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JUDGES IN THE STORM: THE JUDICIAL REVIEW DEBATE

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THE JUDGES IN THE STORM

The promulgation of the Presidential Powers (Temporary Measures)(Labour Relations) Regulations, 1998,¹ in November 1998 has brought a major simmering controversy in Zimbabwe to the boil. The regulations outlaw and make a criminal offence all "unlawful collective action," the latter expression being defined in very broad terms.²

The legality of the regulations turns on the question of whether they are lawful in terms of the enabling legislation and the Constitution, and this is an interpretation question.³ This raises the issue of the extent of the powers of the courts to declare legislative measures invalid. Major controversy has erupted in legal scholarship and within the judiciary over the legitimacy of the use of the judicial review process as a tool of judicial social engineering by the Dumbutshena and Gubbay Courts.⁴

The regulations are a jurisprudential minefield that will finally expose the character and nature of the Gubbay Court, a thing that has hitherto been difficult to do because of the

1. Statutory Instrument 368A of 1998.
2. s2 defines "unlawful collective action" as meaning: "... any strike, boycott, lock-out, sit-in, sit-out, stay-away or other such concerted action on the part of employers or employees which constitutes a breach of any contract of employment and which —
 - (a) is prohibited in terms of subsection (3) of section 104 of the principal Act; or
 - (a) is engaged in wholly or mainly for the purpose of —
 - (i) resisting any law or lawful measure of the Government; or
 - (ii) inducing or compelling the Government to alter any law or lawful measure."
3. The issues raised include whether the regulations are *intra vires* the enabling Act, the Presidential Powers (Temporary Measures) Act, Chapter 10:20, and the constitutionality of the regulations viz issues such as separation of powers, the freedom of expression and freedom of assembly and association.
4. For debates on the issue in various jurisdictions including the USA, Canada, India and South Africa see generally Davis D., Chaskalson M & De Waal J., "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in van Wyk, Dugard J, de Villiers B & Davis D., *Rights and Constitutionalism: The New South African Legal Order* (Juta, SA, 1994) 1. In Zimbabwe, for similar debates, there have been those who have argued generally against judicial activism like Hlatshwayo B., "Judicial Activism and Development — Warning Signals from Zimbabwe" (1991-1992) Vols. 9-10 *Zim.L.Rev.* 4; Hlatshwayo B., "Order in the Courts: Judicial Activism and Restraint," (1997) Vol. 9 No. 4 *Legal Forum* 14; van Horn A., "Redefining Property: The Constitutional Battle Over Land Distribution in Zimbabwe" (1994) 38 *JAL* 144; Madhuku L., "Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on *United Parties v Minister of Justice, Legal and Parliamentary Affairs*" (1998) Vol. 10 No.1 *Legal Forum* 48. On the judicial front see similar sentiments expressed by Gubbay CJ in *Chairman PSC & Ors v ZIMTA & Ors* 1996 (1) *ZLR* 637, (the Bonus Case). And on the other hand are those who have supported judicial activism in varying degrees like Linington G., "Is Parliament's Right to Amend the Constitution Limited?" (1996) Vol. 8 No. 3 *Legal Forum* 23; The Reviewer, "A Retreat of Judicial Review" *Legal Forum, Ibid.*, p 11; Biti T., "The Judiciary, the Executive and the Rule of Law in Zimbabwe" (unpublished article, 1997). At the judicial level see *Zimnat Insurance Co. v Chawanda* 1990 (2) *ZLR* 364.

confusing signals that have come from that court over the last decade.⁵ The calm of the preceding years allowed the court to disguise its true ideological colours: — acting as the friend of liberal democracy in some instances⁶ whilst suppressing it in others.⁷ But that time is gone. In the storm of social struggles that now engulfs Zimbabwe, there can be no room for fence-sitting.

In this article we assess some of the debates that have taken place on the question of judicial activism, judicial review and the role of the judiciary in the realisation of liberal democracy. In particular we focus on the controversy over models of constitutional interpretation and what bearing this has in complex cases like those dealing with the Presidential Powers (Temporary Measures) (Labour Relations) Regulations.

LITERALISM V CONTEXTUALISM

Two broad schools on judicial activism may be ascertained. On the one side is the traditional bourgeois school of interpretation, which sees the role of the courts in the strict Diceyan sense of separation of powers — the role of the courts is to enforce the will of the legislature. To do this the judiciary must be guided by the literal rule. Du Toit has styled this the “literalist-cum-intentionalist” model of interpretation.⁸

In terms of such model the “words of a statute are to be given their ordinary, grammatical meaning unless this would lead to a patently absurd or unjust result, in which case certain contextual aids may be invoked”.⁹ Courts must apply the literal meaning of the text to get to the purpose of the legislature and not their own values or morals. The legislature enjoys the power of making value decisions or policies because it represents the will of the majority of society and is more attuned to its needs.¹⁰ Such principles apply to the interpretation of both the constitution and general statutes, as no distinction is drawn between the two. As Fieldsend CJ observed in *Hewlett v Minister of Finance*:¹¹

