UNIVERSITY OF ZIMBABWE

JUDICIAL REVIEW IN CASES CONCERNING THE CONSTITUTIONALITY OF THE PRESIDENTIAL STATUTORY POWERS

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DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF A MASTER'S DEGREE IN CONSTITUTIONAL AND ELECTORAL LAW (LMCE)

THE FACULTY OF LAW

UNIVERSITY OF ZIMBABWE

JULY 2022

DECLARATION

I **BASUTU. S MAKWAIBA,** hereby declare that this dissertation is the result of my study, save to the extent specified in the acknowledgements and references. I confirm that it has not been submitted partly or in its entirety for any other degree at any other University.

Signed……

Date…….

This dissertation was submitted for assessment with my approval as the University supervisor, Prof L. Madhuku.

Signed…….

Date…….

APPROVAL FORM

The undersigned certify that they have read and recommended to the University of Zimbabwe for acceptance, a dissertation titled: **JUDICIAL REVIEW IN CASES CONCERNING THE CONSTITUTIONALITY OF THE PRESIDENTIAL STATUTORY POWERS**, submitted by **BASUTU. S MAKWAIBA** in partial fulfilment of the requirements for the award of a Master's Degree in Constitutional and Electoral Law (LMCE).

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ABSTRACT

The research traces and analyses the Zimbabwean jurisprudence in cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act. It identifies five Zimbabwean cases which dealt with the constitutionality of the Act. In the cases, the courts held that the Presidential Powers (Temporary Measures) Act is constitutional or they avoided dealing with its constitutionality by invoking technicalities. The study aims to look at the appropriate standards of judicial review in cases dealing with the lawfulness of the Presidential statutory powers. It desires to discuss the settled judicial review standards that are used to review the constitutionality of the Presidential statutory powers in jurisdictions of best practice. The research also targets to analyse the theoretical foundations underlying judicial reasoning. It seeks to critically review how the Zimbabwean judiciary has interpreted the Constitution when adjudicating cases dealing with the legitimacy of the Presidential statutory powers. It is the aim of the research to discuss the ideal approaches to interpreting the Constitution in cases dealing with the constitutionality of the Presidential statutory powers. There is what is called the "non-delegation doctrine". The study also seeks to discuss the theoretical foundations of the doctrine and its intent.

TABLE OF STATUTES AND STATUTORY INSTRUMENTS

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27. Presidential Powers (Temporary Measures) (Medical, Dental and Allied Professions Act) (Amendment) Regulations 1995, Statutory Instrument 21/95
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34. Presidential Powers (Temporary Measures) (Urban Councils) 1995, Statutory Instrument 148 A/95
35. Presidential Powers (Temporary Measures) (Urban Property Renovation) Regulations 1987, Statutory Instrument 198/87
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42. Reserve Bank of Zimbabwe Act (*Chapter 22.15*)
43. Statutory Instrument-2020-096-Presidential Powers (Temporary Measures) (Deferral of Rent and Mortgage Payments during National Lockdown) Regulations, 2020
44. United States Administrative Procedure Act of 1946
45. United States of America Constitution, 17 September 1787

ACKNOWLEDGEMENTS

I would like to express my gratefulness to my supervisor Prof. L. Madhuku for providing me with helpful guidance in this research.

My grateful thanks are also extended to everyone who has read my published journal articles and given me feedback.

I am also indebted to the students in the Constitutional and Electoral Law class, 2022. Thank you, colleagues, for the discussions and support.

My parents, Rorisang and Pastor Makwaiba, thank you for your innumerable support.

Above all, I am thankful to God for granting me the strength to undertake this study and complete it satisfactorily.

DEDICATION

To Ro and Pa

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3. *Fanele Maqele & Aldrin Nyabando and Tendai Warambwa v Vice Chancellor, Professor N.M Bhebhe N.O and Midlands State University* HB 129-16
4. *Field v Clark* 143 US 649, 692 (1892)
5. *Forum Party of Zimbabwe & others v Minister of Local Government, Rural and Urban Development & others* 1997 (2) ZLR 194 (S)
6. *Greater Boston Television Corp v FCC* 444 F 2d 851
7. *Griswold v Connecticut*, 381 U.S 479, 484 (1965)
8. *Hunter v Southam Inc*, 1984 2 SCR 145
9. *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA
10. *Marbury v Madison* 1803
11. *Mistretta v United States* 488 US 361
12. *Mlilo v The President of the Republic of Zimbabwe* HH 236-18
13. *Motor Vehicle Manufacturers v State Farm Mutual Auto-Mobile Insurance Co.* 463 US 29, 41, 43-44, 48-49, 51-52 (1982)
14. *Morrison v Olson*, 487 US. 654, 697 (1988)
15. *Motor Vehicle Manufacturers Association of the United States v State Farm Mutual Automobile Insurance Co.* 463 US 29, 43 (1983)
16. *Mujuru v the President of Zimbabwe & 5 others* CCZ 8/18
17. *Panama Refining Company v Ryan* 293 US (1935)
18. *Portland Cement Association v Ruckel Shaus* 486 F 2d 375, 393 (DC Circuit 1973)
19. *Rey blatt v United State Nuclear Regulatory Commission*, 105 F3d 715, 722 (D.C Circuit 1997)
20. *S v Gatzi & Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H)
21. *S v Hove* 1976 RLR 127
22. *S v Makwanyane & another* 1995 (3) SA 391 (CC)
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ACRONYMS

APA	Administrative Procedure Act
COVID-19	Coronavirus diseases of 2019

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CHAPTER ONE

Introduction to the Study

1.1 INTRODUCTION

From the year 1994 to 2018, the constitutionality of the Presidential Powers (Temporary Measures) Act[1] has been challenged before the Zimbabwean Courts. The argument by the applicants has been that the Act gives extensive powers to the President of making laws virtually on every subject, a function which should only be exercised by the legislative body in terms of the Constitution of Zimbabwe.[2] It has also been argued that the Act is inconsistent with the concept of supremacy of the Constitution, the doctrine of legality, rule of law and the doctrine of separation of powers enshrined in the Constitution.[3] The Zimbabwean Courts have held that the Act is constitutional or they have avoided dealing with its constitutionality. The Courts have creatively used technicalities to evade the issue of the constitutionality of over-sweeping Presidential powers as contained in the Temporary Measures Act.[4] The study seeks to interrogate the pertinent standards of judicial review in cases dealing with the constitutionality of the Presidential statutory powers. Judicial review is the power of the courts to consider the constitutionality of acts of other organs of government when the issue of constitutionality is pertinent to the disposition of law suits pending before the courts.[5] It is the power to consider constitutionality in appropriate cases including the court's authority to enforce, and invalidate government acts they find to be unconstitutional.[6] The chapter looks at the background of the Presidential statutory powers, the Presidential Powers (Temporary Measures) Act, judicial review, constitutional supremacy and the doctrine of separation of powers. The chapter also examines the problem which the research attempts to address. It also includes the justification of the research, literature review on the constitutionality of the Presidential Powers (Temporary Measures) Act,[7] methodology, hypothesis and delimitations.

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[1] Presidential Powers (Temporary Measures) Act [*Chapter 10.20*] (hereafter "Temporary Measures Act").

[2] The Constitution of the Republic of Zimbabwe, 2013 (hereafter "Constitution"). It is key to note that some challenges were brought under the old Constitution of Zimbabwe.

[3] See Chapter 2 of the study which discusses the High Court, Supreme Court and Constitutional Court cases which dealt with the legitimacy of the Presidential Powers (Temporary Measures) Act (n 1 above).

[4] M Gwisai, Judges in the storm: The Judicial Review Debate, 1998. Vol 5. *The Zimbabwean Law Review* 61.

[5] J Rutl *Encyclopedia of the American Constitution*, Macmillan and Free Press, 1986. 1054.

[6] Rutl (n 5 above) 1054.

[7] Presidential Powers (Temporary Measures) Act (n 1 above).

1.2 BACKGROUND TO THE STUDY

A statute is a written law that is passed by the legislature.[8] Statutory powers mean powers that are given to an individual by a statute. Presidential statutory powers are varied. They are adopted in various ways through executive orders, proclamations, and other means such as notices.[9] In carrying out their statutory and constitutional duties, Presidents also issue Regulations.[10] Predominantly, the Zimbabwean Presidential constitutional powers obtain from section 110 of the Constitution which permits the President to assent and sign bills, refer bills to the Constitutional Court for advice on their constitutionality, make appointments, call for elections, execute conventions among other duties which are stated in the provision. None of the provisions in section 110 empower the President to make law. In terms of section 111 of the Constitution, the President also has "the power to declare war and peace".[11] Section 112 confers the President the power to grant a pardon to any person convicted of any offence.[12] The President may by proclamation in the Gazette declare that a state of emergency exists.[13] The focus of this study is the exercise of Presidential statutory powers executing the provisions of the Presidential Powers (Temporary Measures) Act.[14]

In Zimbabwe, the President has powers to make Regulations to deal with an urgent situation under the Temporary Measures Act. The Act came into force in 1986.[15] The preamble of the Act states that it is "An Act to empower the President to make Regulations dealing with situations that have arisen or are likely to arise that require to be dealt with as a matter of urgency…" Primarily, the legislation bestows on the President the power to enact unilaterally[16]primary legislation equivalent in status to an Act of Parliament when it is necessary to deal with an urgent situation.[17] Regulations made under the Presidential Powers (Temporary Measures) Act are the primary legislation.[18] The Act provides that when it appears to the President that a situation has emerged or is likely to emerge which needs to be dealt with urgently, cannot be dealt with satisfactorily in terms of any other law, the President may make akin regulations as he contemplates suitable to deal

[8] Angus Stevenson and Maurice Waite "Concise Oxford English Dictionary" 12th Ed, 2011 1411.
[9] H.H Bruff, Judicial Review and the President's Statutory Powers, 1982. Vol 68 No 1. *Virginia Law Review* 1-61.
[10] Rutl (n 5 above) 1440.
[11] Constitution (n 2 above).
[12] Sec 112 of the Constitution (n 2 above).
[13] Sec 113 of the Constitution (n 2 above).
[14] Presidential Powers (Temporary Measures) Act (n 1 above).
[15] (n 1 above). Date of commencement was 25 April 1986.
[16] The Presidential Powers (Temporary Measures) Act (n 1 above) grants the President power to enact legislation individually.
[17] G Linington, Briefing Zimbabwe's 2013 Elections. Two constitutional controversies and comments on some structural matters. Volume 13 No 2. *Journal of African Elections* 13.
[18] Linington (n 17 above) 13.

with the circumstance. Section 2 of the Act provides for the making of urgent Regulations and states as follows:

(1) When it appears to the President that-
  (a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defense, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest, and
  (b) the situation cannot adequately be dealt with in terms of any other law, and
  (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation;
  then subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.

(2) Regulations made in terms of subsection (1) may provide for any matter or thing for which Parliament can make provision in an Act
  Provided that such Regulations shall not provide for any of the following matters or things-
  (a) authorising the withdrawal or issue of moneys from the Consolidated Revenue Fund or prescribing the manner in which withdrawals may be made there from, or
  (b) condoning unauthorised expenditure from the Consolidated Revenue Fund, or
  (c) providing for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of an Act, or

amending, adding to or repealing any of the provisions of the Constitution.[19]

The Regulations made by the President to the extent of inconsistency, prevail over any other law to the contrary.[20] The researcher's findings were that over forty Regulations have been issued by the Zimbabwean Presidents since the promulgation of the Act.[21]

It is key that the research makes a distinction between the Presidential Powers (Temporary Measures) Act and the Emergency Powers Act.[22] The Emergency Powers Act commenced in 1960. The preamble of the Act reads that it is an Act to make exceptional provision for the protection of the community in cases where a declaration of state of emergency has been declared.[23] The preamble refers to the declaration of a state of emergency in terms of section 31 J of the old Constitution[24] which provided for public emergencies. Section 3[25]of the Act states that where a state of emergency has been declared and is in force, it shall be lawful for the President to make such Regulations that are necessary for "public

[19] Sec 2 of the Presidential Powers (Temporary Measures) Act (n 1 above).
[20] Sec 2 of the Presidential Powers (Temporary Measures) Act (n 1 above).
[21] The details of the Regulations that have been enacted on the basis of the Presidential Powers (Temporary Measures) Act (n 1 above) appear in footnote 69.
[22] Emergency Powers Act [*Chapter 11.04*].
[23] See the Preamble of the Emergency Powers Act (n 22 above).
[24] Constitution of Zimbabwe, As amended on the 14th of September, 2005 (up to and including Amendment No.17).
[25] Sec 3 (1) (a)-(f) of the Emergency Powers Act (n 22 above).

safety, maintenance of public order, maintenance of any essential services, the preservation of peace, making adequate provision for any situation which has arisen and making adequate provision for the termination of a state of emergency". The Appellate Division decision in *S v Hove*[26]explained that the purpose of the Act is "…to prevent a state of emergency degenerating into a state of anarchy by conferring extraordinary powers on the President to deal with it". The Act provides for the proclamation of a state of emergency in terms of the old Constitution and needs to be aligned to the Constitution. Be that as it may, this research is of the view that the Act is justified as the law provides for a state of emergency. The Constitution also provides for the checks and balances between the executive and Parliament in cases of state of emergencies. The focus of the study is judicial review of the Presidential Powers (Temporary Measures) Act whose constitutionality is questionable as it grants the President the primary law-making power which is a preserve of Parliament.[27]

Determining the extent of the Presidential authority depends on the nature of the judicial review which can serve to clarify or obscure the respective responsibilities of the other branches.[28] Should the courts give significant deference when reviewing presidential statutory powers on merits?[29] Or should they engage in more searching review?[30] Should the minimalist rational basis apply to the review of Presidential powers or instead the more demanding arbitrary and capricious standard?[31] Professor Driesen has argued that courts should apply a form of "arbitrary and capricious review", "the Hard look Doctrine" to ensure that laws and orders passed under presidential statutory powers are supported by facts, as well as by a rationale adequately connected to the source of the legal authority that authorised the passing of the law or order.[32] Similarly, Professor Kovacs argued that the arbitrariness standards should be used to assess the legality of Presidential action.[33] The other approach encourages the courts to shun administrative law's many deference doctrines and instead apply a uniform rational basis review.[34]

Judges face a choice between innovation and restraint, where 'innovation' refers to the judicial development of the law and 'restraint' refers to a disposition to

[26] *S v Hove* 1976 RLR 127.

[27] See the literature review segment on the constitutionality of the Temporary Measures Act.

[28] Bruff (n 9 above) 6.

[29] L Manheim and K. A. Watts, Reviewing Presidential Orders, 2019. Vol 86, no 7. *The University of Chicago Law Review* 1743-1824.

[30] Manheim & Watts (n 29 above) 1743-1824.

[31] D. M. Driesen, Judicial Review of executive orders' Rationality, 2018. *Syracuse University College of Law* 1.

[32] Driesen (n 31 above).

[33] K. E. Kovacs, Constraining the Statutory President. 98. *Washington University Law Review* 063.

[34] Manheim & Watts (n 29 above) 1743-1824.

conserve existing law, refraining from pursuing the more innovative route.[35] The study will argue that there have been deficient standards of judicial review in cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act[36] in Zimbabwe. It will argue that there has been judicial restraint where the courts have avoided dealing with the constitutionality of the Act to conserve the law. The research will adopt a comparative approach and it will draw lessons from jurisdictions which have developed suitable standards of reviewing the Presidential statutory powers. The jurisdictions have similar legal systems to the Zimbabwean one.

The concept of constitutional supremacy bestows the highest power in a legal system on the Constitution.[37] Constitutional supremacy means the lower ranking of statute and the legislator.[38] On the basis of section 2[39]of the Constitution, Zimbabwe is a constitutional supreme state.[40] It follows that all authority must be exercised in accordance with all the provisions of the Constitution.[41] Zimbabwe is founded on the value and principle of the rule of law.[42] The most famous exposition of the rule of law came from A.V Dicey who associated the principle with a right based liberalism and judicial review of governmental action.[43] Others have tracked down the modern ideal to Aristotle, who equated the rule of law with rule of reason[44]while some have associated the rule of law with respect for human rights.[45] Fuller affirmed that that the rule of law commands publicly promulgated rules laid down, in advance, and adherence to natural law values.[46]

The Constitution of Zimbabwe[47]was also set in frame with the objective of separation of powers[48]where principles of government require a separation of

[35] A Kavanagh, Judicial Restraint in the Pursuit of Justice, 2010. Vol 60, No 1. *The University of Toronto Law Journal* 24.

[36] Presidential Powers (Temporary Measures) Act (n 1 above).

[37] J Limbach, The concept of the supremacy of the Constitution, 2001. Vol 64, No 1. *The Modern Law Review* 1-10.

[38] Rainer Wahl, *Der Vorrang der Verfabbung De Staat* 4/81 485.

[39] Sec 2 (1) of the Constitution (n 2 above) states that the Constitution is the supreme law of Zimbabwe and that any law, custom or conduct in conflict with it is null and void. See also sec 3 (1) of the Constitution which provides that Zimbabwe is founded on supremacy of the Constitution as a value and principle.

[40] B. S Makwaiba '*Welfare of children and disposal of the matrimonial property upon divorce: A legal analysis*' (Unpublished thesis, Midlands State University, 2018) 20.

[41] Makwaiba (n 40 above) 20.

[42] Sec 3 (1) (a) of the Constitution (n 2 above).

[43] A. V Dicey, *Introduction to the study of the Constitution*, 1959. 181-205.

[44] J. N Shklar, 'Political Theory and the Rule of Law' in A Hutchison & P Monahan *The rule of law: Ideal or ideology*, 1987, 1-16.

[45] J Finnis, *Natural law and natural rights*, Oxford University Press, 1980. 272.

[46] L. L. Fuller, *The morality of the law,* Yale University Press, 1964.42-44.

[47] Constitution (n 2 above).

legislative, executive and judicial powers.[49] The doctrine of separation of powers has come to play a significant part in recent constitutional debate.[50] The emergence of separation of powers is tracked down to the excerpts of John Locke and Baron de Montesquieu.[51] John Locke's arguments about separation of powers are found in his Treatise of government.[52] In his discussion, Locke made an inclination for investing legislative power in a large representative assembly[53] where the law making powers ought to be allocated to Parliament.[54] According to Monstesquieu, "When legislative power is united with executive power in a single person or in a single body of the Magistracy, there is no liberty".[55]

Erec Barendt[56] ensuing Vile[57] differentiates pure and partial classes of separation of powers.[58] The pure theory calls for complete separation of the three branches of the state, a strict delineation of functions between the executive, the legislature and the judiciary.[59] The division of power functions as a control on the power of the state.[60] Under the pure theory, specific functions and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction.[61] Legislative power, executive and judicial authority are critical. Explaining what the doctrine of separation of powers means in the Britain, Lord Mustill in the case of *R v Home Secretary, ex p fine Brigades Union*[62]stated as follows:

> It is a feature of the pecuniary British conception of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance

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[48] Sec 3 (2) (e) of the Constitution (n 2 above) states that the principles of good governance which bind the state, institutions and agencies of government include "the observance of the principle of separation of powers".

[49] Constitution (n 2 above) in section 3 (1) provides that Zimbabwe is founded on the supremacy of the Constitution.

