

# ZIMBABWE BRIEFING

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## DCC Fiasco; What Form and Type of Democracy Does ZANU PF Practice?

The decision by the ZANU PF central committee to endorse a recommendation by its Communist-style run organ, the politburo to disband the district coordinating committees of the party over factional fighting poses serious questions about the appreciation of democracy in this political oligarchy. The boggling decision which overlooks the human agency in the problems facing ZANU PF has tempted me to look at the possible models of democracy as postulated by democratic scholars and try to see where ZANU PF fits if at all it does.

There are different models of democracy but for the purpose of the ZANU PF intrigues, context and political shenanigans; I shall limit my analysis on the two broad types advanced by David Held which are direct or participatory and liberal or representative democracies. Direct or participatory democracy is understood to mean a system of decision making about public affairs in which citizens are directly involved while liberal or representative democracy is defined as a system of rule embracing elected 'officers who undertake to 'represent' the interests of citizens within the framework of the rule of law.

In Africa, most countries use a mixture of these two variants in terms of the structures of the State and the system of governance that various governments purport to practice. While the ought to be, the ideal is not problematic, the implementation of these variants of democracy is what is proving difficult. This is the problem that ZANU PF is grappling with and that has led to the disbanding of a party structure without investigating the human agency attended to the disturbances that bedeviled the former liberation party. It is argued that certain criteria and processes should take place in order to determine a democracy. Robert Dahl argues that there should be effective citizen participation in policy formulation, when policies are made citizens should have voting equality and that within reasonable limits of time citizens should have equal and effective opportunities to learn and understand the policies and their consequences to their lives.

Dahl postulates that all adults should exercise their full rights in policy making. He goes on to argue that this aspect and his views on whatever type of democracy was in place before the 20th century, universal adult suffrage was unacceptable to most advocates of democracy. It is argued that the inclusion of adults as a criterion for democratic practices ironically rules out many cases that political philosophers have regularly taken as great historical models of democracy. Dahhl, therefore, contends that Greek and Roman polities, Viking Crews, Village Assemblies and some City-States which



*Some members of Zanu PF protesting over results of DCC elections in Nyajena, Masvingo Province in April 2012.*

all built their political deliberations by means of exclusion of slaves, women and paupers should be critically questioned. Dahl seems to agree with advocates of procedural democracy who single out a narrow range of governmental practices to determine whether a regime qualifies as a democracy. These procedural observers center their attention on elections looking at whether genuinely competitive elections engaging large numbers of citizens regularly produce changes in personal and governmental policy.

Advocates of procedural democracy however, cautions that if elections remain a non-competitive sham and an occasion to smash opponents of the incumbent government, procedural analysts reject them as a criterion for democracy but if elections cause significant governance changes, it is argued they maybe a sign of the presence of democratic practices. From the above, it is difficult to understand the kind of democratic practices that ZANU PF entails. Its practices through the disbanding of the district coordinating committees, the failure to run credible internal electoral process reflects how it has failed to administer free and fair elections at the national level. It is generally agreed that a state is governed democratically if governmental office is allocated on the basis of competitive popular elections. It is argued that the idea of administering credible and polls that offer citizens varied choices in an environment where civil liberties are not obstructed are characteristics that all democracies have in common and that non-democratic forms of government lack and aspire to have. The current practices and state of affairs in ZANU PF is far from these basic postulations about democracy, so what type of democracy does ZANU PF practice?

Another leading democratic scholar, Samuel Huntington sees elections as a barometer for defining democracy. In his view, democracy could be understood as a means of constituting authority and making it responsible. A modern state, argues Huntington could be perceived as having a democratic political system if its most powerful political officers are chosen through fair, honest, periodic elections in which candidates freely compete for votes in a system to allow universal suffrage. "According to this definition elections are the essence of democracy. From this follow other characteristics of democratic systems. Free, fair and competitive elections are only possible if there are some measure of freedom of speech, assembly, and press, and if opposition candidates and parties are able to criticize incumbents without fear of retaliation," Huntington argued.

It is however, doubted if elections alone could define adequately the elusive concept of democracy. In trying to answer this riddle, Larry Diamond elaborated a key distinction between liberal democracy and electoral democracy. Liberal democracies not only have elections. Diamond argues that all liberal democracies have restrictions on the power of the executive, independent judiciaries to uphold the rule of law; protection for individual rights, and freedoms of expression, association, belief and participation, consideration for minority rights, limits on the ability of the ruling party to bias the electoral process, effective guarantees against arbitrary arrest, and minimum state control of the media. Most electoral democracies lack these safeguards. The current ZANU PF internal electoral processes and the failed elections in Zimbabwe pose critical questions about the form, type and practice of democracy by ZANU PF.

It is therefore my contention that in some African States such as Zimbabwe, electoral processes are used as part of what celebrated Cameroonian anthropologist and democratic scholar Benjamin Nyamnjoh described as "face powder democracy" meant to legitimize the continued rule of the political elite while citizens rights are trampled upon and without a deepening democratic culture and the respect for fundamental civil and political liberties of citizens in electoral administration.