5. Compare for instance Gubbay CJ's position in *Rattigan & Ors v Chief Immigration Officer* 1994 (2) ZLR 54 calling upon the judiciary “to make the Constitution grow and develop to meet the needs of an everchanging society...” and his statements in *Chairman PSC & Ors v ZIMTA & Ors* 1996 (1) ZLR 637 where he observed “It is immaterial that the legislative measure may be unreasonable, impolitic or retrospective or that it impinges on existing rights... it must be upheld whatever the court may think of it.” Or compare his statements in opening the 1991 Legal Year in his “Essential Features” speech and his “Search for the Truth” speech at the opening of the 1998 Legal Year — quoted *infra*, at p 34 and p 44 respectively.
6. For instance in *Munhumeso & Ors v A-G* 1994 (1) ZLR 49, declaring restrictions on the freedom of assembly and association unlawful.
7. *Chairman PSC & Ors v ZIMTA & Ors* 1996 (1) ZLR 637 denying government workers their bonus.
8. du Toit D., Woolfrey D., Murphy J., Godfrey, Bosch D. & Christie S., *The Labour Relations Act of 1985* (Butterworths, Durban, 1996).
9. *Ibid.*, Madhuku L., *supra* note 140 p 50.
10. Dissenting judgement of McNally JA in *S v A Juvenile* 1989 (2) ZLR 61. See also Gubbay CJ in *Nyambirai v NSSA* 1995 (2) ZLR 422, wherein he said, “I do not doubt that because of their superior knowledge and experience of society and its needs, and familiarity with local conditions, national authorities are, in principle, better placed than the judiciary to appreciate what is in the public benefit...”
11. 1981 ZLR 571 (S). Also see Madhuku L., *supra*, at p 50 for endorsement of such a view.

... in general the principles governing the interpretation of a constitution are basically not different from those governing the interpretation of any other legislation.

Thus for instance such an interpretation would give Parliament wide berth to amend the Constitution as it sees fit, as long as the two-thirds procedural requirements of s 52(1) are met.

The other broad school is the so-called purposive model or contextualist school. This rejects the literalist model's view that the starting point is the literal application of the legislation. Rather the courts are supposed to take "a more contextually-sensitive and value-coherent approach". Devenish puts it thus:

A purposive methodology looks beyond the manifested intention. The purposive theory has its ratio in the fact that a statute is a legislative communication between the legislature and the public that is 'inherently purposive.' The interpreter must endeavour to infer the design or purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all intentional and external sources.¹²

In particular, a distinction is drawn when it comes to constitutional interpretation involving constitutions with justiciable Bills of Rights,¹³ in which the purposive model should be used even more to realise the values underlying the Constitution, the so-called constitutionalism doctrine.¹⁴

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12. Devenish G E., *Interpretation of Statutes* (Juta, Johannesburg, 1992) p 36; In the labour law context, application of the same approach is supported by various authors including du Toit, *supra* note 144 p 44; Rycroft A., & Jordan B., *A Guide to South African Labour Law* (Juta, Cape Town, 1992) p 29. Such model of interpretation was used in the minority judgement of Mucshetere JA in *Chidiva & Ors v Zimbabwe Iron & Steel Co. Ltd.* SC No-137-97 at p 18 on what amounts to waiver. And also *Chiworeshe v Rixi Taxi Services Co-Op Society* HH 13-93.
13. *Minister of Home Affairs & Anor v Fisher & Anor* (1980) AC 319; (1979) 3 All ER 21 (PC), cited approvingly as the *locus classicus* in constitutional interpretation in *Marumahoko v Chairman, PSC & Anor* 1991 91 ZLR 27 (HC); Adam J. See McNally JA's rather reluctant acceptance of the same value in *Chairman of the Public Service Commission & Ors v Hall S- 49-89*, where he draws a distinction in the power of parliament under constitutions with justiciable Bills of Rights and those without. Consistent with that reluctance of invoking constitutional arguments, McNally JA declined to go into the issue of whether restrictions on unregistered trade unions under s30 of the Labour Relations Act, Chapter 28:01 violates the freedom of association and assembly. *Agricultural Labour Bureau & General Agricultural and Plantation Workers' Union v Zimbabwe Agro-Industry Workers' Union* S.C. 126/98, at p 8, where he observed: "This Court cannot and does not claim any expertise in what is fundamentally a matter of policy, to be determined by the Registrar, namely the question whether or not it is desirable to have more than one Trade Union in this industry." See section 3 of the Constitution which reads: "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." See also, *Chairman, PSC & Ors v ZIMTA & Ors* 1997 (1) SA 209, where the court affirmed that Zimbabwe is a "constitutional democracy" although in this case such point was raised to buttress the court's acquiescence with arbitrary executive activity.
14. For supporting and counter arguments see, Davis D., *supra* p 2; Botha C. J., *Statutory Interpretation: An Introduction for Students* (Juta, SA, 1996) p 153; Linington G., *supra* note 140. See also Chaskalson M., *et al.*, *supra* note 140 where the authors aver that "... the approach to constitutional interpretation which says the meaning of the Constitution is to be found in the intention of its drafters is fundamentally flawed. Nor is the meaning of the Constitution to be found in a simple decoding of the written text. Rather the meaning of the Constitution is to be determined with reference to its underlying values and commitments."

In terms of such doctrine there are certain fundamental values or "essential features" underlying a democratic constitution that cannot be amended or destroyed even by a democratic government. These include equal participation of citizens in the democratic process,¹⁵ and "the institution and preservation of a democratic form of government; the establishment of a system of separation of powers... and finally, the enunciation and preservation of basic human rights".¹⁶

Chief Justice Anthony Gubbay in opening the 1991 Legal Year in Harare echoed similar views observing:

a constitution stands on certain fundamental principles which are its structural pillars. If these pillars are demolished or even damaged the constitutional edifice will fall . . . there is an implied limitation on the power given under s52(1) which precludes Parliament from abrogating or changing the identity of the Constitution or any of its basic features. Consequently any law which has that effect would be pronounced invalid by the judiciary.¹⁷