[50] N. W Barber, Preclude to the Separation of Powers, 2001. Vol 60. *The Cambridge Law Journal* March 59-88.

[51] S Ratnapala, John Locke's Doctrine of the Separation of Powers: A Re-Evaluation, 1993. Vol 38 Issue 1. *The American Journal of Jurisprudence* 189-220.

[52] J Locke, *Two Treatise of Government,* Cambridge University Press, 1998. 366-67.

[53] J Waldron, Separation of Powers in Thought and Practice? 2013. Vol 54. *Boston College Law Review* 449.

[54] Locke (n 52) 329-30.

[55] C Montesquieu, *The Spirit of the Laws*, Cambridge University Press, Anne M. Cohler etal Eds & Trans, 1989.

[56] E Barendt, Separation of Powers & Constitutional Government, 1995.

[57] M.J.C Vile, *Constitutionalism & Separation of Powers*, Indian polis, 1998 Ch. 1.

[58] Barber (n 50 above) 59-88.

[59] Barber (n 50 above) 59-88.

[60] Vile (n 57 above) 14.

[61] Judge Phineas Mojapelo. The doctrine of separation of powers (a South African perspective). Paper delivered at the Middle Temple South Africa Conference, September 2012.

[62]*R v Home Secretary, Ex p fine Brigades Union* (1995) 2 513 at 567.

with the power conferred on it by law. The courts interpret the laws, and see that they are obeyed.

An alternative vision of the doctrine is the partial version which emphasises the significance of checks and balances within the state.[63] Checks and balances relates to the degree in which the arms of government are able to diminish each other's powers.[64] The three arms of the government are given powers over each other and they work to complement and keep another in check.

1.3 STATEMENT OF THE PROBLEM

The ideal situation is that the Zimbabwean Courts are engaging in a more searching review when determining cases dealing with the constitutionality of the Temporary Measures Act. Ideally, the courts apply an "arbitrary and capricious" judicial review in assessing the constitutionality of the Act and the Regulations passed under it. The courts have adopted critical doctrines of judicial review which include the doctrine of severability. When interpreting the Constitution in cases regarding the constitutionality of the Presidential Powers (Temporary Measures) Act, the courts adopt progressive interpretative methods which include structuralism, teleological and historical interpretation. For preference, there is a framework that provides guidance to the courts for judicial review of Presidential statutory powers. When courts deal with the constitutionality of Presidential action, they do not exercise judicial restraint. However, in practice the Zimbabwean Courts have not developed standards of judicial review when determining the constitutionality of Presidential Powers (Temporary Measures Act). In actuality, there is no theorised structure that directs the courts when they are reviewing Presidential statutory powers. There is no theory about how to detect the meaning of Presidential powers. There is a want of a broad structure for judicial review of Presidential action in cases undergoing such review. The courts have adopted a judicial restraint wherein, they have avoided dealing with the constitutionality of the Temporary Measures Act or they have held that it is constitutional. When interpreting the Constitution in cases dealing with the Presidential action, courts have adopted a textual approach of interpretation and they accord the constitutional provisions their original meaning. The research is of the argument that there are deficient standards of review in cases concerning the constitutionality of the Presidential powers. The research recommends setup of a methodological legal framework to guide judicial review in cases concerning the constitutionality of the Presidential statutory powers.

[63] Barber (n 50 above) 59-88.

[64] Open Society Initiative for Southern Africa (Osisa), *Constitutional Review and Reform and the Adherence to Democratic Principles in Constitutions in Southern African Countries* 2007 39.

1.4 JUSTIFICATION OF THE STUDY AND NOVELTY FEATURES

The research explains the appropriate standards of judicial review in cases dealing with the Presidential statutory powers that Zimbabwean scholars have not interrogated. It is an effort to contribute to the existing literature on the conception of pertinent standards of judicial review in cases concerning the constitutionality of the Presidential statutory powers. Zimbabwean scholars have argued that the Presidential Powers (Temporary Measures) Act is unlawful but have not gone further to assess the standards of judicial review that courts should adopt in adjudicating cases dealing with the same. There is a gap in literature that the study intends to fill. The study is inspired by the standards of judicial review that are used to review agencies' actions under the American administrative law. The judicial review standards stipulated in United States Administrative Procedure Act[65]have been entrenched as the appropriate standards of judicial review. Out of the numerous judicial review doctrines, key for this study is the arbitrariness review also known as "hard look review", procedural review and the rational basis review. The judicial review standards command agencies to have justification for the rules that they make and sanction that laws made should not be ambiguous. The review standards mandate the courts to set aside agency action that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law".[66] The rational basis calls for a careful examination of the rationality of a piece of legislation. Even after the United States Supreme Court decision in *Franklin v Massachusetts*[67] which held that the President is not an "agency" as provided for in the APA, scholars have contended that the review standard that apply to agencies should be used by courts when reviewing the constitutionality of the Presidential statutory powers. The argument has been that Presidential action shapes national life, policy and affects human rights. Hart, an American scholar states that through Presidential statutory powers:

> Presidents have declared a national freeze on national wages and prices, established major agencies such as the EPA, the Peace Corps, and the office (now Department) of Homeland Security, mandated non-discrimination and affirmative action programs for the vast portions of the economy engaged in government contracting, suspended private legal claims against foreign governments in domestic courts, established tribunals, ordered that an American citizen captured in Chicago be subject to military jurisdiction, and initiated federal funding for faith based organisations.[68]

In exercising their statutory powers, United States Presidents have issued executive orders that affect national life and fundamental liberties. The situation is not different from Zimbabwe. Presidential orders in the form of execution of the

[65] United States Administrative Procedure Act of 1946 (hereafter "APA").

[66] APA (n 65 above).

[67] *Franklin v Massachusetts* 1992 US 505.

[68] K. M Stack, The Statutory President, 2005. 90, *Iowa Law Review* 541.

Presidential Powers (Temporary Measures) Act have been the origin of a number of significant laws in Zimbabwe.[69] Laws that have their basis on the Presidential

[69] The Regulations that have been passed by the Zimbabwean Presidents on the basis of the Presidential Powers (Temporary Measures) Act (n 1 above) include the Presidential Powers (Temporary Measures) (Electoral Act Modification) Regulations 1986, Statutory Instrument 151B/86, Presidential Powers (Temporary Measures) (Urban Property Renovation) Regulations 1987, Statutory Instrument 198/87, Presidential Powers (Temporary Measures) (Modification of Medical, Dental and Allied Professions Act), Regulations 1987, Statutory Instrument 191/87, Presidential Powers (Temporary Measures) (Dissolution of District Councils, Matabeland North) Regulations 1987, Statutory Instrument 279A/87, Presidential Powers (Temporary Measures) (Parastatals Commission) Regulations 1988, Statutory Instrument 86/88, Presidential Powers (Temporary Measures) (Urban Property Renovation), Statutory Instrument 204/91, Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991, Statutory Instrument 226A/91, Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) (No.2) Regulations 1991, Statutory Instrument 330A/91, Presidential Powers (Temporary Measures) (Urban Property Renovation) (No.2) Regulations 1991, Statutory Instrument 317/91, Presidential Powers (Temporary Measures) (Mutare City Council Elections Validation) Regulations 1991, Statutory Instrument 364A/91, Presidential Powers (Temporary Measures) (Fee for Inspection Imports) (Validation) Regulations 1992, Statutory Instrument 426B/92, Presidential Powers (Temporary Measures) (Immigration Act) Regulations 1993, Statutory Instrument 96B/93, Presidential Powers (Temporary Measures) (Reserve Bank) Regulations 1993, Statutory Instrument 111A/93, Presidential Powers (Temporary Measures) (Hire-Purchase Act Amendment 1993), Statutory Instrument 149/93, Presidential Powers (Temporary Measures) (Urban Transport Services) Regulations 1993, Statutory Instrument 247A/93, Presidential Powers (Temporary Measures) (Sales in Execution) Regulations 1994, Statutory Instrument 148/94, Presidential Powers (Temporary Measures) (Medical, Dental and Allied Professions Act) (Amendment) Regulations 1995, Statutory Instrument 21/95, Presidential Powers (Temporary Measures) (Urban Councils) 1995, Statutory Instrument 148 A/95, Presidential Powers (Temporary Measures) University of Zimbabwe) Regulations 1995, Statutory Instrument 191A/95, Presidential Powers (Temporary Measures) (Nomination of Mayors) Regulations 1995, Presidential Powers (Temporary Measures) (Cellular Telecommunications Services) Regulations 1996, Statutory Instrument 151 A/96, Presidential Powers (Temporary Measures) (Dairy Marketing Board) Regulations 1997, Statutory Instrument 128B/97, Presidential Powers (Temporary Measures) (Labour Relations) Regulations 1998, Statutory Instrument 368A/98, Presidential Powers (Temporary Measures) (Capital Gains Tax) Regulations 1999, Statutory Instrument 222E/99, Presidential Powers (Temporary Measures) (Prisons) Regulations 1999, Statutory Instrument 240B/99, Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000, Statutory Instrument 148A/2000, Presidential Powers (Temporary Measures) (Income Tax Act Amendment) (No.2) Regulations 2000, Statutory Instrument 212C/2000, Presidential Powers (Temporary Measures) (Broadcasting) Regulations, Statutory Instrument 255A/2000, Presidential Powers (Application of *Chapter 8.14*) to Premier Service Medical Aid Society) Regulations 2015, Statutory Instrument 2015/77, Presidential Powers (Temporary Measures) (Trafficking in Persons Act) Regulations 2014, Statutory Instrument 4/2014, Presidential Powers (Temporary Measures Measures) (Amendment of Electoral Act) Regulations 2013, Statutory Instrument 85/2013, Presidential Powers (Temporary Measures) (Amendment of Criminal Law Code) Regulations 2008, Statutory Instrument 51A/2008, Presidential Powers (Temporary Measures) (Land Acquisition) (No.2) Regulations 2001, Statutory Instrument 338/2001. Recently the Presidential Powers Temporary Measures Act (n 1 above) was used in the gazetting of the Presidential Powers (Temporary Measures) Amendment of Money Laundering and Proceeds of Crime Act Regulations 2014, Statutory Instrument 2/2014, Presidential Powers (Temporary Measures) (Amendment of Criminal Law) (Codification and Reform Act), Statutory Instrument 3/2014, The Presidential Powers (Temporary Measures) (Trafficking in

Powers (Temporary Measures) Act have been passed on issues affecting national life, the finance system of the country, the electoral and criminal system and fundamental freedoms. The United States judiciary has authoritatively stated that the standards of judicial review that are used to review agencies are the appropriate standard to review Presidential action. It is for this reason that this study argues that the Zimbabwean Courts have not applied satisfactory standards of review in cases regarding the constitutionality of the Presidential statutory powers. The judiciary has not applied a searching and demanding review in cases dealing with the same. The study also discusses the critical doctrines of judicial review that are missing in the Zimbabwean literature. Critical for this research is the doctrine of severability.

1.5 LITERATURE REVIEW ON THE LAWFULNESS OF THE PRESIDENT'S LAW-MAKING POWERS

Professor Feltoe[70]raises a question on whether Parliament can delegate its legislative powers to the executive.[71] The author states that the Zimbabwean President has power to enact law under the Temporary Measures Act. On page 10 of his book, he reiterates that the Regulations made in terms of the Act have an effect of overriding any law. Professor Feltoe concludes by stating that the powers of the President to make law under the Temporary Measures Act "…are arguably unconstitutional". Linington[72]explains the changes that were made to the Electoral Act in 2013. He states that the changes were not done through a Bill passed by Parliament but were enacted by the President using the Presidential Powers (Temporary Measures) Act. The author on page 13 of his article states that the constitutionality of the procedure in the amendment of the Electoral Act by the President is "doubtful". Veritas, the legal think tank in Zimbabwe in its Election Watch of 2017 asserts that the Temporary Measures Act by empowering the President to make law is unconstitutional.[73] The Zimbabwe Human Rights NGO[74]

Persons Act) Regulations, 2014, Statutory Instrument 4/2014 and the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act Regulations) 2016, Statutory Instrument 133/2016. In 2020, the Presidential Powers (Temporary Measures) (Deferral of Rent and Mortgage Payments during National Lockdown) Regulations, 2020 were passed. In June 2022, the President entrenched the multi-currency into Zimbabwean law through the enactment of the Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2022.

[70] G Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe,* 2012. 10.

[71] Feltoe (n 70 above).

[72] Linington (n 17 above)13.

[73] Veritas" Election Watch 11/2017". Presidential Powers (Temporary Measures) Act used to amend the Electoral Law. Accessed 28 March 2022.
http://www.veritaszim.net/node/2186.

[74] Zimbabwe Human Rights NGO Forum, Separation of Powers and Protection of Human Rights in the context of the New Constitution in Zimbabwe, 2010. Accessed March 6 2022. https://www.hrforumzim.org/wp-content/uploads/2010/06/HR1-Separation-of-Powers-Zimbabwean-Experience.pdf.

reiterates that the President's power to make law on the basis of the Temporary Measures Act is in an infringement of separation of powers.

1.6 STRUCTURE OF THE DISSERTATION

The dissertation has five chapters. Chapter one gives an introduction. It significantly furnishes critical aspects of the research such as the introduction, background to the study, justification of the research, literature review, statement of the problem, methodology, hypothesis and delimitations. The introduction provides a list of the Regulations that have been passed by the Zimbabwean Presidents using the Presidential Powers (Temporary Measures) Act. It makes a distinction between the Temporary Measures Act and the Emergency Powers Act.[75] One of the major aims of the introduction was to highlight that from the year 1994 to 2018, there has been legal challenges challenging the constitutionality of the Temporary Measures Act to no avail.

The second chapter is the conceptual framework of the study. The chapter critically reviews the jurisprudence of the Zimbabwean Courts in cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act. The aim is to show that the standards of judicial review by the Zimbabwean Courts in cases dealing with the constitutionality of the Presidential powers are deficient. The Chapter discusses the appropriate standards of judicial review in cases involving the Presidential powers and these include the arbitrariness review often called the "hard look" review, procedural review and the rational basis review. Chapter two also debates critical doctrines of judicial review which include the doctrine of severability.

Chapter three is the theoretical framework of the study. It interrogates the theoretical foundations underlying judicial reasoning. The chapter discusses judicial restraint which encompass a number of doctrines that include textual interpretation of the Constitution and respect for precedent. Chapter three discusses the ideal constitutional interpretative methods in cases dealing with the constitutionality of the Presidential statutory powers. These include structuralism, teleological and historical interpretation. The chapter will argue that there is a missing interpretative theory that provide guidance to the courts for judicial review of Presidential statutory powers.

Chapter four discusses the "non-delegation doctrine". It converses about the theoretical foundations of the doctrine and its intent. Under this chapter, the researcher argues that in cases regarding the constitutionality of the Presidential Powers (Temporary Measures) Act, the Zimbabwean judiciary has not executed the purpose of the doctrine. The chapter also discusses the exemption of the President from review under the Administrative Justice Act.

[75] Emergency Powers Act (n 22 above).

The fifth chapter reiterates the argument, re-affirms the objectives of the research, summarises the findings drawn from chapter two, three and four. The chapter proffers recommendations and it concludes the research.

1.7 RESEARCH AIMS AND OBJECTIVES

The research was guided by the following objectives:

1. To critically interrogate the standards of review, if any established, that have been adopted by the Zimbabwean Courts when adjudicating cases dealing with the constitutionality of the Temporary Measures Act.
2. To discuss the theories underlying judicial reasoning analysing whether there is an established theory about how to determine the connotation of Presidential statutory powers.
3. To discuss the non-delegation doctrine of legislative powers and the exemption of the President under the Administrative law.
4. To provide recommendations for judicial review for cases undergoing review of constitutionality of Presidential statutory powers.

1.8 RESEARCH QUESTIONS

1. Can the Zimbabwean judiciary adopt the more demanding standards of judicial review which include the arbitrariness review, procedural review and rationality basis review?
2. Can the Zimbabwean Courts adopt critical doctrines of judicial review which include the doctrines of severability?
3. Can Zimbabwean Courts avoid dealing with the constitutionality of the Presidential powers?
4. Can Zimbabwean Courts use technicalities to evade the issue of constitutionality of the Presidential powers as contained in the Presidential Powers (Temporary Measures) Act?
5. Can Zimbabwean Courts adopt judicial restraint when dealing with cases involving the constitutionality of the Presidential powers?
6. What is the relevance of constitutional interpretation in cases dealing with the Presidential action?
7. Are courts in jurisdictions of best practices applying a stricter review in cases regarding the constitutionality of Presidential action?

1.9 METHODOLOGY

The research was mostly a desk research. The researcher utilised the doctrinal and analysis study methods.

Doctrinal research involves the study of constitutional principles and scrutinising legal theories analysing how they have been configured and put into practice. The researcher analysed case law, the Constitution, Acts of Parliament, Statutory

Instruments and law theories to ascertain whether Zimbabwean Courts have been applying appropriate judicial review standards when adjudicating cases concerning the constitutionality of Presidential statutory powers.

The study also adopted the comparative research method. The comparative research methodology involves making comparisons between countries, aim being to make conclusions past exclusive instances. The research focused on the jurisdiction of the United States. It discussed the review standards that have been developed under the American Administrative law, deliberating case law where the courts applied them.

1.10 HYPOTHESIS

The hypothesis of this study is that if the Zimbabwean Courts apply strict standards of judicial review, then there will be development of constitutional jurisprudence, protection of liberties, constitutional supremacy, the doctrine of separation of powers, rule of law, legality and democracy.

1.11 DELIMITATIONS

The research is carried out in Zimbabwe. The Zimbabwean Courts' decisions that dealt with the constitutionality of the Temporary Measures Act from 1994-2018 structure the drive of this study. The research is carried from March-July 2022.

1.12 CONCLUSION

This was an introductory chapter. The chapter contains the introduction, background to the study, justification of the research, literature review, methodology, hypothesis and delimitations. The chapter looked at the background of the Presidential statutory powers, the Temporary Measures Act, judicial review, constitutional supremacy and the doctrine of separation of powers. The next chapter discusses in depth the concept of judicial review. It critically reviews the jurisprudence of the Zimbabwean Courts in cases dealing with the lawfulness of the Temporary Measures Act. The chapter discusses the appropriate standards of judicial review in cases concerning the constitutionality of the Presidential Powers (Temporary Measures) Act and also discusses critical doctrines of judicial review.

CHAPTER TWO

Judicial Review in cases dealing with the Constitutionality of the Presidential Statutory Powers

2.1 INTRODUCTION

The chapter discusses the appropriate standards of judicial review in cases concerning the Presidential statutory powers. The standard of judicial review in Presidential statutory powers matters given the growth in Presidential policy making relying on statutory powers.[76] The chapter discusses the concept of judicial review in depth. It also discusses the Zimbabwean jurisprudence in cases dealing with the Presidential Powers (Temporary Measures) Act,[77] critically analysing how the courts have reviewed the cases. In the case of *S v Gatzi and Rufaro Hotel (Pvt) Ltd*[78]the High Court held that the Act was not in conflict with the old Constitution of Zimbabwe.[79] In the case of *Forum Party of Zimbabwe and others v Minister of Local Government, Rural and Urban Development and others*[80]the Supreme Court held that the Act is constitutional. In the case of Morgan Tsvangirai, an application that challenged the Temporary Measures Act was dismissed without reasons. In the case of *Mujuru v The President of Zimbabwe and others*[81]the constitutional application challenging the Act failed on the basis that the applicant had not sought a declaratur that the Temporary Measures Act is unconstitutional. In *Mlilo v The President of Zimbabwe*[82]the High Court held that the Act is not in contravention of the Constitution. In the Supreme Court, the Court dismissed the case on the basis of a technicality. The Supreme Court held that the applicant should have appealed against the order of validity or invalidity to the Constitutional Court.

