasoning should, in all earnestness, be seen as complementing and enhancing a broad approach to reasoning in the way the judges of the Constitutional Court decide and research-in a more detailed way in which experience, knowledge

⁴⁰²This is used lightly to describe both the Constitutional Court judge and the judge who is expected to determine constitutional issues such as the High Court or Supreme Court Judge.

of other juridical research developments, and differences in judicial reasoning make the courts proper custodians of the Constitution.

With the Chief Justice leading the pack in invoking the doctrine, it can be difficult for other courts to focus on innovative reasoning on the Constitution because most of the judges of the Constitutional Court also serve as judges of the Supreme Court. There is no new kind of innovation that is expected under such circumstances. The Constitution allows such a structural composition and it is not likely that the judges of the Supreme Court or High Court who serve as acting judges of the Constitutional Court can discard the doctrine when they know that the apex court on constitutional issues will either refuse to confirm the order for referral or will invent a doctrine to justify why technical arguments must be upheld. Judges become innovative by making independent decisions while doing so within the confines of the law, which may be tested through referral of the matter to the Constitutional Court.

All this, it is argued, immensely contributes to the normative framework that is envisaged by the Constitution. For instance, in furthering this framework, the High Court has generated a lot of interest and attention among public interest or strategic impact litigants as well as the general populace, especially the media practitioners. The constitutionality of statutes of limitation such as the Police Act and the State Liabilities Act has been widely reported and reviewed in the print media, reflecting the innovativeness of the judges and involvement of the HC. The judgments in the *Nyika*⁴⁰³ and *Mangwiro*⁴⁰⁴ cases show that there is a possibility of having extraordinary judges-who pay attention to the values that are embedded in the Grundnorm-the Constitution. Their initiative, depth of research, and application of relevant foreign and international law to judicial reasoning brings a glimmer of hope that the judges can protect the Constitution as a creature of the constitutional democracy that Zimbabwe ascribes to.

5.5 Conclusion

The Constitutional Court has been quick in dealing with technicalities in impact litigation cases. It has also been frequently relying on the jurisprudence from South Africa on the avoidance doctrine. An attempt to separate the avoidance doctrine from the subsidiarity doctrine was done in *Zinyemba v Minister of Lands and Another*, CCZ 3/16. The distinction was however academic

⁴⁰³ Supra note 42

⁴⁰⁴ Supra note 1

as the subsidiarity doctrine also serves the aim of avoiding the merits of constitutional issues. The reason why the avoidance doctrine or its variants have not been developed seems to emanate from the failure by the Constitutional Court to explain the rationale behind the avoidance doctrine including its variant forms. In its modern and loose form, it has been shown that courts cannot simply rely on the orthodox apprehension that simply avoided complex issues, but focuses on various issues where the court employs various ways of reasoning so as to avoid reaching the merits of a case.

This can help litigants and lawyers to prepare their cases, especially heads of argument for the changing constitutional approach and use the approaches from other jurisdictions to convince judges to treat constitutional matters as different from other civil and criminal cases. Essentially, there is need to distinguish between doctrines that are used in general litigation and doctrines that are used in constitutional litigation. This is seen in this dissertation as the perennial challenge for judicial and legal research. What it means to be a constitutional judge and a strategic impact or public interest lawyer must be informed by the normative framework under the Constitution. The availability of digital resources and legal research platforms must enable scholars and researchers to support and encourage judicial innovation because it is clear that: judges always blame it on the lawyers for not bringing relevant cases and proper research to inform the judge or guide him in his reasoning.

This calls researchers to help judges re-invent themselves, and to think beyond certain precedents such as the *Chawira*,⁴⁰⁵ *Majome*,⁴⁰⁶ *Katsande*⁴⁰⁷, and others that were alluded to above. As such, the chief conclusion that was drawn out from this research was that the ramification of avoidance doctrine usually precedes the need for judicial activism (including generous interpretation of the constitution Court using judicial discretion sparingly). The approach of the judges of this Court to judicial reasoning in impact cases has grown unusually predictable. The first judgment in 2013 brought hope that the Constitutional Court would always avoid technical arguments and adopt an approach that is enmeshed in the broad standing provision in the Constitution.⁴⁰⁸ Surprisingly,

⁴⁰⁵ *ibid*

⁴⁰⁶ *ibid*

⁴⁰⁷ *ibid*

⁴⁰⁸ Section 85 of the Constitution. The *Mawarire* case, *supra* note 3, saw the Constitutional Court inventing a doctrine which saw it hearing the merits of the case as alluded to in previous chapters.

the Court began to invoke the avoidance doctrine to avoid the merits of the case and has not been seen to associate itself with the *Mawarire* precedent.