In the realm of constitutional interpretation, constitutionalism has given rise to a number of interpretation presumptions, which have been overtly and openly supported by the courts in a number of cases.¹⁸ These include that the constitution must be "interpreted so as best to carry out its objectives and promote its purposes and should therefore be interpreted generously and purposively and should not be given a narrow, artificial or pedantic interpretation;¹⁹ rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise and derogations from rights should be given a strict and narrow rather than wide interpretation;²⁰ and there is a duty on the courts to make the Constitution grow and develop to meet the needs of an ever-changing society which is part of the wider human society.²¹

The purposive model therefore asserts and admits the law-making function of the judges, in particular the use of the substantial judicial review process (SJR) as a tool of social engineering. It makes liberal use of SJR using the *ultra vires* doctrine to strike down legislation deemed in violation of the values underlying the statute, as opposed to merely restricting itself to procedural judicial review, which looks at whether stipulated procedures have been adhered to. In *PF ZAPU v Minister of Justice (2)*²² Dumbutshena CJ said:

15. Davis D., *supra* note 140, 2.

16. Linington G., *supra* note 140. Linington and Gubbay CJ (above) do not openly articulate their justifications for coming up with such theory, but mechanically draw legitimacy from the Indian *Kesavananda* line of cases. For instance in *Kesavananda v State of Kerala* AIR 1973 sc 1461, Khana J stated that the word "amendment" postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations. For a critique of the same see, Davis D., *supra* note 140 p 41.

17. Quoted in Linington G., "Is Parliament's Right to Amend the Constitution Limited?" (1996) Vol. 8, No. 3 *Legal Forum* 23.

18. For a compilation of constitutional and human rights cases, see Feltoe G., "Fundamental Human Rights Cases" (1996) Vol. 8 No. 1 *Legal Forum* 25 (an update is contained in the 1999 issue).

19. *CCJP v AG & Ors* 1993 (1) ZLR 242 (S) at p 252-253; *Rattigan & Ors v Chief Immigration Officer & Ors* S-64-94 at p 12-13.

20. *Munhumeso & Ors v AG* 1994 (1) ZLR 49 (S); *Minister of Home Affairs & Anor v Fisher & Anor* (1979) 3 All ER 21 PC at 26A-E.

21. *Rattigan & Ors v Chief Immigration Officer & Ors*, *ibid*.

22. 1985 (1) ZLR 305 (SC) at p 318.

the President, in the exercise of his powers ... is supposed to act lawfully and reasonably. If he acts unlawfully or unreasonably to the detriment of the rights of citizens, the courts . . . have jurisdiction to review the exercise under those circumstances of the President's actions.

An acute example of the application of the same, is when the judiciary seeks to limit the power of the legislature to change or amend the constitution, even where the latter has met the constitutional procedural requirements for effecting such amendments, as for instance the two-thirds assent vote under s52 (2a) of the Zimbabwe Constitution. Some courts have restrictively read such power to amend such that any amendment that amounts to a destruction of an "essential feature" of the Constitution would be struck down. As Khanna J observed in the *Kesavananda v State of Kerala* case:

... the word 'amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations.²³

McNally JA, rather atypical, reluctantly uses a similar line of argument in *Chairman of the Public Service Commission & Ors v Hall S - 49-89*, where in assessing the validity of a Public Service Commission action denying an employee the right to be heard in violation of the *audi alteram partem* maxim observed:

It may be that in a country with a justiciable Bill of Rights one cannot apply the dictum of Stratford ACJ in *Sach v Minister of Justice*... where he said: 'Sacred though the maxim (*audi alteram partem*) is held to be, Parliament is free to violate it'. Even if Parliament were free to violate it, one might ask whether a subordinate authority such as the Commission is free to do so.

It is this aspect of the exercise of judicial review that irks Madhuku and Hlatshwayo, who feel that this is a violation of liberal democratic values, because judges lack the moral authority to make value-laden laws since they are not elected.²⁴ In the USA such an outlook has become known as the "countermajoritarian difficulty". One scholar of a similar outlook has observed:

when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of . . . the people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it . . . judicial review is a deviant institution in American democracy.²⁵

However, this is a mechanical and artificial conception of the judicial process. The reality is that there is no fundamental difference between the two models. Under both models judges do make value-laden decisions and laws. Where the results of a literal interpretation do not suit them, the literalists can always evoke the Golden or Mischief rules and other traditional common law interpretation presumptions such as that harsh, unjust or

23. AIR 1973 SC 1461. See footnote 185 below for the conflict between the Indian court and government over the authority of the government-legislature to amend the Constitution as it desired as long as the necessary constitutional procedures had been met. The same arguments earlier used by the Indian court underlay Gubbay CJ's "essential features" speech, cited above. Justice McNally uses a similar argument in *Chairman of the PSC & Ors v Hall S - 49-89*. Adam J gives a good summary of the evolution of the contextualist SJR in *Marumahoko v Chairman of the PSC & Anor*, 1991 (1) ZLR 27, 43.

24. *supra*, note 140.