The chapter will argue that the Zimbabwean judiciary has not developed a framework of reviewing the Presidential statutory powers and that the courts have not fulfilled the purpose of the doctrine of non-delegation. It will discuss the appropriate standards of reviewing the Presidential statutory powers. The researcher will discuss the judicial review doctrines entrenched under the United States APA. Important for this study is the "arbitrary and capricious" / "hard look", procedural and the rationality judicial review standards. It is now a settled position that these review standards that are used to review agencies' action are the appropriate standards to review Presidential action. At the end, the chapter will discuss the judicial review doctrine of severability, arguing that the

[76] Driesen (n 31 above).
[77] Presidential Powers (Temporary Measures) Act (n 1 above).
[78] *S v Gatzi & Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H).
[79] Constitution of Zimbabwe, As amended on the 14th of September, 2005 (n 24 above).
[80] *Forum Party of Zimbabwe & others v Minister of Local Government, Rural & Urban Development & others* 1997 (2) ZLR 194 (S).
[81] *Mujuru v the President of Zimbabwe and 5 others* CCZ 8/18.
[82] *Mlilo v The President of the Republic of Zimbabwe* HH 236-18.

Zimbabwean Courts have not adopted the doctrine in the cases regarding the constitutionality of the Temporary Measures Act.

The researcher chose the United States as a standard of best practice because of its constitutional and legal framework which is not so different from the Zimbabwean one. The United States Constitution incorporates the settled values and principles,[83] one of it being the supremacy of the Constitution. As explained in chapter 1, supremacy of the Constitution establishes a primacy hierarchy within the sources of law.[84] It entails that a Constitution trumps any other norm in a legal system in case of any inconsistency with constitutional imperative.[85] In a constitutional supreme state, judicial review is a necessity. The United States Constitution provides for the supremacy of the Constitution in Article 6 which states that:

> [The] Constitution…shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

A similar provision is found in the Constitution. Section 2 states that [the] "Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid…" The concept of supremacy of the Constitution is also enshrined as value and a principle in the Constitution.[86] The opposite of constitutional supremacy is the principle of "Parliamentary Sovereignty" which is a primary feature of the English constitutional law.[87] The principle entails that the law maker, being Parliament "has under the English Constitution, the right to make or unmake any law whatsoever, and further, that no person is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[88] Judicial review is not a characteristic of parliamentary sovereignty principle and issues concerning constitutionality are left to Parliament.

A constitutional supreme state is supported by the separation of powers doctrine, checks and balances on the government and the principle of legality.[89] There is a clearly defined separation of powers under the United States Constitution. All legislative powers are bestowed in the Congress,[90] executive power is endowed on

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[83] G Romeo, The conceptualisation of constitutional supremacy: Global discourse and legal tradition, 2020.21. *German Law Journal* 904-923.

[84] Romeo (n 83 above) 905.

[85] n 84 above, 905.

[86] Sec 3 (1) (a) of the Constitution (n 2 above).

[87] Limbach (n 37 above) 1.

[88] A.V Dicey *Introduction to the Study of the Law and the Constitution* 8th Ed, Indiana Polis: Liberty/classics, 1982.

[89] C Botha *Statutory Interpretation. An Introduction for students* 5th Ed, Juta and Company (Pty Ltd), 2012, 185.

[90] Art 1 of the United States of America Constitution, 17 September 1787 (hereafter "United States Constitution").

the President[91] and the judicial power is vested in the Supreme Court.[92] The United States constitutional structure is similar to the Zimbabwean one where the legislative authority is exercised by the legislature,[93] the executive authority conferred on the President,[94] and the judicial authority in the courts.[95] In contrast to countries with parliamentary forms of government where the office of the President for the most part is formal, the United States President has considerable command.[96] Article 2 of the United States Constitution provides that the President is the Commander-In-Chief and Navy of the United States and of the militia. He has the ability to grant and reprieve pardons and has the authority to nominate judges. He also has the power to veto legislation. Chapter one of the study discussed the statutory powers that a Zimbabwean President has. They are similar to the statutory powers highlighted above.

2.2 THE CONCEPT OF JUDICIAL REVIEW

Judicial review is the power of evaluation conferred to the judiciary.[97] It is based upon the following theorem: (1) that the Constitution binds all the government organs, (2) that the law is known and capable of being enforceable by the courts and that (3) the function of interpreting the law lies with the courts, and their interpretation of the Constitution is authoritative.[98] Judicial review alludes to the authority of a court to enquire if a law, executive order or other government action conflicts with the Constitution and declare it unconstitutional if found in breach.[99] The duty of the court is to determine the constitutionality of the legislation, assessing the rationality of the statute.[100] When the constitutionality of the legislation is challenged, a court is mandated to consider its constitutionality on the basis of the framework set by the Constitution.[101] How the courts interpret the provisions of a statute in light of the Constitution is critical since their exposition is commanding.

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[91] Art 2 of the United States Constitution (n 90 above).
[92] Art 3 of the United States Constitution (n 90 above).
[93] Sec 117 of the Constitution (n 2 above).
[94] Sec 88 of the Constitution (n 2 above).
[95] Sec 162 of the Constitution (n 2 above).
[96] Britannica "Presidency of the United States of America" Accessed 4 April 2022. https://www.britannica.com/topic/presidency-of-the-United-States-of-America.
[97] R. V. Ramachandrasekhara Rao, Bases of Judicial Review, 1961. Vol 3. *Journal of the Indian Institute* 293-310.
[98] E.S Corwin, *Marbury v Madison* and the Doctrine of Judicial Review, 1914. Vol 12 No 7. *Michigan Law Review* 538-572.
[99] P Sharan, Constitution of India and Judicial Review, 1978.Vol 3 No 4. *The Indian Journal of Political Science* 526-537.
[100] A. S Anand, Judicial Review, Judicial Activism, Need for Caution, 2000. Vol 42 No 2/4. *Journal of the Indian Law Institute* 150.
[101] Anand (n 100 above) 150.

What may be reviewed by the courts include the decisions of lower courts, acts and decisions of the executive authorities or enactment of legislation.[102] The concept has its origins in the theory of limited government and on the theory which provides that any law or conduct which contravenes the Supreme Law is void, and that within a state there must be an organ with powers to pronounce such invalid.[103] As indicated earlier, judicial review is a feature of constitutional supreme states. In constitutional supreme jurisdictions, the Constitution is supreme and it binds every person, the executive, legislative and judicial institutions and all government bodies. In aforesaid states, the courts have the power of testing the validity of the legislation and governmental actions.[104]

The concept that entails that courts have powers to review statutes is not new.[105] The notion can be traced to the ancient Greek *graphai paranomon*, a procedure by which legislation was set aside on the rationale that it was unlawful.[106]*(Graphe) paranomon* was a public arraignment against the conceiver of a new *psephisma* (decree) on the basis that the decree or legislation was unconstitutional.[107] In the Athenian legal system, where a proposed legislation was illegal substantively or procedurally, a public case could be introduced against the author of the proposed law.[108] A volunteering prosecutor (*Ho boulomenos*) could submit against the proposer of a law after it was passed by the *Boule*[109] and before it was ratified by the *Ekklesia*[110]or before it was formally introduced or passed by the *Ekklesia*.[111] The process commenced by making a statement that was taken under oath *hypomosia*[112]during the debate on the proposed legislation (in the *Boule* or the *Ekklesia*) and then submitting the written charge with the *themothetai*.[113] In the case of a conviction, the proposed legislation was revoked and the author of the

[102] Ramachandrasekhara Rao (n 88 above) 293-310.
[103] M. P Jain, Indian Constitutional Law 1822-22 (2003).
[104] Anand (n 100 above).
[105] M Radin, The Judicial Review of Statutes in Continental Europe, 1935. Vol 41. *West Virginia Law Review* 112.
[106] R J Bonner and G Smith, *The Administration of Justice from Holmes to Aristotle*, University of Chicago Press, 1930. 264-267.
[107] S.C Todd, Selections by Michael de Brauw, *A Glossary of Athenian Legal Terms*, 2003, 44 of 50.
[108] I Giannadaki, The time limit (Prothesmia) in the Grap he-paranomon. Paper presented at the American Philosophical Association meeting in Philadelphia in 2012 and in at the Ionian University, Corfu (Greece).
[109] A *Boule* was a Council in Greece which composed of an advisory body of nobles. The major task of the *Boule* was to draft contemplations (*probouleumata*) that were to be discussed in the *Eclesia*. It was also in control of the financial matters, provided advice in military matters and oversaw the competence of the Magistrates.
[110] Hansen 1974. 28-9. The *Ekklesia* was a popular assembly endorsed all decrees before being passed as law. Although the *Ekklesia* was not a judicial body, in a way it operated as a court.
[111] Hansen 197 (n 110 above).
[112] CF. Dem. 18.103.
[113] Harris 2013.21-122.

statute or decree was punished with a fine.[114] The *graphe paranomon* was one of the fundamental actions which aimed not only checking brisk legislation but also the political power of the positions in Athens.[115] It was also a means of entrenching the rule of law.[116] In the latter days of the Republic Rome, the Senate had a duty to declare invalid statutes because of their unconstitutionality.[117]

2.3 JUSTIFICATION FOR JUDICIAL REVIEW

2.3.1 Constitutionalism and the Principle of the Rule of Law

Judicial review is the foundation of constitutionalism and rule of law. Judicial review is regarded as a necessary feature of constitutionalism.[118] Constitutionalism entails limits that are placed on the state and government powers.[119] It is an idea that is often correlated with John Locke's theories which put forward that the powers of the government ought to be limited and that its legitimacy depends on it observing the limitations.[120] The objective of constitutionalism is to ensure that power is exercised in accordance with stipulated principles.[121] Constitutionalism is achieved by dispensing power within a political system and creating a system of checks and balances. Power is divided between the legislative branch which is charged with making laws, the executive body responsible for implementing laws and judiciary which has a mandate of adjudicating disputes. The rule of law is also a justification of judicial review. As defined in Chapter 1, the rule of law refers to the dominance of the law and consists of formal and procedural characters addressing the method a nation is ruled.[122] A determination of whether the rule of law has been breached by state or not is a preserve of the courts.

The authoritative justification for judicial review was expounded by John Marshall in the landmark decision of *Marbury v Madison*[123] where the Supreme Court of the

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[114] Giannadaki (n 108 above).

[115] H Yunis, Law, Politics and the Graphe Paranomon in the fourth century Athens, 1998.29. *Greek Roman Byzantine Studies* 361-82.

[116] M. J Sundahl, The rule of law and the nature of fourth-century Athenian Democracy, 2003. Vol 54. *Law Faculty Articles and Essays* 127-156.

[117] G. W Botsford, The Roman Assemblies, 1909. 30 (1). *The Journal of Hellenic Studies* 107, 113, 405, 457 and 459.

[118] K E Whittington, An "indispensable feature"? Constitutionalism and Judicial Review, 2002. 61. *New York University Journal of Legislation and Public Policy Legislation and Public Policy* 22.

[119] T Corrigan, Securing constitutionalism and civil liberties in Africa: An analysis of evidence from APRM. African Perspectives Global Insights, Research Report 22 February 2016. *South African Institute of International Affairs*.

[120] Stanford Encyclopedia of Philosophy. First published Wednesday January, 10, 2001, Substantive Revision Wed, 2017. Accessed March 15 2022.
https://plato.stanford.edu/entries/constitutionalism/#ConInt.

[121] Corrigan (n 119 above).

[122] Stanford Encyclopedia of Philosophy, first published Wednesday June 22, 2016. Accessed March 16 2022.
https://plato.stanford.edu/entries/rule-of-law/.

[123] *Marbury v Madison* 1803 hereinafter "*Marbury*".

United States entrenched for the first time that courts have the power reverse an act of congress on the basis of unconstitutionality.[124] In the case of *Marbury*, the Supreme Court of the United States handed down a decision in which it held that the acts of the congress were unconstitutional. The congress had bestowed on the court authority to furnish original writs of mandamus in cases not having an effect on Ambassadors, public Ministers and Consuls. In terms of Article III of the Constitution of the United States[125]the Supreme Court does not have the power to issue such writs. *Marbury* was the first decision in the United States where the Supreme Court endorsed the position that the courts have authority of not executing a statute if it is in breach of the Constitution.[126]

Justice Marshall's argument was based on judicial review and he reiterated as follows: (1) "All those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void".[127] (2) "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each…If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply".[128] (3) "…This doctrine…would declare, that if the legislature shall do what is expressly forbidden, such act notwithstanding the express prohibition is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breadth which professes to restrict their powers within narrow limits".[129]

2.3.2 System of checks and balances

The need to confer courts with powers to declare legislation unconstitutional arises as a result of checks and balances between the three branches of the government.[130] Separation of powers is connected to the concept of checks and balances. Checks and balances is a principle which entails that the branches of government i.e. the legislature, executive and judiciary are separate from each other. It alludes to how power can be controlled within the three bodies. The aim of the principle of checks and balances is to guarantee that the three arms of the state regulate one another. Under checks and balances, the judiciary has the power to review the conduct of the legislative and executive bodies.

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[124] *Marbury v Madison* (n 123 above).
[125] United States of America Constitution (n 90 above).
[126] L H Tribe *American Constitutional Law,* 3rd Ed, Foundation Press, 2000.
[127] *Marbury v Madison* (n 123 above) 177.
[128] n 123 above, 177-178.
[129] n 123 above, 178.
[130] Anand (n 100 above).

2.3.3 Judicial authority

Judicial review is a justifiable exercise by the judiciary of its constitutional obligation by the mere fact that the Constitution assigns a specific role to the courts.[131] Separation of powers demand that the power to make law lie with Parliament and the executive administers them. Judicial power as a check on the arbitrary use of power exists in the courts.[132] Judicial authority entails that an individual or group of individuals are conferred with authority to adjudicate and resolve conflicts.[133] Section 160 of the Constitution states that judicial authority is entrusted to the courts. The provision empowers the judiciary to determine the constitutionality of the acts of the legislature and the executive. If the courts find that any piece of legislation is ultra vires the Constitution, they have the power to declare it unconstitutional. Judicial authority entails a 'legitimacy credit'.[134] The establishment of courts implies an acceptance of a binding judicial authority.[135]

2.4 ZIMBABWEAN JURISPRUDENCE IN CASES DEALING WITH THE CONSTITUTIONALITY OF THE PRESIDENTIAL POWERS (TEMPORARY MEASURES) ACT

In 1994, the lawfulness of the Temporary Measures Act was objected to in the case of *S v Gatzi and Rufaro Hotel (Pvt) Ltd.*[136] In the case, both accused were convicted of contravening section 6 of the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy vehicles) Regulations.[137] The Regulations had been enacted on the basis of section 2 of the Temporary Measures Act.[138] The issue for determination before the Court was whether the Regulations were valid or not. On review, the argument on account of the accused was that the Temporary Measures Act was objectionable on a number of grounds. It was argued that the Act amounts to a delegation of law-making power which was contrary to section 51 of the old Constitution.[139] Section 51 of the old Constitution provided that law making power was the function of Parliament. On that basis, it was argued that Parliament could not delegate its authority to make laws to the President and that such act amounted to an infringement of the doctrine of

[131] Anand (n 100 above) 150-151.

[132] C. W. Pound, The Judicial Power, 1992. Vol 35 No 7. *Harvard Law Review* 790.

[133] B Makwaiba, The Supreme Court of Zimbabwe's Chigwada Decision and Its Implications for Testamentary Dispositions and Enforcement of Section 26 of the Constitution of Zimbabwe, 2022. Vol 25. *Potchefstroom Electronic Law Journal* 22.

[134] K Traisbach, Judicial authority, legitimacy and the (international) rule of law as essentially contested and interpretive concepts: Introduction to the special issue, 2021. 10 (1). *Global Constitutionalism* 77.

[135] Traisbach (n 134 above) 77.

[136] *S v Gatzi & Rufaro Hotel* (n 78 above).

[137] Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991 (Statutory Instrument 226 A of 1991) (Published in the Government Gazette on 19 August 1991.

[138] *S v Gatzi & Rufaro Hotel* (n 78 above).

[139] n 78 above, 14.

separation of powers. The Court held that Parliament could adeptly delegate its legislative power to the President. According to the High Court, "the doctrine of separation of powers was of little relevance, since the Constitution is the supreme law against which the encroachment on Parliament's powers had to be determined…"[140] The Court held that the Act was not in conflict with the old Constitution.

In the case of *Forum Party of Zimbabwe and others v Minister of Local Government, Rural and Urban Development and others*[141] an appeal was brought before the Supreme Court by the Forum Party of Zimbabwe. The High Court had declined to set aside the Gweru October 1995 general elections. The election had been conducted in terms of the Presidential Powers (Temporary Measures) (Urban Councils Regulations 1995) which had been made under the Temporary Measures Act. On appeal, the applicants challenged the Temporary Measures Act on the basis that it contravened sections 50 and 51 of the old Constitution and that the Regulations were in breach of the enabling Act.[142] It was also argued that the Regulations were ultra vires section 2 of the Temporary Measures Act.[143]

The Court remarked that even it was assumed that Regulations were unconstitutional and ultra vires the Temporary Measures Act, such argument could not hold.[144] This was so because section 321 (2) of the Urban Councils Act validated the elections in a clear wording.[145] Any councillor or mayor who was elected was deemed to have been elected in terms of the Urban Councils Act and not the Regulations.[146] The impact of the provision was to remove the election away from the Regulations.[147] The elections were validated as they were deemed to have been done in terms of the Urban Councils Act.[148] According to the Supreme Court, it therefore followed that the election was not contrary to the Constitution.[149] It was the Court's decision that it was futile to decide the argument raised by Forum Party of Zimbabwe and others regarding the constitutionality of the Temporary Measures Act. Gubbay CJ (as he then was) suggested that the Presidential Powers (Temporary) Measures Act is constitutional when he remarked that the Minister of Local Government, Rural and Urban Development might have been aware of the decision in *S v Gatzi* (Supra) in which the Act was found to be intra vires the Constitution.[150] The Court stated that on the papers before Adam J, the High Court

[140] n 78 above, 9.
[141] *Forum Party of Zimbabwe & others* (n 80 above).
[142] n 80 above, 196.
[143] n 80 above, 196.
[144] n 80 above, 197.
[145] n 80 above, 197.
[146] n 80 above, 197.
[147] n 80 above, 197.
[148] n 80 above, 197.
[149] n 80 above, 198.
[150] n 80 above, 196.

judge who dealt with the matter, there was no indication that the Forum Party of Zimbabwe did not accept the correctness of the decision.[151] The Supreme Court in a way held that the Act is constitutional.