By and large, the ever-changing approach of the Constitutional Court points to the fact that the judges of the Court appear to consider technical arguments as very complex and important in deciding whether cases are constitutional matters or not on the one hand, and whether constitutional issues can be skirted or not in impact litigation cases. Either way it takes, the approach of the Constitutional Court plays a pivotal role in explaining the contribution of various judicial responses to the development of impact litigation. This is particularly evident in the actions that are adopted by the judges such as striking constitutional matters off the role, and in the manner in which practice directions are constantly produced as way of creating a controlling procedure under which litigants can approach the courts.

Secondly, in the wake of judicial passivity on the part of the Constitutional Court, political correctness, and doctrinaire judicial reasoning, human rights activists have continued to devise different strategies to advancing impact litigation. Notably; impact articles are presented in the media (both the print and social media such as the Zimbabwe legal forum) and appears in scholarly journals such as the Zimbabwe Electronic Law Journal, and the Rule of Law Journal. There are institutions such as VERITAS as well as electronic sources such as ZIMLII which exclusively report or follow up on the impact of court decisions.

Thirdly, lawyers and their clients and the general populace have not stopped in conducting legal audits on the need to be proactive in impact litigation. Law-based institutions such as the Zimbabwe Lawyers for Human Rights continue to train member lawyers on impact litigation. They have also been participating as friends of the court or intervening parties. Private law firms such as Tendai Biti Law Chambers have also been active in instituting public interest litigation cases either on behalf of affected members, or on behalf of interest groups such as Veritas Zimbabwe. This has produced a huge impact on the need to ensure that the avoidance doctrine is discarded and that the Constitution must be seen to be receiving adequate attention and protection, especially from the Constitutional Court.

Fourthly, this research accepts that there has not been a faithful synthesis of the role of the judges of the superior courts in developing the constitutional jurisprudence that is based on the merits of

strategic impact cases. The dearth in comprehensive research material in this regard has been seen to have been allowing the Constitutional Court to “*wing out*” of the impact litigation cases that emanate from the decision of lower courts or the High Court. For instance, the Constitutional Court has been very slow in deciding whether or not to confirm orders that were referred to it by the High court in the *Nyika*⁴⁰⁹ and *Mangwiro*⁴¹⁰ cases that were alluded to above.

Fifthly, this research found out that there appears to be a perceived competition for legitimacy between the three superior courts: the High Court, Supreme Court and Constitutional Court. The Supreme Court seems to be the *midpoint* in this situation because it provides the highest number of judges who also serve as judges of the Constitutional Court. Some of the judges who were elevated from the High Court to the Supreme Court have also heard occasion to serve as Constitutional Court judges. Ultimately, the litigants have been the most affected and might believe that impact litigation work to their detriment because of the various ways in which the Constitutional Court invokes the avoidance doctrine. As such, this research, sought to produce a *thesis-antithesis-synthetic* treatment of the doctrine with a view of showing how impact litigation ought not to have suffered under such an anti-constitutional doctrine. Because the researcher and interviewees form part of the consuming population of the seemingly illegitimate decisions, this study is meant as one of the broad academic to fill in the lacuna in the literature on constitutional doctrines.

Further this research drew the conclusion that the role of judges in impact litigation can only be understood by resorting to heuristic models of studying targeted populations and their responses. It found out that the affected population has four pillars. These are the *interpreting, implementing, consumer and secondary populations*. The response element has two pillars: *the acceptance decision and the behavioural response decision*. In explaining this heuristic model, the respondents had mixed views on the benefits of impact litigation. While other celebrated the gains of impact litigation, others felt that it is irrelevant because the same judges will always be the ultimate arbiters in constitutional matters.

The different viewpoints were used to weigh the cumulative wait of the views of the respondents. In this light, the research also considered the behavioural response of the emerging activist

⁴⁰⁹ Supra note 42.

⁴¹⁰ Supra note 1.

community popularly known as social movements. They have also become litigious and form part of the consumer population. For this reason, some respondents felt that the heuristic model is one such model that must always be used in researches such as this. This is particularly because it enables researchers to consider various consumers of the decisions a targeted population such as superior courts. This was quite important since impact litigation usually receives wide press coverage from both the state and private media. Further, citizens and emerging activists have slowly been occupying strategic spaces such as social media platforms such as Whatsapp and Twitter and radios. This produces a huge impact on the consuming population and the benefits of impact litigation can reach out to both the remote areas such as rural areas, and the well-connected population in urban Zimbabwe.

5.6 Recommendations and possibility of achieving them

5.6.1 *Recommendations on the need to capacitate judges on constitutional doctrines and Constitutional interpretation*

Firstly, there is need for strategic impact workshops which target judges. Civil Society Organizations (CSOs) and law-based organizations such as Zimbabwe Lawyers for Human Rights (ZLHR), Zimbabwe Women Lawyers Association (ZWLA), Zimbabwe Environmental Lawyers Association (ZELA), Transparency International Zimbabwe (TIZ) and the Centre for Applied Legal Research (CALR) among others must produce manuals which outline the guidelines for handling impact cases. They must also produce tools for tracking constitutional doctrines and these must be used in the workshops to specifically equip the prospective impact litigation judge with the practical benefits of impact litigation. A constitutional rights-based approach can be used to achieve this recommendation. The Law Society of Zimbabwe can also partner researchers, law-based organizations, the Ministry of Justice and the Judicial Services Commission to organize judicial colloquiums or retreats which are aimed at capacitating judges in constitutional interpretation and doctrines.