25. Bickle A., *The Least Dangerous Branch* (1962) quoted in Davis D., *supra* note 140, 6.

unreasonable results are not intended;²⁶ and that unless explicitly stated, the legislature does not intend to encroach on rights already gained and that where two interpretations are possible, the one that does the least violence to rights already established will be used.²⁷

Further, the very broad wording of constitutions and statutes gives rise to value-laden decisions, whichever model of interpretation one uses. For instance the phrase "reasonably justifiable in a democratic society" found in a number of sections of the Constitution²⁸ can be interpreted variously depending on one's ideological premises.²⁹

Madhuku is forced to admit that a degree of discretion is inevitable:

The conclusion to be drawn is that whilst some degree of judicial originality and activism is unavoidable given the very nature of constitutional language, there is a level beyond which this activism should not go.³⁰

But still he fails to tell us the appropriate threshold or level which must not be transgressed. Madhuku's dilemma is not surprising. The reality is that both systems do allow judges to exercise a high degree of value discretion, depending on their particular objectives. Du Plessis & Corder argue that the literalists' presumption that words can have a clear, literal meaning is fundamentally flawed:

There is, as matter of fact, no such thing as a clear and unambiguous language in the abstract (or even in context prior to its meaning having been established). The language of a statute can, in other words, only be said to be clear once its meaning, interwoven with its full intra- and extra-textual structure has somehow been determined. This means that anyone asserting that the meaning of a statute is obvious because its language is clear, is either so familiar with the context that s/he takes it for granted or has previously interpreted the statute intuitively or subconsciously and has in neither instance taken precautions to limit her or his personal predilections and prejudices.³¹

The difference between the two models is historical and in form. The traditional literal model is the preferred tool of analytical positivism or laissez-faire and prospering capitalism, where there is consensus between the executive and judiciary arms of the state in the enforcement of "the rule of law". It allows law to play one of its primary roles under capitalism, namely being the paramount hegemonic ideological tool of the ruling class. It is the legal manifestation of analytical positivism. Under the myth of separation of powers and rule of law, judges are painted as neutral enforcers of the will of the majority as represented by laws passed by parliament.

26. *Kruse v Johnson* (1898) 2 QB 91. These principles have been incorporated into Zimbabwean law in a number of cases, including *S v Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S) and *PF-ZAPU v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S); See also *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (SC); G. Feltoe, *supra* note 140 p 7.

27. *S v Galgut's Garage (Pty) Ltd* 1969 SA 459 (A); *Shabalala v Attorney-General, Transvaal* 1994 6 BCLR 85 (T) at 100; Botha C J, *supra* note 150.

28. For instance, sections — 16(7); 17(2); 19(5); 20(2); 21(3); 22(3); and 23(5).

29. See different perceptions of Gubbay and Adam on what constitutes "reasonably justifiable in a democratic society", *infra*.

30. Madhuku L., *supra* note 140.

31. Du Plessis & Corder., *Understanding South Africa's Transitional Bill of Rights* (Juta, Cape Town, 1994) p 66.

But as history has shown, adherents of such ideology are not averse to applying SJR norms, under the cover of the golden rule and so forth, against a reformist state, in order to protect bourgeois private property and values.³²

On the other hand, contextualist SJR is the preferred model of reformist liberalism, such as that influenced by sociological and realist jurisprudence, in particular when faced with a conservative *status quo* executive, as was the case with the Zimbabwe bench in the late 1980's and early 1990's. Further, the contextualists believe that the legitimacy of the bench arises not so much from being seen as a neutral enforcer of laws but a caring-just-compassionate enforcer of law.

The one model is therefore more open about what it is doing, whereas the other seeks to disguise this. The traditional interpretation model favoured by Madhuku and Hlatshwayo sows false illusions about what the judges actually do. It allows judges to apply their own ideological outlooks without having to offer any systematic justification for so doing. And as history has shown they have usually done so in a reactionary and right-wing manner that suppresses rights and freedoms. No wonder why such model has been criticised as "primitive, naïve and antiquated".³³

On the other hand, purposive SJR admits to its value-laden law — making process but seeks to justify it on the basis of some articulated value or ideological system, namely constitutionalism or liberal democracy.

At the end of the day the real issue is not whether judicial activism is *per se* bad or good. The substantive results or consequences of its use in particular circumstances is what matters. The major inarticulate premises of the court/judge plays an important role in this. But paramount in the question of whether SJR or judicial activism in general is always a negative phenomenon or a negation of liberal democracy, is the particular historical situation and social context of the court-judge. It is therefore a dialectical issue. In certain historical eras or situations it has been used to advance bourgeois rights, in particular political and civil rights such as in its contextualist or purposive version, as for instance under the Dumbutshena Court and early Gubbay Court³⁴ or the Warren Court in the USA,³⁵

32. See for instance the conservative Rehnquist Bench in the USA appointed under Presidents Reagan and Bush has used judicial activism to entrench such an unjust *status quo*, for instance holding affirmative action to be presumptively unconstitutional, Davis D., *supra* note 140, pp 7-8. Previously in the early 20th century the court had used judicial activism through the notorious economic due process doctrine to strike down social welfare legislation as violating the freedom of liberty of capitalists. The most famous such decision being *Lochner v New York* 198 US 483 (1954) striking down as unconstitutional state laws that limited the number of hours an employee may work in a week. For a similar situation in India see below, note 185.

33. Quoted in Devenish G E., *supra*. Lord Denning, one of the most eminent judges from the *fons et origo* of literalism, the UK, has also observed: "even in interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will 'promote the general legislative purpose' underlying the provision." In Denning A., *The Discipline of Law* (Butterworths, London, 1979) p 21.

34. see cases like *PF ZAPU v Minister of Justice* 1985 (1) ZLR 305 (on limitations to executive discretion); *S v A Juvenile* 1989 (2) ZLR 61 (asserting equal rights in constitutional protection between juveniles and adults); *CCJP v AG* 1993 (1) ZLR 246 (on rights of prisoners on death row); *Munhumeso & Ors v AG* 1994 (1) ZLR 49 (on the vital importance of the right to assemble and association).