On 24 June 2013, Morgan Tsvangirai, who was the Prime Minister at the time filed a Constitutional Court application demanding that the Temporary Measures Act be declared as unconstitutional.[152] On 4 July, the case was argued and on the very day, an order was issued by the court dismissing the application.[153] The Court did not give reasons for its decision.[154] In 2016, the President promulgated the Regulations which introduced the bond notes and coins. The Regulations were the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations.[155] The Regulations sought to amend the Reserve Bank of Zimbabwe Act[156]by the insertion of section 44 B which provides for legal tender of bond notes and coins. In terms of the provision, the bond notes and coins are a legal tender in all transactions in Zimbabwe. Ensuing the publication of the Regulations, Joyce Mujuru filed a Constitutional Court challenge under the case of *Mujuru v The President of Zimbabwe and others*.[157]

By exercise of Parliament's primary law making power through the passing of the Regulations mentioned above, the applicant sought that the Constitutional Court declare the President as having failed to fulfil his constitutional obligation to obey section 134 (a) of the Constitution.[158] The applicant also sought that the Court declare the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act and Issue of Bond Notes) and the introduction of the bond notes unconstitutional as they were a result of the President's failure to fulfil his constitutional obligation.[159] By allowing the Presidential Powers (Temporary Measures) Act to remain operational even with the passing of the Constitution, Mujuru sought that the Constitutional Court declare Parliament to have failed to fulfil its constitutional obligation to protect section 134 (a) of the Constitution.[160]

In a Constitutional Court decision delivered by Garwe JCC, the Court concluded that the Temporary Measures Act is still part of the Zimbabwean law as no court in Zimbabwe has declared the statute unconstitutional.[161] The following passage from the Constitutional Court decision deserves a reproduction. On page 9 of the

[151] n 80 above, 196.
[152] Linington (n 17 above) 15.
[153] (n 17 above), 15.
[154] (n 17 above) 15.
[155] Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe and Issue of Bond Notes) Regulations, 2016.
[156] Reserve Bank of Zimbabwe Act (*Chapter 22.15*).
[157]*Mujuru* (n 81 above).
[158] n 81 above, 3.
[159] n 81 above), 3.
[160] n 81 above, 4.
[161] n 81 above, 9.

judgment, the Court commenting on the constitutionality of the Act stated as follows:

> …the opinion expressed by the applicant that it is no longer valid law following into force the coming of the new Constitution cannot be correct. The Constitution itself has not said so. To the contrary, the Constitution provides in para 10 of Part 4 of the Sixth Schedule that all existing laws remain valid, but are to be construed in conformity with the Constitution.
>
> Implicit also in the opinion of the applicant is the suggestion that it is the constitutional obligation of the President to analyse all the laws under which he purports to act in order to ascertain their compliance with the Constitution. Surely that cannot be the correct legal position, in the absence of a specific provision in the Constitution invalidating a law previously enacted, it cannot be the duty of a sitting President to embark upon such an enquiry. That is the role of the courts. Section 134 of the Constitution does not impose such an obligation of the President…[162]

It is key to state that unlike the previous decisions, the case was decided after the enactment of the Constitution in 2013. What is bewildering for this research is that while the Constitutional Court endorsed the position that it is the responsibility of the courts to decide the constitutionality of legislation, it did not do so. The Court used a technicality and eluded dealing with the lawfulness of the Temporary Measures Act. The Court remarked that the applicant ought to have sought a declaratur that the Temporary Measures Act is non-constitutional and that she should not have proceeded in terms of section 167 (3)[163]of the Constitution.[164] The Court further stated that having proceeded through section 167 (2) (d)[165]of the Constitution, the inquiry whether or not section 2 of the Temporary Measures Act amounted to an unlawful delegation of Parliament's primary law making was not an issue before the Constitutional Court.[166] The Constitutional Court challenge failed.

On 15 September 2017, through Government Gazette extra ordinary Volume XCV No. 61, the President of the Republic of Zimbabwe published the Presidential Powers (Temporary Measures) Amendment of Electoral Act Regulations as Statutory Instrument 117/2017. The Regulations were published on the basis of section 2 of the Temporary Measures Act. In the case of *Mlilo v The President of the Republic*

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[162] n 81 above, 9 para 1.

[163] Sec 167 (3) of the Constitution states that "The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force".

[164] *Mujuru* (n 81 above) 9-10.

[165] Sec 167 2 (d) of the Constitution states that the Constitutional Court may "determine whether Parliament or the President has failed to fulfil a constitutional obligation".

[166] *Mujuru* (n 81 above) 14-15.

of Zimbabwe,[167]the applicant used the Regulations as an opportunity to challenge the constitutionality of the Presidential Powers (Temporary) Measures Act.[168] The applicant sought that the High Court declare Presidential Powers (Temporary Measures) Amendment Electoral Act Regulations and the Presidential Powers (Temporary Measures) Act to be of no force and effect.[169] He argued that section 2 of the Temporary Measures Act gives the President the power to change or override an Act of Parliament and that the "amendment of the Electoral Regulations" was illegitimate.[170] The applicant argued that there was no urgent situation that necessitated the passing of the Regulations.

Mlilo argued that whilst the provisions of section 134 of the Constitution provide that Parliament may assign its power to enact statutory instruments, the provision stipulates that Parliament's original-law making power must not be delegated.[171] It was his view that the Temporary Measures Act infringes section 134 of the Constitution. Considering section 110 of the Constitution which provides for the executive functions of the President and Cabinet, the applicant argued that the President is not one of the persons whom power can be delegated to.[172] Basing his reasoning on the principles of constitutionalism which include supremacy of the Constitution, separation of powers and legality, he moved the High Court to set aside Act and the Regulations.[173]

In a judgment delivered by Mangota J, the High Court held that the Presidential (Temporary Measures) Act is in complete consonance with the Constitution. The High Court held that the legislative authority in Zimbabwe is vested in the legislature and the President and relied on sections 116, 117 and 131 of the Constitution which it stated provides complementary roles between Parliament and the President.[174] The Court also reasoned that the Regulations which the President makes are subject to Parliamentary scrutiny.[175] According to the Court, Parliament has powers to resolve that any Regulations tabled before it be repealed or amended and that the President is bound by the resolution of Parliament.[176] The Court also held that the President's inevitable encroachment into the functions of Parliament is justifiable on the basis of section 86 of the Constitution.[177] Section 86 provides for the limitation of rights. Section 86 (2) states that:

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[167]*Mlilo* (n 82 above).
[168] n 82 above, 2 & 4.
[169] n 82 above, 18 & 4.
[170] n 82 above, 4.
[171] See applicant's founding affidavit.
[172] See applicant's founding affidavit.
[173] See applicant's Heads of Argument.
[174]*Mlilo* (n 82 above) 9.
[175]*Mlilo* (n 82 above) 9.
[176] n 82 above, 9.
[177]*Mlilo* (n 82 above) 10.

> The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom…

Mangota J remarked that the President's powers contained in section 2 of the Temporary Measures Act relate to his powers to limit rights as provided for in Section 86 (2) (b) of the Constitution.[178] The High Court interpreted section 86 (2) (b) of the Constitution together with section 110 and held that the President has powers to make primary law. It was the Court's decision that the Presidential (Temporary Measures) Act is constitutional.

The applicant aggrieved by the decision approached the Supreme Court with an appeal under the case of *Mlilo v The President of the Republic of Zimbabwe*.[179] Before the Supreme Court, Mlilo argued that the High Court misdirected in upholding the rationality of the Presidential (Temporary Measures) Amendment of Electoral Act.[180] In addition, he argued that the High Court was mistaken in failing to hold that the Presidential Powers (Temporary Measures) Act was ultra vires the Constitution in that it allowed the unlawful delegation of legislative power.[181] It was his further argument that the High Court erred in failing to hold section 2 of the Presidential Powers (Temporary Measures) Act as invalid.[182] In his submissions, Mlilo argued that the provisions of section 86 of the Constitution could not be interpreted to mean that the President can make a law which can limit rights.[183] He argued that 86 of the Constitution only relates to a law of general application made by Parliament and not an individual.[184] Mlilo prayed that the Supreme Court overturn the High Court judgment, declare the "Regulations" and the Act as unconstitutional.[185]

The Supreme Court dismissed the application on a technicality. On the basis of sections 169 (3) and 175 (3) of the Constitution, the Court held that the applicant ought to have appealed against the order of constitutional validity or invalidity to the Constitutional Court.[186] The Supreme Court held that only the Constitutional Court can determine the validity of an Act of Parliament.[187] The decision of the

[178] n 82 above, 11.
[179] *Mlilo v The President of the Republic of Zimbabwe* SC 179/20 (hereafter "Mlilo Supreme Court decision".
[180] *Mlilo Supreme Court decision* (n 179 above) 5.
[181] n 179 above, 5.
[182] n 179 above, 5.
[183] n 179 above,5.
[184] n 179 above, 5.
[185] n 179 above, 5.
[186] n 179 above, 9-15.
[187] n 179 above, 11-15.

Court was that it became unnecessary to consider the issue whether or not the Temporary Measures Act is constitutional or not.[188]

There is a pattern in the cases discussed above. Courts have either held that the Temporary Measures Act is constitutional or they have invoked technicalities to avoid dealing with the constitutionality of the Act. It is because of this systematic approach by the courts that the researcher has undertaken this study. Three cases were brought before the courts under the old Constitution (*S v Gatzi* and *Rufaro Hotel, Forum Party of Zimbabwe* and the *Tsvangirai cases*). Two cases were filed in the High Court and the Supreme Court after the enactment of the Constitution in 2013 (*Mujuru* and *Mlilo cases*). The old Constitution did not prohibit the delegation of legislative authority to another body. The Constitution of the Republic of Zimbabwe that was enacted in 2013 took a different turn. It expressly forbids the assignment of Parliament's original law-making powers. One would have expected the attitude of the courts to change when the Constitution was sanctioned. Sadly, it did not.

2.5 WHAT THE ZIMBABWEAN JUDICIARY HAS MISSED

On the basis of this trend, this study is of the view that the Zimbabwean Courts have not satisfactorily reviewed the cases dealing with the lawfulness of the Temporary Measures Act. The courts have used technicalities to elude dealing with the constitutionality of the Temporary Measures Act or they have held that the Act is constitutional. The Zimbabwean judiciary has not developed any framework that acts as a guide in adjudicating cases dealing with the constitutionality of the Presidential statutory powers. How the courts review Presidential powers is critical. As explained under chapter one, Presidential action is exempted from review under the administrative law. This is despite the fact that it affects human rights, democracy and policy. The courts have not executed the purpose of the non-delegation doctrine. There is what is called "non-delegation doctrine". The doctrine states that the power to make laws is a function of the legislature and should not be delegated inordinately to the executive.[189] Scholars have argued that the doctrine of non-delegation promotes democracy and human rights by guaranteeing that laws are passed by the legislature that reports back to the electorate. The doctrine of non-delegation is fully explored in chapter four of this study. Courts have also not applied critical doctrines of judicial review when determining the constitutionality of the Temporary Measures Act. Key to this study is the doctrine of severability.

[188] (n 179 above),11-15.

[189] C.R Sunstein *Designing Democracy: What Constitutions do*, Oxford University Press, 2001. 137.

2.6 TOWARDS DEVELOPING A FRAMEWORK DETERMINING HOW COURTS SHOULD REVIEW THE PRESIDENTIAL STATUTORY POWERS

The Zimbabwean judiciary has not developed a framework that guides the courts when reviewing Presidential statutory powers. There are consequences of an absence of such review framework.[190] The absence of a judicial review framework that guides the courts in reviewing Presidential statutory powers erodes stability and predictability in review resulting in the President not having clear guidance on the scope of his statutory powers.[191] The "uncertainty does nothing to limit adventurous assertions of statutory power by Presidents".[192] This effect is a risky concentration of power.[193] What is critical for this study are the doctrines of judicial review that have been developed under the United States Administrative law that bind agencies in the making of decisions that affect the public.

The United States (APA) which was enacted in 1946 stipulates the ways in which federal agencies may make and enforce Regulations.[194] Section 2 (a) of the APA defines an agency as "an authority…of the government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia". The APA was codified in the United States Code.[195] The enactment of the APA was as a result of worry regarding the expeditious growth of federal agencies in the course of the rule of President Franklin D Roosevelt who generated several agencies in an attempt to execute his commercial schemes.[196] The provision of a weighty judiciary was a critical part of the statutory scheme.[197] The passing of the APA introduced procedural rules that regulated decision making.[198] By postulating a constructive method for regulating agency action, the APA protected individual fundamental rights against exploit of administrative authority.[199] The APA contains some strict rules of rulemaking by agencies.

The review standards that are outlined in the APA have been well developed as the pertinent review standards. The arbitrariness review often referred to as "hard look review", procedural review and rationality review were entrenched as the appropriate standards of judicial review guiding the courts in the review of the agency action. The doctrines were not designed to facilitate judicial review of

[190] Stack (n 68 above) 568.
[191] n 68 above, 568.
[192] n 68 above, 568.
[193] n 68 above, 568.
[194] Britannica "Administrative Procedure Act, United States 1946". Accessed March 18 2022. https://www.britannica.com/topic/Administrative-Procedures-Act.
[195] 5 United States Code ss 551-559.
[196] Britannica (n 194 above).
[197] R Elias, The legislative history of the Administration Procedure Act, 2015. Vol 27 No 2. *Fordham Environmental Law Review* 221.
[198] Elias (n 197 above) 207.
[199] n 197 above, 207.

challenges brought against Presidential actions.[200] As a result of the increase of Presidential involvement in agency resolutions, scholars have contended that the judicial review that governs how agencies pass statutory instruments should apply to judicial review of Presidential statutory authority.[201] Kovacs stated that when a President is reviewed under the APA, public participation, political accountability and transparency would be improved.[202] Stack also argued that the framework of judicial review that governs agencies' rule making should apply to judicial review of the President's statutory authority.[203] The United States judiciary has endorsed the reasoning. The courts have applied the review standards governing agencies in cases involving the Presidential statutory powers.

2.7 PERTINENT STANDARDS OF JUDICIAL REVIEW IN CASES DEALING WITH THE CONSTITUTIONALITY OF THE PRESIDENTIAL STATUTORY POWERS

2.7.1 "Arbitrary and Capricious Review" / "Hard look Review"

Section 10 was enacted in the APA and it provides for judicial review. The provision entrenches the right of procedural review and it states that "any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof". Section 10 (e) provides the scope of judicial review and states as follows:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, (2) contrary to constitutional right, power privilege, or immunity (3) in excess of statutory jurisdiction authority, or limitations or short of statutory right, (4) without observance of procedure required by law and (5) unsupported by substantial evidence in any case…[204]

In terms of section 10 (e) of the APA, a law passed by an agency should in accordance with a procedure set out by the law. It should be supported by evidence. A court that is reviewing the conduct of the agency shall proclaim as illegitimate and overrule an agency action that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law". Central to the "arbitrary and capricious review"/"hard look review" is that agencies should

[200] Manheim & Watts (n 29 above) 1751.
[201] Stack (n 68 above) 570.
[202] Kovacs (n 33 above).
[203] Stack (n 68 above) 570.
[204] Section 10 (e) of the APA (n 65 above).

give grounds for their determinations with sufficient logical basis.[205] In examining whether an agency has acted in an "arbitrary or capricious" manner, courts apply an observant enquiry to dictate whether the agency[206]has "examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made".[207] Review for arbitrariness is the origin of most of the burdens that courts have urged on agency rule making.[208] The "arbitrary and capricious" review mandates courts to strike down an agency action as arbitrary and capricious:

> If the agency…relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or (was) so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[209]

Administrative law scholars have distinguished between "arbitrary and capricious review" from review to make sure that agency decisions abide to the substantive law regulating their actions under the APA.[210] They have asserted that "contrary to law" review centres on statutory interpretation rather than the relationship between the record and the agency's reasoning.[211] Arbitrary and capricious review goes further than the contrary to law review. It seeks to establish the reasons behind the agency's actions. Rathburn[212]states that the "arbitrary and capricious review can be easily and appropriately applied to agency decisions, even in cases of Presidential involvement". On page 664 of his article, the author states that arbitrary and capricious provides the courts with a system for agency decisions that are subject to Presidential involvement.[213]

In the case of *Panama Refining Company v Ryan*[214]the United States Supreme Court applied the arbitrary and capricious review when it decided the justifiability of an executive order on oil shipments that had their basis on the National Industrial Recovery Act.[215] The Court held that the executive order contained no findings and

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[205] K.A Watts, Proposing a place for politics in arbitrary and capricious review, 2009. Vol 119 No 1. *The Yale Law Journal* 5.

[206] J E Gersen & A. J. O' Connell, Deadlines in Administrative Law, 2008. Vol 56 No 4. *University of Pennsylvania Law Review* 962.

[207]*Motor Vehicle Manufacturers Association of the United States v State Farm Mutual Automobile Insurance Co*. 463 US 29, 43 (1983).

[208] S. A Shapiro & R. W. Murphy, Arbitrariness review made reasonable: Structural and conceptual reform of the "Hard look", Vol 92 No 1. *Notre Dame Law Review* 331.

[209]*Motor Vehicle Manufacturers Association of the United States* (n 207 above) 43.

[210] Driesen (n 31 above) 16.

[211] n 31 above,16.

[212] D. P. Rathburn, Irrelevant Oversight "Presidential Administration" from the standpoint of arbitrary and capricious review, 2009. Vol 107 No 4. *Michigan Law Review* 645-646.

[213] Rathburn (n 212 above) 664.

[214] *Panama Refining Company v Ryan* 293 US (1935).