In addition, Section 7 of the Constitution should be used as a way of increasing the constitutional literacy of the general populace. The section allows citizens and various organizations to work together with the Government in making the general populace aware of the provisions of the

Constitution. Test cases can be conducted during the workshops and can be organized under section 85, as the legal standing provision.

5.6.2 Recommendations on the need for strategic research partnerships

Because the conclusion in this research focused on the importance of research partnerships, there is need for impact litigation lawyers to partner academic and legal researchers in showing the benefits of impact litigation. The researchers would review the literature on the use of constitutional doctrines and methods of constitutional interpretation that would have been developed or invented by the judges of the superior courts. They will also carry out specific research on the status of compliance by the judges with the interpretation guidelines that are enshrined in the Constitution. In short, there is need to develop tools for the effective monitoring and assessment of impact litigation as well as innovative constitutional interpretation.

Such tools are central in ascertaining the interplay between access to justice and the fulfilment of the obligations that are expected of a judge of a superior court. It should be emphasized that there is comfort in numbers-and a lot more effort is needed to be done within the various stakeholders alluded to above. Until this is done, it would be difficult to blame judges when they do not have the necessary research to guide them.

5.6.3 Recommendations on the need to follow best practices from the Legal Profession

Practicing lawyers are required to carry out on the job training (OJT) initiatives such as enrolling for postgraduate studies such as Masters Degrees or Doctoral studies. These initiatives contribute to Continuous Professional Development (CPD) points. Furthermore, the Law Society of Zimbabwe conducts various trainings which the members of the legal profession must attend so that they earn the required CPD points. It also works in collaboration with international organizations such as International Bar Association (IBA) and organizations such as ZLHR, ZELA. Members can attend trainings under the auspices of these organizations and still earn CPD points. Inasmuch as judges have their own colloquial, which is done together with the Law Society, such an arrangement must be framed in a manner that considers them first as lawyers. In essence, judges must be constitutionally obliged to further their academic studies or to be continuously trained in each legal year. This is because the Constitution is very progressive in

that it is transformative and obliges the judges of the High Court, Supreme Court and Constitutional Court to develop the common law. The judges must be continuously trained on the nuances of legal research and comparative constitutional arguments. This recommendation makes sense since lawyers are also obliged to gain CPD points if they are to practice law in a particular legal year.

5.6.4 Recommendations on the litigants and lawyers in impact litigation cases

Impact constitutional litigation must be used by litigants as a way of promoting constitutionalism and fighting against impunity in human rights violations. The Constitution has an expanded Bill of Rights that protects all the three generations of rights. Litigants must constantly be trained by Community Based Organizations (CBOs) and CSOs on constitutional literacy. The issue of impunity is of major concern in Zimbabwe as has been shown in some cases above. If not strategically dealt with, impunity can be a perennial hindrance to the protection, promotion and respecting of human rights.

5.7 Recommendations for government to support impact litigation

The Government of Zimbabwe is encouraged to sponsor public interest litigation as is the case in the USA. Having dealt with the need for judges to identify with test case or impact litigation, it is necessary for judges to always decide on strategic matters by considering both state sovereignty and individual sovereignty. The latter is a type of sovereignty which is central to the preamble of the constitution under the “*We the people of Zimbabwe*” clause. This is a type of sovereignty which is often not interpreted and considered by judges as it ought to be. A convenient point of departure by the judges may be found in a consideration of the recommended question: “*what exactly happens to the development of the case that is before me if I do not deal with the merits of the case in a Constitution sense?*” The balancing of the two forms of sovereignty can only be done if the Government of Zimbabwe openly supports Public interest litigation /strategic impact litigation by deliberately funding public interest groups or creating a conducive operating environment where CSOs are not associated with their clients or their funders. A collaborative approach to developing constitutionalism in Zimbabwe can benefit from the increasing partnerships between government and CSOs as well as the government and international donor agencies in many spheres.

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Appendix 1: Interview Guidance Questions on the link between impact litigation and avoidance doctrine

1. What is impact litigation and how is it different from normal litigation?
2. What is the legal basis for such cases?
3. In what way do courts protect the legal basis for impact cases in Zimbabwe?
4. How important is the Constitution in promoting public interest and strategic litigation in Zimbabwe.
5. How important is strategic or public interest litigation to addressing constitutional breaches or violations in Zimbabwe?
6. How can impact cases be developed from lower courts to superior courts in Zimbabwe?
7. What remedies should litigants who utilize impact litigation seek from courts of law?
8. How effective are the remedies?
9. What is the danger of upholding technical arguments and resolving impact litigation cases on such technicalities?