35. See *Marumahoko v Chairman of the PSC*, *supra* note 159, p 43; *infra* note 185 and also see Davis D., *supra* note 140, p 7 where they argue that one such famous case was that of *Grisworld v Connecticut* 381 US 479 (1965) where it was held that a state law limiting access to contraception was in violation of the

whilst in other situations SJR has been used to defend an unjust *status quo*, favouring a minority at the expense of the majority in particular where it relates to property rights and in times of political turmoil. Examples include India and Zimbabwe. In Zimbabwe the immediate post-independence bench used judicial activism to defend South African spies and saboteurs or to protect bourgeois private property.³⁶ This reality has now been exposed by the report of the Truth and Reconciliation Commission in South Africa, in which such saboteurs who were allowed to go scot-free by the courts, indeed admitted to their nefarious activities. A similar trend is the quasi feudal-natural law values represented in a number of Justice McNally's judgements in family law cases upholding the oppression of women and young people.³⁷ In India, during the first three decades of independence, the courts formed the bulwark of resistance to social transformative measures introduced by the reformist Nehru government, including appropriation of property at government-determined compensation levels. Relying on the so-called "essential features" doctrine the courts declared invalid constitutional amendments passed by the legislature, as certain rights, including property, were held to be inviolable in all circumstances.³⁸

The same danger lies in South Africa today, where a judiciary inherited lock, stock and barrel from the apartheid era is most likely to apply judicial activism in a way hostile to the reformist efforts of the post apartheid government. This is what make Davis *et al*, sceptical about the use of SJR in the current South African context:

Given the possibility that the use of a flexible constitutional theory is as likely to produce a conservative as a liberal jurisprudence, earlier calls for judicial activism in the South African context might prove inappropriate to a transformative political enterprise.³⁹

The real challenge for those seeking to expand the horizons of liberal democracy is to be guided by the substantive results from the judicial law-making process as opposed to the mechanist one of the tools used. In many circumstances, the contextualist SJR is a progressive, albeit reformist tool, that should be defended. At the end of the day the question is not

right to privacy although such right is not specified in the constitution itself. The court justified itself on the grounds that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance".

36. *Hewlett v Minister of Finance & Anor* 1981 ZLR 571; *Bickle & Ors v Minister of Home Affairs* 1983 ZLR 400; *Austin & Anor v Minister of State (Security) & Anor* 1987 (1) ZLR; *Austin & Harper v Minister of State Security & Anor & Commissioner of Zimbabwe Republic Police* 1986 (1) ZLR 174; *Minister of Home Affairs & Anor v Austin & Harper* 1986 (1) ZLR 240 (SC) and *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (SC). See a good criticism of such decisions in Ghutto S B O & Makamure K., "Judicial Subversion under the Cloak of Legality? The Judgement in the *Minister of Home Affairs v Bickle & Ors*" (1985) 3 *Zim. L. Rev.* 119. Indeed the authors have since been vindicated by the report of the Truth and Reconciliation Commission in South Africa in which such saboteurs have since admitted to their nefarious activities. See *The Zimbabwe Mirror*, 4 December 1998.
37. See for instance his dissenting judgement in *S v A Juvenile, supra* and in *Ruwodo v NO v Minister of Home Affairs* SC 42-95.
38. *Infra* note 185.
39. This has already happened in a case where the exercise of presidential discretion in appointing a commission into the apartheid stronghold of rugby administration, was held to be reviewable by the courts and President Mandela was hauled before the courts to be questioned on the exercise of such discretion. This is perhaps why Davis *et al, supra* note at p. 7 are sceptical if not fearful of judicial activism in the South African context of an unrehabilitated judiciary.

whether the judges are exercising value-laden discretion, but how and in whose favour they are exercising it. Where the character of the bench or judges expands rights, whatever tool used, it must be supported, but where the bench resists or is an obstacle to change whether against the state or not, and whether using the traditional interpretation model or SJR, it must be opposed.

In the context of Zimbabwe, the use of purposive SJR had exhibited a positive side in the expansion of bourgeois rights against a conservative *status quo*, and hence the bench deserved some conditional support, especially in the civil and political rights arena. To base one's argument on a mechanical premise, namely what interpretation tool has been used, is very naïve and dangerous in a situation where the executive-legislature itself is highly undemocratic and unaccountable as Zanu(PF) is in Zimbabwe. Such arguments will be easily used by incumbent dictatorships to justify their attack on basic bourgeois democratic rights.

NO ILLUSIONS IN COURTS

However, unlike the liberals, we must not have illusions about the utility of contextualist SJR as a fundamental tool for social change. Whilst it is only slightly better than the traditionalist model, it still remains hemmed within the confines of bourgeois law. It is not substantially different from the other model. The reality is that all bourgeois courts, reformist or not, retain a class character. Like all law contextualist SJR or judicial activism has class limitations to its declared ambition of social engineering.

In the first place we must appreciate that the interpretation process, in particular the constitutional one, largely involves a balancing and weighing in of potentially conflicting values and rights.⁴⁰ Whilst contextualist SJR tells us that it is the duty of the court to promote rights and so forth, it does not tell us what to do where there is a conflict of such rights — how are constitutional rights to be prioritised? For instance in trade union matters, how is the potential conflict between the freedom of expression and freedom of assembly and association of workers to be reconciled with that of private property of the boss?⁴¹ or the conflict between the need for certainty and stability in law represented by the sanctity of contract doctrine derived from the property right and that of freedom of work-employment-trade derived from the freedom of movement section in restraints in employment clauses.⁴²

40. A rare admission of this is to be found in McNally's dissenting judgement in *S v A Juvenile* 1989 (2) ZLR 61. See also *International Brotherhood of Teamsters v Hanke*, *infra* note 52.