[215] *Panama Refining Company* (n 214 above).

that there was no basis for the President's act.[216] The Supreme Court stated that the President's order was in contrast with "historic practice by which declarations of policy were made by congress and that the delegations were to be within the framework of that policy and have relation to the facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority".[217] The Court stated that the President needed a basis of his act to prevent unrestrained discretion.[218]

The word "hard look review" evolved in the D.C circuit as an authoritative interpretation by the judiciary on the explanation of the APA's "arbitrary and capricious" test.[219] The Court in the case of *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance*[220]entrenched the "hard look" review standard which mandates courts to apply a more careful examination at rule making than had been taken under the "arbitrary and capricious" test.[221] The *Citizens to Preserve Overton Park v Volpe*[222]has been called the "seminal case to change the meaning of the 'arbitrary and capricious' review of agency action".[223] In addition to agency rule making being supported by facts, the *Overton Park* decision undertook a "searching and careful" enquiry in the factual basis of the decision.[224] The 'hard look' doctrine is more demanding than the arbitrary and capricious standard in that it requires that the agency rule making should be grounded in the record and that rule is to be reasonable and, not just minimally rational.[225] Professor Garland described the "hard look" doctrine as follows:

> As the doctrine developed, the courts demanded increasingly detailed explanations of the agency's rationale, they required specification of agency's policy premises, its reasoning and its factual support. In time, a host of other now familiar elements also became part of the hard look: an agency had to demonstrate that it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen. These requirements of consideration and explanation combined to generate a kind of paper in informal rule making cases, as

[216] n 214 above.
[217] n 214 above.
[218] n 214 above.
[219] M Warren, Active Judging: Judicial Philosophy and the Development of the Hard look Doctrine in the D.C Circuit, 2002. 90. *George Law Review* 2599.
[220]*Motor Vehicle Manufacturers Association of the United States* (n 198 above) 553.
[221] P. M Garry, Judicial Review and the "Hard look" doctrine, Vol 7. *Nevada Law Journal* 152.
[222]*Citizens to Preserve Overton Park v Volpe* 401 US 402 (1971).
[223] William Funk, Rationality review of state administrative rulemaking, 43, Administrative Law Review 147, 164 (1991).
[224] Garry (n 221 above) 155.
[225] M B Garland, Deregulation and Judicial Review, 1985. 98. *Harvard Law Review*. 505, 530.

well a paper record of the agency's decision-making process that could serve as a basis for judicial review.[226]

The hard look doctrine emphasised that the agency should explain its rationale and provide factual support. The agency had to demonstrate that it had involved the public in the making of the rules and had considered alternatives. Courts intervened where based on its review, it became conscious that the agency had not taken a 'hard look' and thus failed in its duty to engage in "reasoned decision making".[227]

2.7.2 Procedural Review

Another long-standing type of judicial review of agency action involves judicial review of the procedures that agencies use when they make Regulations.[228] This type of judicial review emerged from section 4 of the APA which imposes some stern procedures in rule making. The provision entrenched specific procedures agencies must follow in rule making.[229] When they are making rules, "agencies are mandated to publish in the federal register a general notice of the proposed rule".[230] The announcement of the suggested rule shall consist of "(1) a statement of the time, place and nature of public rule making proceedings, (2) reference to authority under which the rule is proposed and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved".[231] In the case of *Portland Cement Association v Ruckelshaus*[232]the Court explained the notice condition to connote that agencies must reveal data and studies on which they depended in mapping their rules.[233] After the notice of the submitted rule, the agency is mandated to grant involved persons an occasion to take part in the procedure of rulemaking through tendering of "written data, views and arguments".[234] When all the matters are contemplated, the agency includes in any rules espoused a brief general statement of their premise and grounds.[235] The United States Courts have set forth that agencies must answer to remarkable comments made by parties who take part in the rule making.[236]

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[226] Garland (n 225 above).
[227] *Greater Boston Television Corp v FCC* 444 F 2d 851.
[228] Manheim & Watts (n 29 above) 1755.
[229] Manheim & Watts (n 29 above) 1755.
[230] Sec 4 (a) of the APA (n 65 above). Sec 4 of the APA was codified as sec 553 in the 5. U.S.C 551-559.
[231] Sec 4 (a) of the APA (n 65 above).
[232] *Portland Cement Association v Ruckel Shaus* 486 F 2d 375, 393 (DC Circuit 1973).
[233] Manheim & Watts (n 29 above) 1756.
[234] Sec 4 (b) of the APA (n 65 above).
[235] n 65 above.
[236] *Rey blatt v United State Nuclear Regulatory Commission*, 105 F3d 715, 722 (D.C Circuit 1997).

2.7.3 Rational basis review

Rational basis review calls for an examination of rationality of a piece of legislation and its purpose.[237] In terms of the APA, the agency shall amalgamate in any rules assumed a general statement of their cornerstone.[238] The rationality basis review entails that agencies should choose the best policies after considering all the relevant factors and explain why the chosen policy is best.[239] It mandates agencies to have reasons.[240] At the moment that an agency promulgates a rule, it must include as part of the rule making a detailed statement that describes the purpose of the rule and responds to any criticism or comments received during the rule making proceedings.[241] Harold states that when reviewing Presidential decisions, courts should begin with the traditional 'rational basis' requirement.[242]

2.8 DOCTRINES OF JUDICIAL REVIEW

There are fundamental doctrines of judicial review that the Zimbabwean Courts have not adopted when dealing with cases regarding the constitutionality of the Presidential statutory powers. Vibhuti in an article titled "Judicial Review in India: Maxims and limitations"[243] identifies eight doctrines of judicial review. He states that judicial review doctrines are "(1) pith and substance, (2) colourable legislation, (3) severability, (4) liberal interpretation, (5) limitations of stare decisis, (6) eminent domain, (7) unconstitutionality and eclipse and (8) waiver". Key to this research is the doctrine of severability.

2.8.1 Doctrine of severability

Judicial review calls a court to determine if the debated law is legitimate.[244] When legislation is incompatible with a supreme law, courts apply the severability doctrine to determine whether other provisions or applications of that legislation can continue being in effect.[245] The Act as a whole may not be void but only a part of it which is inconsistent with any provision of the Constitution is severable from the rest. [246] The other provisions of the legislation can continue to operate if the

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[237] Jack Rutl (n 5 above) 1514.

[238] Sec 4 (b) of the APA (n 65 above).

[239] J Gersen & A Vermuele, Thin Rationality Review, 2016. Vol 114 No 8. *Michigan Law Review* 1355-1412.

[240] M Ponomarenko, Administrative Rationality Review, 2018. Vol 104 No 8. *Virginia Law Review* 1448.

[241] *Motor Vehicle Manufacturers v State Farm Mutual Auto-Mobile Insurance Co*. 463 US 29, 41, 43-44, 48-49, 51-52 (1982).

[242] Bruff (n 9 above) 52.

[243] V. S Shekhawat, Judicial Review in India: Maxims and limitations, 1994. Vol 55 No 2. *Journal of Political Science* 178.

[244] Manheim & Watts (n 29 above) 1819.

[245] R. L Stern, Separability and Separability clauses in the Supreme Court, 1937. 5. *Harvard Law Review* 76.

[246] Shekhawat (n 243 above) 179.

invalid aspects of the legislation are severed from it.[247] The severability doctrine often applies when multiple and not all provisions are invalid[248]but it can also apply when some applications of a single statutory provision are invalid.[249] In instances where severing an affected part is not possible, then the entire Act becomes in- operative.[250] The doctrine aims to provide the courts with guidance on how to deal with statutes that are unlawful.[251] "In determining how to conduct the severability analysis in respect to legislation, the courts are expected to determine how the law makers had they known about the defect, would have preferred the statute to be treated".[252] Commenting on Article 13 of the Constitution of India[253] Vibhuti states that the provision expresses the doctrine of severability.[254] The Constitution in paragraph 10 of the sixth schedule states that "all existing laws continue in force but must be construed in conformity with this Constitution". The provision is worded similarly to the Indian Constitution and this research is of the argument that courts should apply the severability doctrine in cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act.

2.9 CONCLUSION

The aim of chapter 2 was to discuss the Zimbabwean jurisprudence in cases regarding the constitutionality of the Presidential Powers (Temporary Measures) Act. The chapter demonstrated that the Zimbabwean Courts have not yet developed a framework that acts as a guide in the adjudication of Presidential action. The chapter argued that the absence of such a framework erodes stability and leads to a perilous concentration of power. The chapter demonstrated that there are well developed standards of judicial review that are used to review Presidential statutory powers under the United States (APA). These are the arbitrary or capricious, procedural and rationality review. Scholars have argued that that they are the appropriate standards of reviewing the Presidential statutory powers. The chapter drew some similarities between the Zimbabwean and the United States legal system and this justified reliance on these judicial review standards. The chapter demonstrated that the Zimbabwean Courts have failed to fulfil the purpose of the non-delegation doctrine. It discussed the doctrine of severability and argued that the Zimbabwean judiciary has not adopted it in cases concerning the constitutionality of the Temporary Measures Act. The

[247] B.C Lea, Situational severability, 2017. Vol 1 No 5. *Virginia Law Review* 743.
[248] Lea (n 247 above) 743.
[249]Lea (n 247 above) 743 citing J Harrison, Severability Remedies and Constitutional Adjudication, 2014. 83. *The George Washington Law Review* 57-59.
[250] G.N Joshi, *Aspects of Indian Constitutional Law* University of Bombay, Bombay, 1965.
[251] Manheim & Watts (n 29 above) 1819.
[252] L. M Manheim, Beyond Severability, 2016. 101 *Iowa Law Review* 1839-40.
[253] The Constitution of India (As on 1st of April 2019). Article 13 of the Indian Constitution states that all laws that were in force in India before the commencement of the Constitution, in so far as they are inconsistent with Part three which provides for fundamental rights are void.
[254] Shekhawat (n 243 above) 179.

next chapter is the theoretical framework of the study. It discusses the theoretical foundations underlying judicial reasoning. This is an attempt to understand the Zimbabwean judiciary approach in cases regarding the constitutionality of the Temporary Measures Act.

CHAPTER THREE

Judicial Restraint and Constitutional Interpretation

3.1 INTRODUCTION

Having identified a problem which is the inadequate standards of judicial review in cases dealing with the constitutionality of the Presidential statutory powers, this chapter interrogates the theoretical foundations underlying judicial reasoning. The elucidation of the law by the courts can be considered to be the ultimate stage in the law-making procedure.[255] The chapter carefully analyses the methods of constitutional interpretation that have been adopted by the courts in cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act. A Constitution is an idea of the highest order that determines the legal and political order of a country.[256] It is a legal document that regulates political and social relations and describes the structure of different organs of state power in their interaction with each other and the society.[257] It follows that a Constitution determines the genesis of statutes, establishment of organs of a state and procedure of enacting legislation.[258] Constitutional interpretation requires the commanding elucidation of the Supreme Constitution by the courts during judicial review.[259] It is the process of finding the connotation of a constitutional clause.[260] Froneman J in the case of *Matiso v Commanding Officer, Port Elizabeth Prison*[261] explained the difference between constitutional and ordinary legislative interpretation as follows:

> The interpretation of the Constitution will be directed at ascertaining the foundational founding inherent in the Constitution whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental principles of the Constitution.[262]

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[255] A Singh and MZ Bhero, Judicial Law-Making: Unlocking the Creative Powers of Judges in terms of Section 39 (2) of the Constitution, 2016. Vol 19. *Potchefstroom Electronic Law Journal* 3.

[256] A. P Datan & R Unnikrishnan, Interpretation of Constitutions, 2017. Vol 29 No 2. *National Law School of Review* 136-148.

[257] W Ncube & S Nzombe, The Constitutional, Reconstruction of Zimbabwe: Much ado about nothing? 1987 Volume 5 *Zimbabwe Law Review* 2.

[258] Datan & Unnikrishnan (n 256 above) 136-148.

[259] Botha (n 89 above).

[260] I Currie & J De Waal *The Bill of Rights Handbook*, Cape Town, Juta, 2013 133.

[261] *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA.

[262] *Matiso* (n 261 above). See also the case of *Hunter v Southam Inc*, 1984 2 SCR 145 where the Canadian Supreme Court Justice stated as follows:

> The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and is easily repealed. A Constitution by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual

Ducat stated that constitutional interpretation is accomplished through several modes of judicial review that addresses the connection between the basis for powers to review and the process by which the courts determine whether a certain governmental act is in breach of the constitution or not.[263] Modes of constitutional interpretation are concerned with the procedure that courts ought to use to decide whether legislation, administrative, judicial or executive conduct is in conflict with the Constitution or not.[264] They are concerned with the practice of judicial review being synchronised with elected establishment and also with the procedure that courts should use to determine whether a given legislature, executive, administrative or judicial action is constitutional or not.[265] The chapter discusses the concept of judicial supremacy and it argues that the judiciary is the final and authoritative interpreter of the Constitution. It discusses judicial restraint which encompasses a number of doctrines which include a textual approach to statutory interpretation, adherence to the primary definition of the Constitution and respect for precedent. In cases concerning the constitutionality of the Temporary Measures Act, the Zimbabwean judiciary has adopted the textualism and grammatical interpretation and they have given constitutional provisions their grammatical meaning. The chapter argues that in cases dealing with the same, the judiciary ought to adopt other interpretative methods which include structuralism, teleological, and historical interpretation. The chapter will debate whether there is a need for a specific theory that provides for the determination of the constitutionality of Presidential statutory powers.

3.2 JUDICIAL SUPREMACY

3.2.1 Judicial review and judicial supremacy

Judicial supremacy is broader than judicial review. The doctrine of judicial supremacy enhances a critical enquiry of who is the commanding interpreter of the Constitution.[266] It presupposes that courts have "exclusive" power to decide the meaning of the Constitution.[267] Other branches of the government are bound by the court's interpretation. Judges are supreme sovereign in the community because they are perceived to be the only people who possess the character, intelligence, and training necessary for them to judge what is just or unjust.[268] It is a contention that constitutional declarations of the judiciary are binding and

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rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must, therefore be capable of growth and development overtime to meet new social, political realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must in interpreting its provisions, bear these considerations in mind.

[263] C. R Ducat & H. W Chase *Constitutional Interpretation* Thomson Learning, 2004.

[264] Ducat & Chase (n 263 above).

[265] n 263 above.

[266] Rutl (n 5 above).

[267] R. E.Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 2002. Vol 102 No 2. *Columbia Law Review* 2002.

[268] D. C Hodges, Judicial Supremacy, 1958. Vol 55 No 3. The Journal of *Philosophy* 101-111.

govern even the political actors and the work of other branches of the national government.[269]

3.3 JUDICIAL RESTRAINT

Judges many a time examine discourses and they choose whether to strictly or leniently probe the state or Parliament's action.[270] "The question arises in statutory interpretation, judicial review of administrative discretion, review of tribunal findings, adjudication of human rights claims and in the interpretation of the law".[271] Upon adjudication, judges sometimes exercise judicial restraint. The terms ("judicial activism" and "judicial restraint") assumes to track down the boldness of specific courts or independent judges between two theoretical antithesis.[272] Judicial activism emphasises that judges are not mere robots who simply "discover" or "find" definite, pre-existing principles and rules, but are often their makers.[273] It is the presupposition of an energetic character on the part of the courts.[274] "In the modern political systems, with the development of the idea of constitutionalism, judicial activism is sine qua non of democracy".[275] An extreme model of judicial activism is of a court so invasive that in effect commands the establishment.[276]

The converse of judicial activism is that a court decides virtually nothing at all, it strains to find reasons why it has no jurisdiction, it maintains deference to the superiority of other departments in construing the law, and it finds endless reasons why the constitutionality of laws cannot be examined.[277] Judicial restraint is a prevalent feature of judicial decision making.[278] Judicial restraint regards the scope to which the courts are prepared to progress the law.[279] Courts can exercise judicial restraint procedurally or substantively. As a procedural doctrine, the principle of restraint urges judges to desist from determining legal issues particularly constitutional issues, unless the decision is necessary to the resolution

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[269] B Friedman and E.F Delaney, Becoming Supreme: The Federal Foundation of Judicial Supremacy, 2011. Vol 100 No 2. *Columbia Law Review* 102.

[270] Jeff A King, Institutional Approaches to judicial restraint, 2008. Vol 28 Issue 3. *Oxford Journal of Legal Studies* 409-441.

[271] King (n 270 above) 441.

[272] Rutl (n 5 above) 1031.

[273] Rutl (n 5 above) 1043.

[274] S Chatterji, For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny, 1997 Vol 42 (2). *The Administrative* 9.

[275] M.M Semwal & S Khosla, Judicial Activism, 2008. Vol 69 No 1. *The Indian Journal of Political Science* 113-136.

[276] Rutl (n 5 above) 1031.

[277] Rutl (n 5 above) 1031-1032.

[278] A Kavanagh, Judicial Restraint in the Pursuit of Justice, 2010. Vol 60 No 1. *The University of Toronto Law Journal* 24.

[279] Kavanagh (n 278 above) 25 citing J Waldron, Compared to What? Judicial Activism and New Zealand's Parliament, 2005 *New Zealand Law Journal* 441 (footnote 1).

of a material dispute between the parties.[280] Substantively, it urges judges when considering constitutional questions to allow substantial deference to the views of the elected and invalidate their actions when constitutional issues have been violated.[281] The consequences of judicial restraint is to allow the legislature and executive greater freedom to develop policy.[282]

In the case of academic analysis, judicial restraint is believed to enclose a broad scope of doctrines among a textual or strict approach to statutory interpretation, respect for precedent, deference to legislative or administrative decision making bodies, doctrine of standing and mootness, the floodgates argument that judges should avoid making moral or policy choices.[283] Sometimes it is believed to mean allegiance to the original meaning of the Constitution.[284] Key to this study is the link between judicial restraint and the doctrines of textual interpretation and respect for precedent.

3.4 TEXTUALISM, LITERALISM AND ORIGINALISM INTERPRETATION

In contrast to modes of interpretation that place tradition and authority at the centre of belief stands the mode that centres on text as the most obviously authentic incorporation of constitutional truth.[285] Textualism or literalism interpretation insists that the clear and unequivocal wording of a statute is related with the purpose of the statute.[286] Textualists commend that interpretation should focus upon what the wording would reasonably be appreciated to convey more than what it was deliberated to connote.[287] "The intention of the legislature can alone be gathered from what it has actually said, and not from what it may have intended to say, but has not said".[288] In constitutional interpretation, this approach can be equated to the grammatical interpretation. Grammatical interpretation accepts the significance of the function of the language of constitutional wording. The approach to interpretation concentrates on the linguistic and grammatical definition of the words, phrases, sentences and other constructional elements of the factors.[289]

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[280] Britannica "Judicial Restraint".
Accessed April 28 2022. https://www.britannica.com/topic/judicial-review.
[281] Britannica (n 280 above).
[282] Britannica (n 280 above).
[283] Kavanagh (n 278 above) 25.
[284] C Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 2001. 87 (1) *Virginia Law Review* 52.
[285] Tribe (n 126 above) 32.
[286] Botha (n 89 above) 160.
[287] A Scalia, *A matter of interpretation: Federal courts and the law*, Princeton University Press, 1997. 144.
[288] Kotze J in *Bulawayo Municipality v Bulawayo Waterworks* ltd 1945 CPD 445.
[289] Botha (n 89 above) 193.

Originalism is the perspective that a Constitution should be interpreted according to its original meaning.[290] The original interpretation of the Constitution encourages judicial restraint.[291] Goldsworthy[292]argues that the justification for an original interpretation of the Constitution is that:

> (1) A Constitution has a meaning that pre-exists judicial interpretation, (2) to change the meaning of the Constitution is to change the law, (3) the original meaning of a Constitution is determined by a restricted range of evidence of what its founders intended to mean, (4) a Constitution requires that it be changed only by special procedures and this binds the judges and, (5) a judge who violates the requirement would defy the Constitution itself, rule of law and the principle of democracy, and that (6) when interpreting a Constitution, the judge's primary duty is to reveal and clarify its pre-existing meaning.[293]

In the cases concerning the constitutionality of the Temporary Measures Act, the Zimbabwean Courts have interpreted the Constitution textually (literally) and they have accorded the constitutional provisions their ordinary meaning. In the case of *Mlilo v The President of Zimbabwe*[294]the High Court interpreted section 116 of the Constitution which lays out that the legislature of Zimbabwe is composed of Parliament and the President literally and it accorded the provision its original meaning. The interpretation that was accorded by the Court undermines the doctrine of separation of powers. Section 116 states that the President is part of the legislature in accordance with Chapter 6 of the Constitution. Section 131 of the Constitution which is under Chapter 6 of the Constitution provides for the Acts of Parliament and procedure for their enactment. "An Act of Parliament is a Bill presented and passed by both Houses of Parliament and assented to by the President".[295] The President is part of the legislature in so far as he or she assents the Acts of Parliament. There are other interpretative methods that the Court could have adopted. These include structuralism, teleological and historical interpretation.