Despite these contested definitions, meanings, types and variants of democracy as well as its application, my view is that democracy is a desirable form of government that ZANU PF should embrace. Instead of suppressing the views and electoral preferences of its members by banning the district coordinating committees, the party should embrace open processes of leadership renewal that has the legitimacy of its members in various communities.

The ZANU PF leadership and indeed other political players and parties in Zimbabwe should realize that democracy is significant as a form of rule because it celebrates diversity and tolerance. The the idea of democracy is important because it does not just represent one value among many such as liberty, equality or justice but it is a value that can link and mediate among competing issues in society. It is a process that will assist ZANU PF to remain relevant. Choking political dissent in order to stop either Emmerson Mnangagwa or Joyce Mujuru from political ascendancy in the current succession battles is only parochial. The other critical significance of democracy is that it does not pre-suppose agreement on diverse values but rather it suggests a way of relating values to each other and leaving the resolution of conflicts about different values open to participants in a public process. The ZANU PF succession battles that have led to the disbanding of the district coordinating committee has stifled democratic processes in the party, silenced people temporarily but the gear for infighting remains. It will manifest itself in other organs of the party and if ZANU PF thinks that disbanding structures is the solution then it will surely disband itself.

*By Pedzisai Ruhanya (PhD Candidate, Media and Democracy, University of Westminster, London).*



# Zimbabwe Civil Society Advocacy Mission to Namibia

## Coordinator's Note 81



dewaMavhinga

This week Crisis in Zimbabwe Coalition is leading a delegation of civil society representatives on an advocacy mission in Namibia to raise awareness on several critical issues affecting Zimbabwe's difficult political transition.

This comes at a time when, in a move indicative of escalating persecution and intimidation, earlier this week, Zimbabwe's police issued summons to Zimbabwe Human Rights NGO Forum's Executive Director, Abel Chikomo to appear in court on 25 July for trial on spurious charges of allegedly running an 'illegal organization.'

Although SADC has brokered a roadmap to free and fair elections, signed to by Zimbabwe's political principals, the central challenge remains that of total lack of

political will and sincerity in implementing agreed reforms and in agreeing to critical reforms. Political parties remain locked in negotiations over a new constitution, which at best, will result in a compromise document and a package of superficial reforms that can be put forward to justify the holding of elections.

But those elections will not be within a conducive environment and certainly will not enable Zimbabweans to freely express their will. Members of the security forces, particularly certain military leaders, continue to entrench themselves in partisan politics. The military factor, coupled with access to resources from diamond revenue and the opaque indigenization program, are the driving factors for rapid democratic regression.

Some military and central intelligence chiefs are after political power, clearly planning for life after Mugabe, to secure their economic and personal security interests driven by an obvious fear of prosecution should there be democratic regime change in the country. It is unlikely that assurances of immunity and safety will be accepted by the security chiefs if given by domestic political actors without a strong regional backing.

For external players like Namibia, SADC, the AU, UN and the rest of the international community, the way to arrest democratic regression and ensure the complete separation of the military from political affairs would be to make it abundantly clear that military rule, no matter how disguised, will not be condoned.

SADC must devise a mechanism to urgently deal with the non-implementation of various plans agreed to under the Global Political Agreement. Otherwise the road to yet another disastrous election will be paved with beautifully worded agreements and commitments that no-one puts into practice.

*Dewa Mavhinga, Regional Coordinator, Crisis in Zimbabwe Coalition*

## Zimbabwe's Constitution and a Free Media

Much has been written about the repressive media environment and the lack of express guarantees of freedom of expression of the media in Zimbabwe. There has been contestation of the notion of a free press in some spheres that question the very notion of press freedom, and yet the rights to free expression are premised on the basic right to speak. To say that everyone has a right to speak is trite because of the mundane assumption that all human beings speak, as an essential part of being human. That we need to be reminded of the basic right to communicate in a Constitution as an inalienable part of being human is a sad testimony of human societies.

Be that as it may, as Zimbabwe crafts its new Constitution, whether it is crafted now or sometime in the future, depending on whether we stop haggling long enough to come up with a passable document, citizens need to continue to demand basic rights. In an ideal situation, the Constitution needs to be a reflection of our values as society. Freedom of expression is a fundamental right in Zimbabwe, among other civil and political rights as a value that is at the foundation of our state; set in the democratisation agenda dating back to the quest for black majority rule and current battles for inclusivity and participation by all in our nation.

Amidst the chaos, disruptions name calling, financial (mis) management surrounding the Constitution making process,

the actual issues and content has almost been lost. Very little debate has happened around the issues themselves and what citizens of Zimbabwe can expect to see in the new Constitution. There have been sporadic bursts of discussions by various organisations that have earned a few centimetres of media space, but overall these have been buried by an avalanche of populist writing on "elections without a Constitution", the "SADC roadmap" or the "COPAC mafia".