41. *Masukusa v National Foods Ltd* 1994 (1) ZLR 66. A good example of such conflict has also been reflected in US labour jurisprudence. Under pressure from rising labour militancy in the 1930s the court had ruled in favour of a wide right to picket as part of the freedom of expression in *Thornhill v Alabama* 310 US 88 (1940) but with the waning of such struggles in the wake of the Mcathyite Red Terror of the 1950s, the court in upholding the enjoining of pickets merely on the basis that the state court had disapproved of the trade union's objectives, the majority of the court suggested that it was proper for the courts to balance competing economic interests: *International Brotherhood of Teamsters v Hanke*, 339 US 470 (1950). In *Hudgens v NLRB* 424 U.S. 507 (1976) the majority upheld the property right of capitalists to deny the freedom of expression and right of workers to picket on private property (shopping mall) even if it was generally available to the public. See generally Goldman S., *Constitutional Law: Cases and Essays* (Harper & Row, New York, 1987) pp. 471-473.

42. As in *Manguwana v Mparadzi* 1989 (1) ZLR 79 and *Book v Davidson* 1988 (1) ZLR 365 where courts changed prevailing law on public policy viz. restraint of trade clauses, holding that the doctrine of sanctity of contract prevailed over that of freedom of trade. See Nherere P., "No Requiem for the Restraint Doctrine — Yet" (1988) 6 *Zim. L.R.* 1.

How far can the judges be trusted to exercise judicial review to uphold democracy, when they themselves are the antithesis of democracy in so far as they are un-elected?

The reality is that in balancing the conflicting interests between the fundamental classes under capitalism, namely the bourgeoisie and the proletariat, the judiciary, whatever characteristic or model they use, will be influenced by their class prejudices, sometimes mediated through racial, sexual and tribal prisms. In the true Poundian sense of the "taught doctrine" a true contextualist SJR court will apply progressive values selectively. It will be more liberal in upholding political-civil rights which do not undermine property rights in a fundamental manner, but remain conservative in those areas key to the needs of capital, in particular those upholding the sanctity of bourgeois private property. An example is the case of *National Foods Ltd. v Masukusa & Anor*,⁴³ involving a conflict between the property rights of the capitalist and the freedom of expression of the worker. In upholding the dismissal of a black employee who had called the employer's black managers 'Uncle Toms' and disparaged the government's reconciliation policy as selling out, the court held:

While he (the worker) was certainly entitled to his views and to pronounce them, he was not entitled to use his workplace as a platform to advocate revolution.⁴⁴

The bottom line is that, whatever differences may exist within the judiciary, ultimately, the judges are there to protect the class rule, property and profits of the bourgeoisie. As the great Bolshevik revolutionary, V.I. Lenin observed:

In capitalist society, providing it develops under the most favourable conditions, we have more or less complete democracy in the democratic republic. But this democracy is always hammered in by the narrow limits set by capitalist exploitation, and consequently, always remains, in effect, a democracy for the minority, only for the propertied classes, only for the rich.⁴⁵

Secondly and more importantly, any tension arising between the executive and the judiciary by use of one or the other process is short-lived, because of the social role of the state, namely to protect the general interest of the bourgeois ruling class. In times of heightened social struggle, the artificial division between the executive and judiciary is swept away before the paramount need to protect the rule of the bourgeoisie. Because of its very composition, drawn from the bourgeois classes, the court will recoil from defending political and civil rights, where this has become a threat to the conditions of accumulation and exploitation. Should it fail to do so, the judiciary will come in conflict with the executive, and because of the relative balance of power weighed in favour of the latter, the judges must either give in or be swept aside. As the Indian liberal judge, Justice Khanna, was forced to admit:

There is no modern instance, ... in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny which have threatened liberty and free institutions. The attitude of a society and of its organised political

43. 1995 (2) ZLR 199 (SC).

44. Compare such views with those espoused in *Retrofit (Pvt) Ltd. & Anor v PTC & Anor* 1995 (2) ZLR 199 where the court in annulling the state monopoly in the telecommunications industry declared that "the freedom of expression is a vitally important right that is an indispensable condition for a free society." See note 185 *infra*, for similar situation in India.

45. V.I. Lenin, *The State and Revolution* (Progress Publishers, Moscow 1981) p 83.

forces rather than of its legal machinery, is the controlling force in the character of free institutions. The ramparts of defence against tyranny are ultimately in the hearts of the people.⁴⁶

History is full of other examples, ranging from India to the USA.⁴⁷ Such was the stark choice that faced Rhodesian judges, after the declaration of UDI in 1965. The few who did not agree with the constitutionality of the new state were forced to resign, whilst most of the judges adapted themselves to the new regime.⁴⁸

The Gubbay Court has similarly backed down after concerted executive rejection of its reformist decisions through the constitutional amendments of the early 1990s. When Chief Justice Gubbay, reminiscent of the 1960s Indian Court, pronounced his "essential features" speech in the Opening of the 1991 Legal Year, in which he said the judiciary would declare invalid any constitutional amendments that violated fundamental rights, in particular those

46. Quoted in Ncube W., "The Courts of Law and the Legal Profession in Rhodesia and Zimbabwe: Lawyers Against the Law?" 1997 ZLR 32. See similar sentiment of frustration by the judiciary where the executive refuses to enforce their decisions in *Minister of Home Affairs & Anor v Austin & Harper* 1986 (1) ZLR 240 (SC) where Dumbutshena CJ commented on the continued re-detention of South African spies who had been ordered free by the courts: "Preventive detentions, in those states which either by legislative authority or through brute force resort to them, are a matter of constant worry. Sometimes they create unnecessary conflict between the judiciary, which is the custodian of the rights of the citizens who seek protection in the courts, and the executive, the guardian of the security of the State. When the executive ignores the orders and judgements of the courts there is the inevitable breakdown of law and order, resulting in uncivilised chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of the judgement. The history of this case leans more towards that which is undesirable than that which is desirable in order to uphold the rule of law.", at p 245.