3.4.1 The Counter-majoritarian difficulty

Originalists support their doctrine as they view judicial review as an undemocratic institution which gives power to officials who are not electorally accountable to overrule decisions made by those who can.[296] All constitutional actors are

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[290] J. O. Mc Ginnis and M B. Rappaport, *Originalism and the Good Constitution*, Harvard University Press, 2013.

[291] T. W. Merril, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 2005. *Columbia Law Review* 274.

[292] J Goldsworthy, The case of Originalism, 2011. *Monash University Law Faculty*, Research Paper 46.

[293] Goldsworthy (n 292 above) 42.

[294]*Mlilo* (n 82 above).

[295] Constitution (n 2 above). See sec 131 (2) and (b).

[296] S Freeman, Original meaning, Democratic Interpretation and the Constitution, 1992. 21 (1). *Philosophy and Public Affairs* 4-5.

obligated to the Constitution and must interpret it.[297] The question is on which organ should be charged to make final decisions about what the Constitution is to be taken to say or mean?[298] Albeit history has assigned this entitlement to the courts, doubt has continually been raised about the legitimacy of this task on the ground that judicial review is undemocratic.[299] Judicial review is viewed to be counter-majoritarian in nature.[300] Judicial review of legislation entails an unaccountable and non-majoritarian institution countering public opinion.[301] The critics of judicial review start from the supposition that in a political society, uses of power which cannot find their justification in the ultimate permission of the ruled are difficult.[302] The argument is that the core of democracy entails that decisions are to be made by majority of citizens or their elected representatives.[303] The justification is that disputed questions are to be submitted to the popular decision making process and the majority rules.[304] It is argued that allocating such issues to the courts is to ignore "the people" resulting in a counter to democracy which is taken to be the rule by the people as determined by majority voting.[305]

The counter-majoritarian dilemma deals with the traction between the elected legislature which establishes its command on the consent of the governed and an unaccountable judiciary with the authority to invalidate the acts of that legislature.[306] "Judges who declare statutes and execute actions to be unconstitutional do not acquire their positions through popular election, once appointed, they cease to be accountable even to the elected officials who nominated and confirmed them".[307] "Judicial review is said to be anti-democratic since its result is the invalidation of government action, legislative or executive that directly or indirectly has the sanction of the electorate".[308] Alexander Bickel states that when a court pronounces illegitimate statute or executive conduct, it

[297] T. M Benditt, Modest Judicial Restraint, 1999. 18 (3). *Law and Philosophy* 244.
[298] Benditt (n 297 above) 244-245.
[299] n 297 above, 245.
[300] B Friedman, Mediated Popular Constitutionalism, 2003. Vol 101 Issue 8. *Michigan Law Review* 2596.
[301] O.R Bassock, The two Counter Majoritarian Difficulties, 2012. Vol 31 No 2. *St Louis University Public Law Review* 2012.
[302] Tribe (n 126 above) 304.
[303] Benditt (n 297 above) 245.
[304] n 297 above, 245.
[305] n 297 above, 245.
[306] R. N. Daniels & J Brickhill, The Counter-Majoritarian Difficulty and the South African Constitutional Court, 2006. Vol 25 No 2. *Penn State International Law Review* 376-377.
[307] L Tribe, *God save This Honourable Court: How the Choice of the Supreme Court Justices Shapes Our History*, New York Random House, 1985.
[308] Tribe (n 126 above) 305.

thwarts the will of the representatives of the people and it uses control against them.[309]

3.4.2 Positive Law and Theory

The textual, literalism and Originalism to interpretation of the Constitution is traced to positive law. Positive law:

> …is the will of the state or the will of the sovereign. Laws are commands. There is no other genuine "source" of law than its legislation (in its broad sense), other putative sources (e.g. custom, judge-made law) are merely secondary or apparent sources. Every legal system is a closed, gapless, complete and coherent whole. Finally, judges have no other function than to deduce, from the rules of positive law, the answer to the concrete cases that come before them. For this purpose, they need not resort to standards or rules not belonging to the legal system, since every case can and should be solved through the application of the standards and rules of the system itself.[310]

Positive law is a system "by which human conduct is regulated in a specific way".[311] The regulation is achieved by provisions which set forth how men should behave.[312] Such provisions are called norms which can arise through custom or enacted by the creation of laws by the legislature acting in its law making capacity.[313] According to legal positivism, law is identical with positive norms that are made by the legislator or considered as common law or case law.[314] For a law to be recognised as 'law', there should be a formal criteria of its origin, enforcement and legal effectiveness.[315] Legal positivists do not determine laws by questions of justice or humanity but on the ways in which the laws have been created.[316] The legal positivists held a view that the interpretation of law was an unconscious process and that no discretion was exercised by a judge.[317] It was contended that the duty of the courts is to obtain the purpose of a statute through the exposition of the words and not rely so much on the outward procedures of interpretation.[318]

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[309] A. M. Bickel, *The least dangerous Branch. The Supreme Court at the Bar of Politics*, The Bobbs-Meril Company Inc, New York, 1963.

[310] G. R Carrio, Professor D Workin's Views on Legal Positivism, 1979. Vol 55 Issue 2. *Indiana Law Journal* 213.

[311] H. Kelsen "The Pure Theory of Law and Analytical Jurisprudence, 1941. Vol 55 No 1. *Harvard Law Review* 50.

[312] Kelsen (n 311 above).

[313] Kelsen (n 311 above).

[314] Internet Encyclopedia of Philosophy, A Peer Reviewed Academic Resource. Accessed April 20 2022.
https://iep.utm.edu/legalpos. Accessed on 20 April 2022.

[315] Internet Encyclopedia of Philosophy (n 314 above).

[316] Internet Encyclopedia of Philosophy (n 314 above).

[317] Singh and Bhero (n 255 above) 3.

[318] Singh and Bhero (n 255 above) 3.

Legal positivism has a history in ancient political philosophy and the term was introduced in the medieval legal and political thought.[319] The modern doctrine has its roots in the political philosophies of Hobbes and Hume, and its first elaboration is due to Jeremy Bentham whose account Austin embraced, modified and popularised.[320] Among the most powerful philosophers of law from untimely modern time was Thomas Hobbes (1588-1679) whose theory of law was an amalgamation of subjects from both the natural law and command theory beliefs.[321] Hobbes argued that law was a principal device of a ruler by which to serve the state.[322] In (1651), Hobbes wrote the magnum opus Leviathan and stated that "law in general, is not counsel, but command" and that positive laws are those Regulations which the common wealth had ordered that defined measures are to be effected or not.[323] Hume saw all regimes as the consequence of a fight between power and freedom, with them attaining stability between the two by executing structures of "general laws".[324] Jeremy Bentham revised Hobbes's formulation of power and the design of law as a kind of order.[325] Bentham expounded law as essentially "an assemblage of signs declarative of a volition conceived or adopted by the sovereign of a state" and he adhered to Hobbes' reasoning about law as the replica of directive.[326] As Hobbes, Bentham adopted the notion of power to clarify the criteria of legal rationality of that order.[327] As stated by Bentham, a given rule is law "if it bears the right relation to an exercise of sovereign legislative power".[328] Like Bentham, John Austin, expressed that laws are orders of a sovereign.[329] He defined "commands" as an expressed wish that something be done, rules as general commands and positive law as consisting of those commands laid down by a sovereign or its agents.[330]

The 20th century was also a century of legal positivism. During the periods 1881-1973 and 1907-1992, Hans Kelsen and HLA Hart both advanced authoritative descriptions of positive theory.[331] Hans Kelsen propounded the pure theory of

[319] F John (2011), *Natural Law and Natural Rights* 2nd Ed, Oxford University Press.
[320] Stanford Encyclopedia of Philosophy, Legal Positivism. First published 3 January 2003, Substantive Revision, 17 December 2019.
[321] Britannica "Thomas Hobbes". Accessed April 21 2022.
https://www.britannica.com/topic/philosophy-of-law/Thomas-Hobbes.
[322] Britannica (n 321 above).
[323] Britannica (n 321 above).
[324] Neil McArthur, *Hume's Political Philosophy-The Oxford Handbook of Hume*, edited by Paul Russell, 2016.
[325] Britannica "The 19th Century". Accessed on April 21 2022.
https://www.britannica.com/topic/philosophy-of-law/The-19th-century.
[326] Britannica (n 325 above).
[327] Britannica (n 325 above).
[328] Britannica (n 325 above).
[329] Stanford Encyclopedia of Philosophy "John Austin" first published 24 February 2001, substantive revisions 14 January 2022.
[330] Stanford Encyclopedia of Philosophy (n 329 above).
[331] Britannica (n 325 above).

law[332] which is a hypothesis of positive law.[333] The theory explores the essence of the law to establish its composition.[334] It is termed pure as it aims to rule out from the understanding of positive law entire components distant to it.[335] According to Professor Hart, a law is characterised by primary and secondary rules.[336] Primary rules are instructions of behaviour and secondary rules are prescriptions of ascertaining, altering and applying primary and secondary commands.[337] For a legal system to exist, primary rules must be obeyed by the citizenry and secondary rules must be accepted as common public standards.[338]

3.5 CRITIQUE BY RONALD D'WORKIN

One of the theorists who criticised the analysis of the law as epitomised by the positivists is Professor D'Workin. D'Workin viewed the law as a system of entitlements.[339] Thus a judicial process is one of vindication of existing legal rights and enforcement of legal obligations.[340] According to D' Workin, a particular judge in deciding a case, will often feel bound to consider material other than rules and in other instances overturn legal rules on the strength of these material.[341] These materials are firstly "policies" which are economic, political and social goals. Secondly, they are "principles" which are standards of justice, fairness or some other dimension of morality.[342] Hart and D'Workin vary in the manner in which they categorise the material used by a judge as reasons for a decision.[343] Hart considers as law only those rules which all judges accept binding by virtue of the relationship of those rules to the rule of recognition.[344] D' Workin contrastingly focuses on the position of an individual judge.[345] A judge is not only bound by rules but also considers a variety of principles.[346]

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[332] Stanford Encyclopedia of Philosophy "The Pure Theory of Law" First Published Nov 18, 2002, Substantive revision Jul 26, 2021.
[333] Kelsen (n 311 above) 44.
[334] Kelsen (n 311 above).
[335] Kelsen (n 311 above).
[336] H.LA. Hart, *The Concept of Law*, Oxford University Press, 1961.
[337] J. M Steiner, Judicial Discretion and the Concept of Law, 1976. Vol 35 No 1. *The Cambridge Law Journal*, April 136.
[338] Hart (n 336 above).
[339] "Model" 30-31.
[340] Steiner (n 337 above) 139.
[341] Steiner (n 337 above) 142.
[342] Model 23 (14).
[343] Steiner (n 337 above) 143.
[344] Steiner (n 337 above) 143.
[345] Steiner (n 337 above) 143.
[346] Steiner (n 337 above) 143.

3.6 DOCTRINALISM AND ADHERENCE TO PRECEDENT

The doctrinarism approach to interpretation involves determining constitutional controversies by interpreting past precedents.[347] Precedent is a previous case or legal decision that is binding and must be followed in ensuing similar cases.[348] Previous judicial decisions as a source of law were recognised as far as back as the ancient Egyptians.[349] The power of judicial determination as precedents in the following cases is substantiated in the principle "*stare decisis et non quieta movere*" which entails to abiding per precedents and not interrupt the resolved position.[350] The principle operated in the Roman law.[351] The full development of the stare decisis principle is found in the English common law.[352]

The principle of *stare decisis* entails that once the position of the law has been determined by a court, there will no longer be need for its scrutiny.[353] According to this formulation, the judicial precedent rules the subsequent decisions presuming that the facts are similar.[354] The doctrine of stare decisis is rooted upon the principle that certainty in law is preferable to reason and correct legal principles.[355] It is established on the principle that stability and certainty in the law are of first importance.[356] The reliance of the law is regarded as of importance than the reason of it.[357]

Explaining the reasons which underlie the maxim, Kent stated as follows:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreserved, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness and the community has the right to regard it is a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore, be extremely inconvenient to the public, if precedents were not unduly regarded and implicitly followed….When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of Appeal or review,

[347] Data & Unnikrishnan (n 258 above) 41.
[348] Stevenson & Waite (n 8 above).
[349] C. W. Collins, "Stare Decisis" and the Fourteenth Amendment, 1912. No 7. *Columbia Law Review* 603-612.
[350] H. C. Black, The Principle of Stare Decisis" The American Law Register, 1886. *The University of Pennsylvania Law Review* 745.
[351] J. C. Gray, Judicial Precedents, 1985. Vol 9 No 1. *Harvard Law Review* 273.
[352] Collins (n 349 above) 603-612.
[353] Black (n 350 above).
[354] R Laun, Stare Decisis, 1938. Vol 25. *Virginia Law Review*, 1938 12.
[355] Harvard Law Review, 1920, Published by the Harvard Law Review Association.
[356] Collins (n 349 above) 612.
[357] n 349 above, 612.

> and never by the same court except for cogent reasons and upon manifestation of error, and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.[358]

Judicial precedent furnishes attainable regulation to dictate judicial determinations in ensuing cases with alike details.[359] Reliance on precedent in constitutional interpretation is said to provide predictability and consistency.[360] The focus of the doctrinal theory is that the principle underlying a past decision (precedent) provides the standard for interpreting the Constitution in future cases.[361] In adjudicating cases regarding the constitutionality of the Temporary Measures Act, the Zimbabwean judiciary has sometimes adopted the doctrinarism approach to interpretation and the application of *stare decisis* principle. In the case of *Forum Party of Zimbabwe and others v Minister of Local Government and others* (supra), the Supreme Court relied on the decision in *S v Gatzi and Rufaro Hotel (Pvt) Ltd* (supra) where the Court had held that the Temporary Measures Act is not unlawful. Collins argues that constitutional law cannot be bound by precedents to the same extent as private law.[362] Unlike private law, constitutional law is organic and it grows.[363] If a decision is wrong, whether from an erroneous conceptualisation of the law or through misinterpretation of the law to the facts and no injurious consequences would probable flow from an annulment of it, it is the authoritative duty of the court to overturn it.[364] The next part of the study discusses the ideal methods of constitutional interpretation that the Zimbabwean judiciary ought to adopt in cases concerning the constitutionality of the Temporary Measures Act.

3.7 IDEAL APPROACHES TO INTERPRETING THE CONSTITUTION IN CASES REGARDING THE CONSTITUTIONALITY OF THE PRESIDENTIAL POWERS (TEMPORARY MEASURES) ACT

A Constitution, which includes a Bill of fundamental rights has been characterised as a "living tree".[365] It is a developing document which must be expounded in light of the ever-changing conditions, values and perceptions.[366] If the original intent of the Constitution becomes the determining factor during the interpretation of the Constitution, there will be no development and flexibility.[367] Originalists believe that a Constitution forever means what it meant when it became part of the

[358] Kent's commentaries 475 in Black (n 350 above) 745-746.
[359] P Bobbit, Constitutional fate: Theory of the Constitution, 1982 7.
[360] L Epstein and T. G Walker, Constitutional Law for a Changing America Rights, Liberties & Justice, 8thEd, 2013 22.
[361] Datan & Unnikrishnan (n 258 above) 41.
[362] Collins (n 349 above) 603-612.
[363] Collins (n 349 above) 603-612.
[364] Black (n 350 above) 749.
[365] Botha (n 89 above) 194.
[366] Botha (n 89 above) 194.
[367] Botha (n 89 above) 194.

constitutional text, whereas living constitutionalists believe that constitutional meaning is not fixed but evolves in response to societal change.[368] In the next part, the research discusses the ideal constitutional interpretation methods in cases dealing with the constitutionality of the Temporary Measures Act. These include structuralism, teleological and historical interpretation.

3.7.1 Structuralism

One of the most prevalent modes of constitutional interpretation is rooted on the structure of the Constitution.[369] The construction of the Constitution is that which shows but does not directly say.[370] Structuralists use the general constitutional arrangement of offices, powers and relationships or rather "the meaning of the Constitution as a whole" to interpret the Constitution.[371] Drawing speculation from the arrangement of the Constitution establishes a key relationship that is generally agreed a Constitution initiates and this includes the relationship between the arms of the state (separation of powers).[372] The great majority of what has been taken to be the bedrock of constitutional principles shaping both the separation of powers within the national government and the division between national and state authority rest on the reasoning that originate not in any constitutional text but in the Constitution's overall aims and structure.[373] Structural analysis is appropriate in order to fill in the elements of separation of powers[374] and also to give shape and substance to "unenumerated" rights.[375] The recognition that constitutional meaning cannot be fully captured in the linear text alone, and that a number of other enquiries including its structure is appropriate and may be crucial in the interpretive effort.[376] The research argues that in cases concerning the constitutionality of the Temporary Measures Act, the Zimbabwean judiciary should adopt the structural interpretation of the Constitution. The Zimbabwean constitution establishes a structure between the three organs of the government. The legislature is charged with the powers to make the law and the executive has a mandate to implement them.

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[368] J. K Goldstein, History and Constitutional Interpretation: Some Lessons from the Vice Presidency, 2016. Vol 69. *Arkansas Law Review* 647.

[369] Legislative Attorney, Modes of Constitutional Interpretation, Updated March 15 2018. *Congressional Research Service* 18.

[370] L Wittgenstein, Tractatus, Logico-Philosophicus para 4.1212 (1921) (1961 Ed).

[371] Datan & Unnikrishnan (n 258 above) 141.

[372] Legislative Attorney (n 369 above) 18.

[373] G.H Reynolds, Penumbral Reasoning on the Right, 1992. *University of Pennsylvania Law Review* 140.

[374] *Morrison v Olson*, 487 US. 654, 697 (1988).

[375] *Griswold v Connecticut*, 381 U.S 479, 484 (1965).

[376] Tribe (n 126 above).

3.7.2 Teleological Interpretation

Of particular importance to this study is the teleological approach to statutory and constitutional interpretation. The teleological theory places values at the centre of constitutional and statutory interpretation.[377] The teleological theory allows courts to extend or restrict the operation of the law.[378] Values and equity underlying statutory provisions "justifies departures from the literal interpretation of statutes".[379] The aim and purpose of the provision must be discovered against the fundamental constitutional values.[380] The fundamental values in the Constitution form the basis of a prescriptive constitutional jurisprudence during which legislation and actions are evaluated against those constitutional values.[381] In the case of *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison*[382]Sachs J explained as follows on the teleological approach to interpretation:

> The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct… [W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to ad hoc technism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.[383]

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[377] A Moyo and BS Makwaiba, *The Role of Founding Values and Principles in Constitutional and Statutory Interpretation: Lessons for Zimbabwe*, 2020. *Africa Journal of Comparative Constitutional Law* 37.

[378] JA Corry, Administrative Law and Interpretation of Statutes, 1935-36 1 (2). *University of Toronto Law Journal* 296.

[379] R Posner, *Law and Literature*, Harvard University Press, 1998 253.

[380] Botha (n 89 above) 193.

[381] n 89 above, 193.

[382] *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA (CC).