47. Davis *et al*, *supra* note 140 at p 36 gives a fascinating account of the history of tension between the judiciary and executive in India in the first few decades of independence, in particular over property rights. The reformist Nehru government had sought to appropriate private property with minimum compensation if any at all, in large scale social engineering public purpose schemes and had enacted constitutional amendments making the issue of compensation non-justifiable. In a series of decisions starting with *Golak Nath v State of Punjab* AIR 1967 SC 1643 the court held that fundamental rights, including property rights, were sovereign and could not be infringed by Parliament in whatever circumstance. There was massive political agitation against such decisions led by the Congress Party, which after winning an overwhelming majority in the 1971 elections, passed constitutional amendments overturning *Golak Nath*. In the case of *Kesavananda v State of Kerala* AIR 1973 SC 1461 the court made a partial back down by upholding the amendments as far as holding that the right to property was not a fundamental feature to the Constitution but still upheld the general concept of "essential features" of the Constitution. The day after the judgement the Gandhi government appointed as Chief Justice a pro-government judge, over the heads of three other senior judges, which led to their resignation. Soon thereafter, during the State of Emergency which followed, in particular after the circulation of government constitutional proposals in which independent judicial review would not be recognised, the court became even more pliant and acquiescent with executive decisions.

In the USA after a series of decisions opposing the reformative social legislation of President Roosevelt's New Deal, the courts were forced to back down after President Roosevelt threatened to "pack" the courts with his own people. The backdown started in *West Coast Hotel Co. v Parrish* 300 US 379 (1937) dealing with the validity of state legislation mandating a minimum wage for women and minors. In upholding such legislation, the court hammered on the concept of economic due process holding that "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." See Goldman S., *supra* note 179 p 44 and 459.

48. The judges were forced to confront this reality in the famous case of *Madzimbamuto & Baron v Lardner-Burke & Ors* 1968 (2) SA 286, in which the judges were faced with the issue of whether to recognise the

making the compensation issue on land acquisition inviolable, there was an outcry from the government.⁴⁹ President Mugabe made "a public invitation to the Chief Justice to resign..." if he did not like the laws passed by parliament.⁵⁰ The Chief Justice did not take the challenge, and like Beadle CJ before him, decided for his own good to adapt and acquiesce before the executive power. This judicial retreat was brutally exposed in the Bonus Case, *Chairman PSC & Ors v ZIMTA & Ors*,⁵¹ in which government had openly and flagrantly stopped payment of bonuses on the eleventh hour in open violation of the literal wording of the relevant regulations. In approving the same, on behalf of the majority, Gubbay CJ said:

It is immaterial that the legislative measure may be unreasonable, impolitic or retrospective or that it impinges on existing rights. If that which is passed into law is within the scope of the power conferred and violates no restriction on that power, it must be upheld whatever the court may think of it.

Other examples have followed. The courts have ingeniously used technicalities to evade the issue of the constitutionality of over-sweeping presidential powers, as contained in s5 of the Presidential Powers (Temporary Measures) Act,⁵² and s158 of the Electoral Act,⁵³

laws of the UDI regime. Most of the bench, including Beadle CJ sided with the regime, whilst Fieldsend J concurred with High Court judges, Lewis and Golding, who had declared the new regime's laws illegal. Fieldsend and another High Court judge, D Young resigned in 1968 when the government rejected the jurisdiction of the British Privy Council over Rhodesia. See Goldin B., *The Judge, the Prince and the Usurper — From UDI to Zimbabwe* (Vantage Press, New York, 1990) as reviewed by Hlatshwayo B., "Judging the Judges" (1991-1992) 9-10 *Zim. L. Rev.* 191 for an account from one of the judges over the "choices" that the judges faced at the time. See dilemma that faced the Dumbutshena Court in its stiff with the executive over preventive detentions, *ibid.*

49. Hlatshwayo B., *supra* note 140.
50. The Supreme Court has also come under sustained attack from other members of the executive. In *Catholic Commission for Justice and Peace v Attorney General* 1993 (1) ZLR 242 the court had upheld the argument that a four-year delay in executing prisoners on death row, after the president had declined to exercise his prerogative of mercy, was in violation of s15 of the Constitution, prohibiting inhuman and degrading treatment. The Attorney General, in response to the judgement, blasted the judgement as "a determined, unashamed and blatant move ... to usurp powers which under our Constitution are vested in the Executive." The judgement was soon overturned by a constitutional amendment, validating such delays. See also, Ncube W., "Supreme Court Didn't Usurp Powers Vested in Executive", (1993) Vol. 5, No. 3 *Legal Forum*, 9.
51. 1996 (1) ZLR 637 (S). For a critique of the majority decision see, The Reviewer, "A Retreat of Judicial Review", (1996) Vol. 8 *Legal Forum* 11.
52. *S v Gatzzi; S v Rufaro Hotel (PVT) Ltd* 1994 (1) ZLR 7. In the case of *Forum Party of Zimbabwe & Ors v Minister of Local Government, Rural and Urban Development & Ors* S-129-97 the court shied away from the constitutional issue on the basis that Parliament's subsequent validation of the offensive regulations was adequate. See Goredema C., "Policing the Perimeter of Parliamentary Sovereignty: A Critique of the Decision in *Forum Party of Zimbabwe & Ors v Minister of Local Government, Rural and Urban Development & Ors*", (1997) Vol. 9, No. 4 *Legal Forum* 31.
53. Chapter 2:01. Subsection 2(c) thereof empowering the President to make statutory instruments which can validate anything done in an election which is in contravention of the Act or "any other law".... In *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997(2) ZLR 254(S) the court refused to entertain a challenge on this section. The court refused to entertain the application merely on the basis that there was no such statutory instrument yet in existence. But the issue is not so much that, as it is whether in a democratic society it is permissible to delegate such powers to an incumbent. See *S v Gatzzi, supra*.

have accepted the diminution of workers' rights that have already been contractually established,⁵⁴ and denied due process of law to striking civil servants.⁵⁵

If there were still any doubting Thomases about the new direction of the court — its new marriage with the executive in the suppression of liberal democracy, the speech of the Chief Justice at the Opening of the 1998 Legal Year on 12 January, must have laid those to rest. The speech which closely followed the first ever post-1980 general strike, the historic and violent 9 December 1997 ZCTU Mass Stay-Away, made clear that in a toss-up between fundamental rights and the interests of law and order the courts would favour the latter, including using a restrictive approach to constitutional interpretation against rights in order to realise "an effective criminal justice system". He went on to declare his requiem on *In Re Munhumeso et al*, in such eloquent terms:

The 'living tree' approach to constitutional interpretation does not give free reign to graft on new branches. The search for truth should not be unnecessarily frustrated by values which have not been sanctioned by the constitutional process.⁵⁶

The retreat of the Gubbay court is not surprising. In an era of accelerating class conflict due to the rising crisis of capitalism, the artificial divisions and tensions within the bourgeois state are increasingly washed away in the face of the need to contain the rising plebeians. In such times greater power is vested in the executive whilst bourgeois democratic niceties are thrown aside. As Karl Marx observed:

The restraints by which their own divisions had under former regimes still checked the state power, were removed by their union; and in view of the threatening upheaval of the proletariat, they now used that state power mercilessly and ostentatiously as the natural war engine of capital against labour. In their uninterpreted crusade against the producing masses they were, however, bound not only to invest the executive with continually increased powers of repression, but at the same time to divest their own parliamentary stronghold, the National Assembly, one by one of all its own means of defence against the executive.⁵⁷

CONCLUSION

It is not surprising that in the last two years, which have been characterised by rising working class militancy, the judiciary has beat a retreat on its earlier tentative steps of expanding bourgeois democratic rights and has increasingly deferred to the executive arm of the state in defence of bourgeois private property and even Zanu(PF) authoritarianism.

The courts have shrunk away from the contextual model of interpretation that it promised in *Zimnat Insurance Co. v Chawanda*, as a general shift to the right marked by reliance on the narrow literalist interpretation model, now characterises the Zimbabwe bench under Chief Justice Gubbay. Regrettably for liberal democracy, the court's newly found marriage with such model of interpretation is likely to see the judicial upholding of the Presidential Powers

54. *Chairman, Public Service Commission & Ors v Zimbabwe Teachers Association & Ors* 1997 (1) SA 209 (SC). See minority judgement.

55. *Jiah & Ors v Public Service Commission & Anor.*

56. (1998) Vol. 10, No. 1 *Legal Forum* 4.

57. Marx K., "The Civil War in France" in *Marx and Engels: Selected Works Vol. 2* (Progress Publishers, Moscow) p 286.

(Temporary Measures) (Labour Relations) Regulations, 1998, and with that the legitimising of the impending fascist dictatorship.⁵⁸

In the final analysis the bourgeois myth of separation of powers cannot stand the heat of accelerated class struggle engendered by economic crisis under capitalism. To end with the Russian revolutionary V. I. Lenin:

No laws on earth can abolish inequality and exploitation so long as production for the market continues, and so long as there is the rule of money and the power of capital.⁵⁹

The implications for the working classes are clear: the misplaced reliance of earlier years on class-partisan institutions like the courts can only lead to tragedy — as observed elsewhere:

Already the stay-aways of the past year have shown that only organised resistance at the point of production can force the exploiting classes, their government and courts to award reforms, in fear of revolution. The only way forward to break the Regulations and the impending dictatorship is a resolute intensification of the general strikes and mass civil disobedience.⁶⁰

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58. Similar sentiments have been expressed by some segments of the ruling classes themselves as shown by editorials in various bourgeois papers. See for instance: "Paying the Price of Mis-governance" (Ed.), *The Zimbabwe Independent*, 6 November 1998, p 4; "Mr. President, Please Listen to Your Subjects" (Ed.) *Zimbabwe Independent*, 13 November 1998, p 5; "Mr. President, You are Now a Liability" (Ed.), *The Zimbabwe Independent*, 20 November 1998, p 4; "Is Zimbabwe Under a Military Dictatorship?" (Ed.) *The Financial Gazette*, 12 November 1998; "Nail Fist Will Fail" (Ed.), *The Financial Gazette*, 3 December 1998, p 8; "Who are Mugabe's Advisors?" (Ed.), *The Sunday Standard*, 29 November 1998, p 8.
59. V.I. Lenin, "The Land Question and the Fight for Freedom", *Collected Works*, Vol. 1 (Progress Publishers, Moscow, 1978). On the limitations of bourgeois liberal democracy, also see Makamure K., "Constitutional Theory and Practice for the Transition From Capitalism to Scientific Socialism" (1987) 5 *Zim. L. Rev.* 108, 110.
60. Gwisai M., *supra* note 139, p 39.



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