[383] *Coetzee* (n 382 above) 631 para 46. See also the remarks by Crawford where the author explained the essence of the teleological approach to interpretation as follows:

> Under the equitable or philosophical theory of interpretation, the bounds of 'genuine interpretation' are considerably extended. The legislative enactment, according to this theory, merely lays down a general guide and gives the court wide leeway within which to deal with individual cases as the justice of the case demands in light of the reason and moral sense of men generally. Accordingly, the court will use the statute applicable to the case as a general guide, but the ethical situation among the litigants will be the determining factor. Justice in the pending controversy is the court's prime object, and such is also the basic legislative intent in all legislation. It may be assumed that the legislators in enacting all legislative acts, intend to delegate to the courts the power to determine each

In Zimbabwe, the judiciary is bound to advance the values and principles that controls a democratic society.[384] Of particular importance to this dissertation is section 46 (1) (b) of the Constitution which postulates that when elucidating the Declaration of Rights, "a court, tribunal, forum or body must promote the values and principles that underlie a democratic society". The provision is authoritative and it calls the courts and other decision-making bodies to discover the values and principles that underlie a democratic society and to guarantee that the interpretation given is compatible with those values and principles.[385] As earlier stated, the Constitution entrenches the values and principles of the supremacy of the Constitution, the rule of law and separation of powers. The study argues that the Zimbabwean Courts should adopt the teleological approach to statutory and constitutional interpretation in cases concerning the constitutionality of the Temporary Measures Act.

3.7.3 Historical Interpretation

Historical interpretation of the Constitution is premised upon the true purpose or understanding of the definition or implementation of a constitutional clause.[386] In trying to identify particular suppositions that an initial generation had on how certain constitutional clauses would be interpreted, a court may call on the historic interpretation of the Constitution[387]that prompted the enactment of the Constitution.[388] Justice Devittie adopted a historical interpretation of the Constitution in the case of *S v Sithole*.[389] On page 585 G-H, he stated as follows:

> What emerges from this brief historical survey of this country's constitutional history is that the present Constitution, upon which the accused in this case places reliance, is a radical departure from an authoritarian past in which scant regard

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> case on its own equitable merits. At least in the absence of a specific intent, may it not be assumed that the law makers intended that the structure in question should promote justice? In fact, it seems logical that the court is simply exercising judicial power when it determines the pending controversy according to the ethical situation *inter partes*. E. T Crawford, The Construction of Statutes Thomas Law Book Company, 1940 243.

[384] Moyo and Makwaiba (n 377 above) 41.

[385] n 377 above, 41.

[386] E. F. Delaney & R. Dixon Eds, Comparative Judicial Review, Edward Elgar Publishing 379.

[387] See the remarks by Mahomed J in the case of *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 262 where he stated as follows:

> All Constitutions seek to articulate, with differing degrees of intensity and details, the shared aspirations of a nation, the values which binds its national institutions, the basic premises upon which judicial, legislative and executive power is to be wielded, the constitutional limits and the conditions upon which that power is to be exercised, and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a broken past to accommodate the needs of the future…

[388] Delaney & Dixon (n 386 above) 380.

[389] *State v Sithole* 1996 (2) ZLR 575 (H).

> was paid to the rights of the individual. Our constitutional history enlightens us to the values on which the present Constitution is premised-but more important, it should alert us to the dangers of retaining the authoritarian traditions of the past.[390]

History aids to disclose the misconduct the document denoted to alleviate[391] The past can be said to bind the present when a judge considers his own role to be that of discovering the intent of those who framed the Constitution and discovering the meaning which the words had at the time they were inserted in the document, or of discovering the purpose for which particular propositions were designed.[392] To search for the intent of the Constitution is to examine the mindset of the framers or ratifiers which exposes past beliefs about the actual reach and implementation of a constitutional clause.[393] To search for meaning is to look for something behind a word.[394] To look for the purpose[395]of a constitutional provision is to look for assertion, sequences and a solid difficulty.[396] The study argues that in cases regarding the constitutionality of the Temporary Measures Act, the Zimbabwean Courts should adopt a historical approach to interpreting the Constitution.

3.8 MISSING FRAMEWORK AND INTERPRETATIVE THEORY THAT PROVIDE GUIDANCE TO THE COURTS FOR JUDICIAL REVIEW OF PRESIDENTIAL STATUTORY POWERS

There is a gap in the interpretative theory.[397] Scholars have proffered a rich literature on statutory interpretation but have not interrogated theories on the laws that are issued by Presidents.[398] "Literature and doctrine grapples with purpose in statutory interpretation, focusing in particular on whether and how the

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[390] *Sithole* (n 389 above).

[391] Delany & Dixon (n 388 above) 380.

[392] G.J Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 1964. Vol 31 Article 3. *University of Chicago Law Review* 502.

[393] Wofford (n 392 above) 502.

[394] Wofford (n 392 above) 502.

[395] See the remarks by the Canadian Supreme Court in the case of the case of *The Queen and Big M Drug Mart Ltd & Attorney General of Canada & 2 others* (1985) 1 S.C.R 295 where the Court stated as follows:

> In my view this analysis is to be undertaken and the purpose of the right or freedom in question is sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be as the judgment in Southam emphasises, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

[396] Wofford (n 394 above) 502-503.

[397] T. L Grove, Presidential Laws and the Missing Interpretative Theory, 2020. Vol 168. *University of Pennsylvania Law Review* 879.

[398] Grove (n 397 above) 879.

courts should consider extrinsic sources in construing ambiguous statutory terms".[399] "However, there is no comparable body of work that attends to purpose and intent in the context of the executive, particularly where the government action in question comes in the form of directives issued by the President or other executive branch actors".[400] When Presidents takes certain measures or publish directives, there is limited literature which explains how to interpret the importance of purpose or how courts should interpret the conduct.[401] When should courts evaluating Presidential action enquire into the Presidential intent?[402] What sources should the courts rely in conducting the intent enquiry?[403] What principles should guide the courts as they adjudicate these matters?[404] When it comes to executive action, there is considerable constitutional doctrine that places official intent at the centre of the enquiry into constitutionality.[405] "It is appropriate and often necessary for courts to scrutinise Presidential intent in the context of assessing the constitutionality of Presidential action".[406] The chapter argues that the Zimbabwean judiciary should develop an interpretative theory that provides guidance to the courts when adjudicating cases dealing with the constitutionality of the Presidential statutory powers.

3.9 CONCLUSION

The aim of chapter three was to discuss judicial restraint, constitutional interpretation in cases concerning the Temporary Measures Act and the theoretical foundations underlying judicial reasoning. The chapter highlighted that judicial restraint is composed of a number of doctrines which include a textual approach to statutory interpretation, loyalty to the true definition of the Constitution and doctrinarism. In light of this, the chapter discussed the textualism and original interpretation of the Constitution. Chapter three discussed a case where the court interpreted section 116 of the Constitution which states that the legislature of Zimbabwe comprises of Parliament and the President literally. The chapter argued that the interpretive method that was adopted by the court undermines the doctrine of separation of powers. The chapter traced the textual and Original interpretation of the Constitution to positive law and it discussed the theories as propounded by the positivists and critiqued by D' Workin. The chapter discussed doctrinarism and respect for precedent. It argued that in cases dealing with the constitutionality of the Temporary Measures Act, the courts have adopted the

[399] K Shaw, Speech, Intent and the President, 2019. 104. *Cornell Law Review* 1339.
[400] Shaw (n 399 above) 1339-1340.
[401] Shaw (n 399 above) 1340.
[402] Shaw (n 399 above 1372.
[403] Shaw (n 399 above) 1372-1373.
[404] Shaw (n 399 above) 1373.
[405] Shaw (n 399 above) 1373.
[406] Shaw (n 399 above) 1373.

doctrinarism approach to interpretation. Relying on scholarship, the chapter argued that constitutional law should not be bound by precedent as private law.

The chapter discussed the ideal approaches to interpreting the Constitution in cases concerning the constitutionality of the Temporary Measures Act. It discussed structuralism, teleological and historical interpretation of the Constitution. The chapter argued that there is a missing framework of an interpretative theory that guides the courts for judicial review of Presidential statutory powers. It argued that the Zimbabwean judiciary should develop a framework and an interpretative theory that provides guidance to the courts when adjudicating cases dealing with the constitutionality of the Temporary Measures Act. The next chapter discusses the “non-delegation doctrine”.

CHAPTER FOUR

The Non-Delegation Doctrine

4.1 INTRODUCTION

Chapter four discusses the "non-delegation doctrine". Much discussion has emerged regarding the powers and limitations of the executive, legislative and judicial branches of government.[407] There is unanimous agreement that the legislative powers cannot be delegated to another organ of the government by the legislature.[408] Delegation means an act of investing one or more persons with authority to do some act or acts.[409] Limits on the law makers power to assign duty obtain from the constitutional demands of agreed administration as dictated by the law.[410] The non-delegation doctrine limits the legislature's delegation of its inherent powers.[411] The doctrine commands that the legislature alone exercise the law making powers in the Constitution.[412] The shared use of accountable authority requires that every such use be traced to a preferred choice that is made by one of the "representative" arms.[413] Lawrence argues that the non-delegation doctrine may be based on four express and implied constitutional theories that are (1) due process (2) constitutional supremacy (3) power vesting clauses and (4) fundamental concepts of representative democracy.[414] For the first, there is legislation in Zimbabwe which proclaims that "all people have the right to administrative action that is lawful, reasonable and procedurally fair".[415] The legislation is the Administrative Justice Act.[416] Be that as it may, the President is exempted from review under the Administrative Justice Act. The chapter will discuss the exemption of the Zimbabwean President under the Administrative Justice Act.

The doctrine of non-delegation of legislative powers has theoretical foundations. John Locke in his treatise of government stated as follows:

> The *legislative cannot transfer the power of making Laws to any other hands.* For it being but a delegated Power from the People, they, who have it, cannot pass it

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[407] H. S Christenson Jr, Constitutional Law-Delegation of legislative powers to the Executive, 1936. 6 (3). *Albany Law Review* 78.

[408] J. B. Cheadle, The Delegation of legislative functions, 1918. Vol 27. *The Yale Law Journal* 892.

[409] Evans, William Ewell, Marshal D. Editor. Treatise upon the Law of Principal and Agent in Contract and Tort. Chicago, Callaghan and Co 47.

[410] Tribe (n 115 above).

[411] J Holman, Re-Regulation at the CPUC and California's Non Delegation Doctrine: Did the CPUC impermissibly convey its power to interested parties, 1997. 20. *Environmental Law Policy Journal* 58, 94, 61.

[412] Holman (n 411 above) 58-94 61.

[413] Tribe (n 126 above) 984.

[414] D. M Lawrence, Private Exercise of Government Power, 1986. 61. *Indiana Law Journal* 647.

[415] G Feltoe, Giving with one hand and taking back with the other: the exemptions and exclusions in the Administrative Justice Act, 204. Issue No 1. *Zimbabwe Human Rights Bulletin* 106.

[416] Administrative Justice Act [*Chapter 10.28*].

> over to other…And when the people have said, we will submit to the rules, and be governed by *Laws* made by such Men, and in such forms, no Body else can say other Men shall make *Laws* for them, nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have chosen, and Authorised to make *Laws* for them. The power of the *legislative* being derived from the People by a positive voluntary Grant and institution, can be no other, than the positive Grant conveyed, which being only to make *Laws,* and not to make *legislators,* the *Legislative* can have no power to transfer their Authority of making Laws and to place it in other hands.[417]

John Locke's perspective that Parliament cannot assign its law making power obtain from a past regulation of agency law which states that the power entrusted to an agent cannot be assigned, because such assignment would be contrary to the motives of inceptive convection.[418] In Locke's perspective, laws obtain their validity from the permission of the ruled.[419] He links the doctrine of non-delegation of legislative powers with the concept of separation of powers.[420] The Constitution provides that "Parliament's primary law making power must not be delegated". By holding that the Temporary Measures Act is lawful and sometimes avoiding dealing with its constitutionality, the Zimbabwean Courts have failed to fulfil the purpose of the doctrine of non-delegation of legislative powers.

4.2 THE INTENT OF THE NON-DELEGATION DOCTRINE

A reason suggested for the doctrine of non-delegation is that each department of the government is a delegate and cannot further delegate.[421] The principle that only the legislature can exercise law making authority, and that other organs outside the legislative branch cannot be vested with this power has been reinforced in the well-known maxim against the delegation of legislative power, *delegatus non-post delegare*.[422] *Delegatus non-post delegare* is a rule that a person to whom power, trust or authority is given to act on behalf of another cannot delegate this legislation.[423] The doctrine proscribes any of the three branches of government abdicating or transferring to other branch the essential functions with which they are vested by the Constitution.[424] Delegates cannot further delegate

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[417] J Locke, Two treatise of government (2d Treatise) 380-81 (2d Treatise), Cambridge University Press, 1960, 380-81.

[418] P. H. Aranson, E. Gellhorn & G.O Robinson, Theory of legislative delegation, 1982. 68 *Cornell Law Review* (1982 4 citing P.W Duff & H.E Whiteside, Delegata Protestats Non Potest Delegari: A maxim of American Constitutional Law, 1929. 14. *Cornell Law Review* 168.

[419] Aranson etal (n 418 above) 5.

[420] Aranson etal (n 418 above) 5.

[421] Cheadle (n 408 above) 895.

[422] B Ganguly, Administrative legislation in modern India: A preface, 1968. Vol 29 No 1. *The Indian Journal of Political Science* 36-43.

[423] Oxford Reference "Overview *delegatus non potest delegare*". Accessed March 31 2022. https://www.oxfordreference.com.

[424] R M Cooper, Administrative Justice and the Role of Discretion, 1938 Vol 47. *The Yale Law Journal* 585.

the duty charged to them because it is to be personally exercised by the delegate himself.[425]

The law makers are mandated to establish standards of action in its delegation of discretionary authority.[426] The cause of the establishment of these standards is to channel the exercise of discretion within the objectives and purposes of the legislative enactment.[427] Unrestrained delegation of legislative powers would undermine the "legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered laws".[428] It has been asserted that the non-delegation doctrine advances a number of goals which include separation of powers, democratic accountability, the rule of law and judicial review.[429]

Critics of delegation of legislative powers assert that legislative delegation to executive branch agencies is regrettable as it cripples the obligation provided by electoral command on legislators.[430] Legislative assignment to the executive arm supposedly generates these difficulties by transferring responsibility for making key important policy decisions to the unvoted officials in the executive arm.[431] If law makers assign the authority to make determinations, the lack of electoral commands on those officials may lead to corrupt decision making procedures.[432] Delegation of legislative powers to the executive also results in the law makers breaking free from accountability.[433]

4.2.1 Non-Delegation Doctrine and Separation of Powers

It is argued that the non-delegation doctrine is a necessary consequence of the tripartite separation of powers theory.[434] "The tripartite model provides an effective safeguard against government tyranny by establishing an interlocking institutional system of checks and balances in which the three main powers of government are distributed amongst different organs".[435] The tripartite nature of the separation of powers doctrine reflects the framers' belief that there are three main public powers which should be exercised separately.[436] For the separation of

[425] Cheadle (n 408 above) 896.
[426] Cooper (n 424 above) 585.
[427] Cooper (n 424 above) 585.
[428] D Schoenbrod, The delegation doctrine: Could the Court give it substance? 1985. Vol 83 No 5. *Michigan Law Review* 1224.
[429] E Carolan, Democratic Accountability and the Non-Delegation Doctrine, 2011. 33. *Dublin University Law Journal* 223-227.
[430] I. G Lovell, That Sick Chicken Won't Hurt: The Limits of a judicially enforced Non-Delegation Doctrine, 2000. 79, *Constitutional Commentary* 82-83.
[431] Lovell (n 430 above) 82-83.
[432] Lovell (n 430 above) 82-83.
[433] Lovell (n 430 above) 82-83.
[434] Carolan (n 430 above) 223.
[435] Carolan (n 430 above) 223.
[436] Carolan (n 430 above) 113.

powers theory to be effective, it is essential that each of the three branches of government fulfil the role entrusted to it so that the inter-institutional balance is maintained.[437]

Delegation of the power of one branch to the officials of another would effectually allow the delegatee branch to exercise the powers of government unilaterally, and crucially unchecked.[438] The risk with delegation is that it could result in growth of executive authority.[439] "This tends to weaken the system's checks and balances and risk effectively equipping the executive with a unified power to both create and implement administrative powers".[440] The practice of delegating power away from the legislature must either be prohibited or constrained so that the inter-institutional balance is preserved.[441] A non-delegation doctrine was thus a necessary ingredient of a separation of powers system.[442]

4.2.2 The Non-Delegation Doctrine, Democratic Accountability, Rule of Law and Judicial Review

The non-doctrine delegation is a vital aspect of democratic government.[443] Delegation endangers democratic accountability by removing decisions from the elected branch of government which reduces the degree to which government is responsible and accountable to the people for its conduct.[444] "Delegation to an agency undercuts accountability because the delegate is unaccountable".[445] Restricting legislative delegations maintains democratic accountability by ensuring that the sort of creative or discretionary decisions which require popular legitimacy continue to be made by the branch of government elected for that cause.[446] The non-doctrine delegation protects the rule of law by ensuring that the government acts in a manner which coincides with its requirements.[447] The doctrine is intended to prevent the transfer of discretionary decision making powers for bureaucratic officials or third party agencies.[448] The implications are that discretionary decisions continue to be made through the legislative process.[449] The consequence is that rules are made in a publicly accessible manner.[450] The

[437] Carolan (n 430 above) 223.
[438] Carolan (n 430 above) 113.
[439] Carolan (n 430 above) 224.
[440] Carolan (n 430 above) 224.
[441] Carolan (n 430 above) 224.
[442] Carolan (n 430 above) 113.
[443] Carolan (n 430 above) 224.
[444] Carolan (430 above) 225.
[445] D Schoenbrod, Separation of Powers and the Powers that be: The Constitutional Purposes of the non-delegation doctrine, 1987. 36 *American University Law Review*.
[446] Carolan (n 430 above) 225.
[447] Carolan (n 430 above) 226.
[448] Carolan (n 430 above) 226.
[449] Carolan (n 430 above) 226.
[450] Carolan (n 430 above) 226.

legislative process motivates the framing of rules at an appropriate level of generality, thus reducing the risk that they may be applied in the sort of inconsistent or unfair manner which would be repugnant to the rule of law.[451] "The non-delegation doctrine serves as a safeguard against arbitrary government action by ensuring that rules are made through processes that conform to these principles".[452] The non-delegation doctrine supports the judiciary's ability to perform its constitutional functions by ensuring that decisions of the other branches are susceptible to judicial scrutiny.[453]

In the United States case of *Panama Refining Company v Ryan*[454]the Court struck down an executive order on the basis that it violated the non-doctrine delegation which forbids the delegation of legislative authority to the President.[455] The Court held that the Parliament is not allowed to assign its law making powers.[456] The Court relied on Article 1 of the United States Constitution which grants the congress the law making powers.[457] In the case of *Mistretta v United States*[458]the Court reiterated "that the non-delegation doctrine is rooted in the principle of separation of powers that underlies the tripartite system of government".[459]

4.3 LEGISLATIVE POWER

Legislative power is the modern conception of law that traces the authority to the law makers[460] and it entails the power to make, amend and repeal rules of law.[461] It is this assumption of a pure power to make or unmake the laws that allows for a clear distinction between "legislative" (law making) and "judicial" (law-interpreting) or "executive" (law-applying) powers.[462] Section 116 of the Constitution states that The Legislature of Zimbabwe consists of Parliament and the President acting in accordance with this Chapter. In Zimbabwe, the courts have adopted a textual approach in interpreting the provision and they have held that the provision entails that there is a complimentary role between the President

[451] Carolan (n 430 above) 226.
[452] Carolan (n 430 above) 226.
[453] Carolan (n 430 above) 226.
[454] *Panama Refining Company* (n 214 above).
[455] Driesen (n 31 above).
[456]*Panama Refining Company* (n 214 above) 421.
[457] n 214 above, 421.
[458]*Mistretta v United States* 488 US 361.
[459] *Mistretta* (n 458 above) 371-72 (citing *Field v Clark* 143 US 649, 692 (1892). The Court stated as follows:

> Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me is that the power to make law, cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power. 488 US at 416-17.

[460] Rutl (n 5 above) 1054.
[461] IM *Rautenbach Constitutional Law* 2003 78.
[462] Rutl (n 5 above).

and Parliament. This approach to interpretation undermines the doctrine of separation of powers that is enshrined in the Constitution.

The Constitution empowers the legislature to amend the Constitution, make laws and confer subordinate legislative powers upon another body. Section 117 states as follows:

> (1) The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution and by the legislature;
> (2) The legislative authority confers on the legislature the power-
> (a) To amend this Constitution in accordance with section 328;
> (b) To make laws for the peace, order and good governance of Zimbabwe; and
> (c) To confer subordinate legislative powers upon another body or authority in accordance with section 134.

Section 117 of the Constitution allows the legislature to assign its law-making powers upon another body in line with section 134 of the Constitution which provides for subsidiary legislation. "Delegation" entails authorisation to issue ordinances of all kinds.[463] "While it is true that section 134 of the Constitution allows Parliament to delegate power to make statutory instruments such as Regulations, unlike the old Constitution,[464] restrictions are placed on such delegation".[465] One limitation on the delegation of the legislative powers is that "Parliament's primary law making power must not be delegated".[466] In terms of section 134 (d) of the Constitution, the Act passed in terms of the delegation "must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable" to the same. Linington states that the right of the legislature to delegate legislative functions to other bodies cannot be doubted.[467] The author further states that this does not mean that Parliament can confer all of its law making powers on another body.[468] He emphasises the need to draw a distinction between Parliament delegating its powers and it abdicating its sovereign authority.[469] The Temporary Measures Act "does not only delegate primary law making power to the President,

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[463] Dicey *Law of the Constitution* 1920 49- 50.

[464] Constitution of Zimbabwe as amended on the 14th of September 2005 (n 24 above). Sec 32 of the old Constitution provided for legislative authority. It provided as follows:

> (1) The legislative authority of Zimbabwe shall vest in the legislature which shall consist of the President.
> (2) The provisions of subsection (1) shall not be construed as preventing the legislature from conferring legislative functions to any person or authority.

The provision was unqualified and it allowed Parliament to delegate its law making authority to "any person or authority".

[465] Veritas (n 73 above).

[466] See sec 134 (a) of the Constitution (n 2 above).

[467] G Linington *Constitutional Law of Zimbabwe*, Legal Resources Foundation, Harare. 79.

[468] Linington (n 467 above) 79.

[469] Linington (n 467 above) 79.

but it also fails to specify the nature and scope of the Regulations that may be made under the Act, or the principles and standards applicable".[470]

4.4 EXEMPTING THE PRESIDENT FROM REVIEW UNDER THE ADMINISTRATIVE JUSTICE ACT (CHAPTER 10: 28)

The main aim of administrative law is the protection of private rights and its focus is the mode of exercise of administration powers and the system of relief against administrative action.[471] The conventional model of administrative law theory circles around the concept of the rule of law.[472] Its primary function is to avert unlawful or arbitrary administrative use of authority against individuals.[473] Administrative law controls legal relations between public authorities and private individuals and between public authorities themselves.[474] The concept thus provides a remedy to the potential friction between social ideals and social structure by providing a procedure for the unprejudiced application of power of the state[475]as it applies a reasonable legal control over the way in which administrative bodies exercise their power, ensuring that their powers are not used arbitrarily.[476] Commenting on the United States Administrative law, Stewart states that "the law defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures the agencies must follow and determines the availability and scope of reviews of their actions by the independent judiciary".[477] Administrative law secures the rule of law and it protects freedoms by guaranteeing that agencies follow fair and impartial decisional operations, act within the bounds of the statutory power assigned by the Parliament, and respect individual rights.[478]

Section 3 (1) (c) of the Act provides that, "an administrative authority which has the potential of affecting rights, interests or legitimate expectations of any person shall supply written reasons within a period stipulated in the law where it has taken an action". Section 3 (2) of the Act states that for an administrative action to be considered as fair, "the administrative action shall give the person affected adequate notice that addresses the nature and purpose of the proposed action,

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[470] Veritas (n 73 above).

[471] E. A Harriman, The development of administrative law in the United States, 1916. Vol 25 No 8. *The Yale Journal* June 658-665.

[472] M Loughlin, Procedural fairness: A study of the crisis in administrative law theory, 1978. Vol 28 No 2. *The University of Toronto Law Journal* 216.

[473] R B Stewart, Administrative Law in the Twenty-First Century, 2003. Vol 78 No 2. *New York Law Review*.

[474] G Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe*, 2012 2.

[475] M Loughlin, Procedural fairness: A study of the crisis in administrative law theory, 1978. Vol 28 No 2. *The University of Toronto Law Journal* 216.

[476] Feltoe (n 474 above).

[477] Stewart (n 473 above).

[478] R. B Stewart, The Reformation of American Administrative Law, 1667. 88. *Harvard Law Review*, 1661-76.

reasonable opportunity to make sufficient representation and adequate notice of any right of review". The Act imposes an obligation on administrative authorities to act in a manner that is "lawful, reasonable and procedurally fair when taking action which may affect the rights, interests or legitimate expectations of any person".[479] Section 68 of the Constitution provides for the right to justice and states that:

> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
>
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

Administrative authorities are also mandated to take administrative action within the time period specified in the applicable law and within a reasonable time.[480] The administrative authorities are further compelled to supply written reasons for their action within the time period specified in the applicable law or after a reasonable period after the reasons were requested.[481] Section 6 of the Act states that any person whose rights, interests or legitimate expectations are fundamentally affected by a decision of an administrative body may apply to the High Court for an order compelling the administrative body to supply reasons.[482] The High Court upon satisfaction that there has been a failure by an administrative body to supply reasons may order that the administrative authority supply reasons within a specified period.[483] Where the administrative authority fails to comply with the order, it shall be presumed that the administrative action constituted an improper exercise of the power conferred by the relevant law.[484]

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[479] Feltoe (n 474 above) 106. The right to administrative justice is entrenched in the Bill of Rights of the Constitution of Zimbabwe.

Mathonsi J commented about the right to administrative justice in the case of *Fanele Maqele & Aldrin Nyabando and Tendai Warambwa v Vice Chancellor, Proffessor N.M Bhebhe N.O and Midlands State University* HB 129-16 as follows: -

> The concept of administrative justice is one which chimes to a certain degree with the notion that administrative authorities which are charged with the responsibility and power to take administrative action affecting the rights, interests, or legitimate expectations of any person should act lawfully, reasonably and in a fair manner, within a reasonable period…In fact administrative justice is now embedded in our Constitution as sec 68 (1) of the Constitution provides that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In addition, sec 3(1) of the Administrative justice Act [*Chapter 10.28*] provides that an administrative action affecting the rights, interests or legitimate expectations of others shall act lawfully, reasonably and fairly within a reasonable time.

[480] Feltoe (n 474 above) 106.

[481] Feltoe (n 474 above) 106.

[482] Sec 6 (1) (a) and (b) of the Administrative Justice Act (n 416 above).

[483] Sec 6 (2) of the Administrative Justice Act (n 416 above).

[484] Sec 6 (3) of the Administrative Justice Act (n 416 above).

The Presidential action is exempted from review under the administrative law. This is despite the fact that the Temporary Measures Act allows the President to enact legislation unilaterally. In terms of the schedule of the Administrative Justice Act,[485] any exercise or performance of the executive powers or functions of the President or cabinet is exempted from duties of administrative authorities provided for in section 3 (1) (c) and section 3 (2) of the Act. The schedule also exempts the President or executive functions from section 6 of the Administrative Justice Act which provides for application and issue of order to supply reasons. Allowing the President to make decisions that are binding on the public without procedural safeguards and a strong judicial supervision shakes the foundation upon which the administrative state is built.[486] Feltoe disapproves the exclusion of the President in the Administrative Justice Act. He states that it is unexpected that a legislation can be passed that completely excludes an authority from the obligation to act unlawfully or that legislation can vary this obligation.[487] The author states that all administrative authorities are obliged to obey the law and that they should not be excluded from this responsibility.[488] No authority can or should be given the right to depart from the requirement to act in a lawful manner. If an authority acts unlawfully, any person affected must surely have the right to approach a court of law for a ruling that the action is illegal and of no force and effect.[489]

The Supreme Court in *Franklin v Massachusetts*[490]held that the United States President is not an "agency" under the APA[491] The President's actions are not exposed to the Administrative Procedure Act's procedural demands or judicial review provisions.[492] The United States Presidents have used statutory authority without adhering to the APA's procedural requirements and complete judicial review.[493] Kovacs argues that *Flanklin* was wrongly decided and that the President should be subject to the Administrative Procedure Act's procedural and judicial review provisions.[494] The author argues that the President of the United States is an authority and is not expressly excluded from the definition as are congress and the federal courts.[495] "A President should be subject to the same constraints as other statutory delegate".[496] As an agency, the President should be bound both

[485] Administrative Justice Act (n 416 above). See the Schedule (Part 1) of the Act.
[486] Kovacs (n 33 above) 70.
[487] Feltoe (n 474 above) 107.
[488] Feltoe (n 474 above) 107.
[489] Feltoe (n 474 above) 107.
[490]*Franklin* (n 67 above).
[491]*Franklin* (n 67 above).
[492] Stack (n 68 above) 552.
[493] K. E Kovacs, Rules about Rulemaking and the Rise of the Unitary Executive, 2018. 70. *Administrative Law Review* 515, 560-62.
[494] Kovacs (n 33 above) 68.
[495] Kovacs (n 33 above) 84.
[496] Kovacs (n 33 above) 68.

formally and judicially.[497] The study argues that the Presidential conduct in Zimbabwe should also be reviewable under the Administrative Justice Act.

4.5 CONCLUSION

In chapter 2, the researcher argued that the Zimbabwean Courts have not executed the purpose on the non-delegation doctrine in cases dealing with the constitutionality of the Temporary Measures Act. Chapter four sought to discuss the non-delegation doctrine. The chapter discussed the theoretical foundations of the doctrine as conversed and propounded by John Locke. It established that the non-delegation doctrine is necessary for the preservation of separation of powers, democratic accountability, the rule of law and judicial review. The chapter discussed case law from other jurisdictions which executed the purpose of the non-delegation doctrine. Chapter four established that the President is exempted from review under the Administrative Justice Act. It discussed the provisions of the Act which provide that administrative authorities should supply reasons stipulating the law where it has taken an action. The chapter also discussed the provisions of the Act which states that for an administrative action to be fair, the administrative authority shall give the person affected adequate notice that addresses the nature and purpose of the proposed action. The researcher highlighted the argument raised by scholars that a President should be exposed to the same restrictions as other statutory agents. Chapter 5 restates the argument of the research, gives a conclusion and proffers recommendations.

[497] Kovacs (n 33 above) 68.

CHAPTER 5

Conclusion and Recommendations

5.1 INTRODUCTION

The research was set out to discuss the Zimbabwean jurisprudence in cases dealing with the lawfulness of the Temporary Measures Act, critically reviewing how the courts have interpreted the Constitution. It sought to discuss the appropriate standards of judicial review in cases dealing with the constitutionality of the Presidential statutory powers. The research established that the Zimbabwean judiciary has not satisfactorily reviewed cases concerning the constitutionality of the Temporary Measures Act and that the courts have used technicalities to avoid dealing with the same. It proved that there is a missing framework in Zimbabwe that provides guidance to the courts of judicial review of Presidential statutory powers. The research established that in cases concerning the constitutionality of the Temporary Measures Act, courts have exercised judicial restraint and they have interpreted the Constitution textually and accorded the constitutional provisions their original meaning. The research confirmed that in cases concerning the Presidential Powers (Temporary Measures) Act, the courts have not executed the purpose of the "non-delegation doctrine". Chapter 5 furnishes an abstract of the study that was undertaken, recapitulates the argument, and gives a conclusion and recommendations.

5.2 RE-AFFIRMATION OF RESEARCH OBJECTIVES

The study sought to:

1. To critically interrogate the standards of review, if any established, that have been adopted by the Zimbabwean Courts when adjudicating cases dealing with the constitutionality of the Temporary Measures Act.
2. To discuss the theories underlying judicial reasoning analysing whether there is an established theory about how to determine the connotation of Presidential statutory powers.
3. To discuss the non-delegation doctrine of legislative powers and the exemption of the President under the Administrative law.
4. To provide recommendations for judicial review for cases undergoing review of constitutionality of Presidential powers.

5.3 SUMMARY OF FINDINGS

From the aims of the study traversed in chapter 1, the ensuing conclusions are drawn:

5.3.1 Judicial Review in cases dealing with the Constitutionality of the Presidential Statutory Powers

It is submitted by this study that the Zimbabwean Courts have not satisfactorily reviewed the cases dealing with the constitutionality of the Presidential Powers (Temporary Measures) Act. The research puts forward that the Zimbabwean Courts have used technicalities to avoid dealing with the constitutionality of the Act or they have held that it is not ultra vires the Constitution. The dissertation advances that the Zimbabwean judiciary has not developed any framework that acts as a command in cases dealing with the constitutionality of the Presidential statutory powers. The research argued that there are implications of not having a framework that acts as a guide in the review of cases concerning the constitutionality of the Presidential statutory powers. Absence of a framework leads to lack of stability in review which results in the President not having a clear guide on the scope of his statutory powers. The study concludes that there is need for the approbation of pertinent standards of judicial review in cases regarding the constitutionality of the Presidential statutory powers. The dissertation discussed the standards of judicial review that have been entrenched in the United States administrative law. These include the arbitrary and capricious review/ "Hard look review", procedural review and the rational basis review. It was the finding of the research that if the Zimbabwean Courts are to apply strict standards of judicial review, then there will be development of constitutional jurisprudence, promotion of democracy and separation of powers. Furthermore, the research's findings were that an absence of a judicial framework of reviewing the constitutionality of the Presidential statutory powers erodes stability and leads to a risky concentration of power. The research recommends that the Zimbabwean judiciary should adopt the appropriate standards of judicial review discussed above in cases regarding the constitutionality of the Presidential statutory powers.

5.3.2 Judicial Restraint and Constitutional Interpretation

It was the finding of the research that in cases regarding the constitutionality of the Temporary Measures Act, courts have adopted judicial restraint which includes interpreting the Constitution textually, adherence to the original meaning of the Constitution and respect for precedent. The research's findings were that in cases concerning the legitimacy of the Temporary Measures Act, courts have adopted judicial restraint which includes interpreting the Constitution textually, adherence to the original meaning of the Constitution and respect for precedent. The research's findings were that in cases dealing with the constitutionality of the same, courts have adopted a textual and grammatical meaning to the Constitution and they have accorded constitutional provisions their grammatical meaning. It was the argument of the researcher that this approach to interpretation undermines the doctrine of separation of powers. The research discussed the ideal constitutional interpretation methods in cases dealing with the constitutionality of

the Presidential Powers (Temporary Measures) Act. It recommends that in such cases, the Zimbabwean judiciary should adopt structuralism, teological and historical interpretative methods.

The study established that in cases dealing with the constitutionality of the Temporary Measures Act, the Zimbabwean Courts have in other instances adopted the doctrinarism approach to interpretation and they have relied on precedent. Relying on scholarship, the dissertation argued that constitutional law should not be bound by precedent. It is submitted by the study that there is no theory which provides for the interpretation of Presidential statutory powers. A number of theories that have been developed focus on statutory and constitutional interpretation. The research recommends that the Zimbabwe judiciary develop an interpretative theory that will provide guidance to the courts when adjudicating cases dealing with the constitutionality of the Presidential statutory powers.

5.3.3 The Non-Delegation Doctrine

The research concludes that in cases concerning the constitutionality of the Presidential Powers (Temporary Measures) Act, the Zimbabwean judiciary has not executed the purpose of the non-delegation doctrine. The research discussed the non-delegation doctrine and it established that it is based on constitutional theories that are (1) due process (2) constitutional supremacy (3) power vesting clauses and (4) fundamental concepts of representative democracy. The study discussed the theoretical foundations of the doctrine and its intent. It was the finding of the study that the "non-delegation doctrine" is necessary for the preservation of separation of powers, democratic accountability, rule of law and judicial review. The research established that the Presidential conduct is exempted from review under the Administrative Justice Act. The study argued that the primary role of administrative law is to curtail the abuse of power by the executive. Relying on scholarship, the research argued that Presidential action in Zimbabwe should be reviewable under administrative law.

5.4 CONCLUSION

The major aim of the research was to discuss the appropriate standards of judicial review in cases dealing with the constitutionality of the Presidential statutory powers. The study discussed the concept of judicial review and its justification. It explained that the justification for judicial review includes constitutionalism, the rule of law, checks and balances between the judiciary, executive and legislature and judicial authority. The research discussed the Zimbabwean jurisprudence in cases dealing with the constitutionality of the Presidential statutory powers. It discussed five Zimbabwean decisions which dealt with the legitimacy of the Temporary Measures Act. The researcher explained that in the five decisions, the Zimbabwean Courts held that the Act is constitutional or they avoided dealing with its constitutionality by invoking technicalities. The research discussed the

appropriate standards of judicial review in cases dealing with the constitutionality of the Presidential statutory powers. It discussed the arbitrary and capricious review, procedural review and the rational basis review and argued that these are the appropriate standards that the Zimbabwean judiciary should adopt when adjudicating cases dealing with the constitutionality of the Presidential statutory powers.

The research also discussed judicial restraint and constitutional interpretation. The study established that judicial restraint encompasses a number a wide range of doctrines which include a textual or strict approach to statutory interpretation and respect for precedent. The research explained that in cases dealing with the lawfulness of the Temporary Measures Act, the Zimbabwean Courts have adopted a textual approach to interpreting the Constitution. The researcher traced the textual approach to interpreting the Constitution to positive law and discussed theorists who advocated for positive law and a critique as propounded by Professor D'Workin. It was the argument of the research that there are other constitutional interpretative methods which the Zimbabwean judiciary should adopt in cases dealing with the constitutionality of the Presidential statutory powers. These are structuralism, teological and historical interpretation.

The study also discussed the "non-delegation doctrine". It discussed the theoretical foundations of the doctrine and John Locke's view that a legislative body cannot delegate its legislative powers. The research discussed the intent of the non-delegation doctrine. It was the conclusion of the study that the non-delegation doctrine is key for the preservation of separation of powers, democratic accountability, "rule of law" and judicial review. The research also discussed the concept of legislative power and the exemption of the Zimbabwean President under the Administrative Justice Act. The study argued that a Zimbabwean President should also be reviewable under the Administrative Justice Act on the basis that the main purpose of administrative law is to prevent the arbitrary use of administrative power.

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