That said, the world over, the right to freedom of expression has broadly been premised on three points that we need to take into consideration, the capacity of freedom of expression to:

1. Promote democracy. The capacity of citizens to hold governments to account and to effectively exercise the power to choose their governments depends on the free flow of information from government
  2. Promotes the search for "truth" J.S Mills in "On Liberty" advanced the argument that subjecting an expressed opinion to contradiction exposes falsehoods and produces a proper understanding of the truth
- Allow individuals autonomy to form their own opinions about their beliefs and actions. This is integral to self development. Besides the above considerations, there are international legal standards on freedom of expression including decisions of international human rights courts, international human rights instruments and other regional mechanisms. The

broad definition on freedom of expression in these instruments includes the right to seek, receive and impart information and ideas; and the right extends to speaking, writing, as well as non-linguistic communication as well.

One of the critical issues within freedom of expression is the need to have press freedom enshrined in the Constitution. A free and independent press is an important determinant for democracy as the media promotes the right of the public to receive information on matters of public interest from a variety of sources. The "leaked" draft Constitution published by both sides of the polarised press contains key provisions of freedom of expression, including press freedom. This is sadly tempered by the provision of a Constitutional Commission to police the media. The inclusion of the commission is a contradiction as there is freedom guaranteed on one hand and a policing agent on the other.

It is understood that all constitutional rights of freedom of expression are universally limited but these limitations should be clearly and unambiguously set out, and most importantly should be "justified in a democratic society". Our constitution needs to address the question of how and in what circumstances freedom of expression can be restricted. In many Constitutions, notably South Africa in our region, the proportionality test is used, that requires an examination of the "end" pursued by the law and the means used to pursue it,

and authorises "balancing" of competing rights and interests. A narrow set of limitations that are considered justifiable in a democratic society include a) for the respect of the rights and reputations of others, b) for the protection of national security or of public order, or of public health and morals. The leaked draft Constitution sets limitations for all fundamental rights and freedoms "...only in terms of general application and to the extent that this limitation is justifiable in an open, just and democratic society".

As noted earlier, it remains critical for Zimbabweans to engage in the constitutional process, to define what will work for the country and what the alternatives are. In the media, the starting point is to define the media we want, and importantly the media we deserve. As we do this however, there remains a case to be made for freedom the media in Zimbabwe, as a democratic right that has been a cornerstone of our state and a key to development.

*By Patience Zirima*



## UPCOMING EVENTS

**3 to 6 July 2012 Namibia Advocacy Mission**

**9- 16 July African Union Summit, Addis Ababa, Ethiopia**

**17 to 20 July 2012 Tanzania Advocacy Mission**



# State of Paralysis

Zimbabwe can best be described as in a state of paralysis with the unity government on the road to nowhere and civil society not sure about what to do next. The new thing in town is Star FM, operated by the state owned media group, Zimpapers and Star FM is already deeming due to its failure to spark as a result of connections to Zimpapers and the Ministry of Information and Publicity.

The hype on a 2012 election demand by President Robert Mugabe and ZANU PF has collapsed under the weight of internal contradictions and infighting. ZANU PF is now using the SADC Luanda summit demand that the Global Political Agreement be fulfilled as an excuse to slowdown and silently hush the election talk. While SADC played a key role in toning down ZANU PF, the party is however caught in intense internal divisions over Mugabe's succession that some long standing party structures, embedded in its constitution, the District Coordinating Committees (DCC) are being disbanded. "They have since stopped serving any purpose" were the words of party spokesperson Rugare Gumbo.

The media also reports that president Mugabe is likely to travel back to Singapore for yet unknown reasons alleged to be treatment for an undisclosed ailment. Before his planned departure Mugabe had soberly told the media that his party is going back to the drawing board on internal political and leadership issues. There was no mention of elections in 2012 and the President is clearly sobering up to the reality. The MDC-T leadership is busy patching up



President of Zimbabwe, Robert Gabriel Mugabe

***While there remain a number of key decisions to be made by the political leadership, Zimbabwe has reached a state of political paralysis mid 2012 that is characterised by uncertainly and lack of positions and actions by politicians and waning enthusiasm for anything within CSOs.***

its own house with the Prime minister and party Leader Morgan Tsvangirai visiting Bulawayo to mend growing party rifts. His Secretary General Tendai Biti was quoted in the media stating his loyalty to Tsvangirai after weeks of speculation that the two are not seeing eye to eye. The most energetic of the MDC parties appear to be the Welshman Ncube party which is reportedly holding rallies throughout Zimbabwe mobilising for support. While there remain a number of key decisions to be made by the political leadership, Zimbabwe has reached a state of political paralysis mid 2012 that is charac-

terised by uncertainly and lack of positions and actions by politicians and waning enthusiasm for anything within CSOs.

At the time of writing there was no clarity on when the new proposed constitution document would be finalised and what is holding movement on this process. Even ZANU PF mandarins like Jonathan Moyo who keep society entertained through their attacks on the MDC parties and the constitutional review process have suddenly gone quite. Dr Tafataona Mahoso, Jonathan Moyo's sidekick and head of the Zimbabwe Media Commission is suddenly writing about the

boring story of sanctions. One has to ask the question what does this political haggling detente mean?. It appears no one is so sure of the future now and which direction to turn or which issue to run with. Political parties have without doubt gone back to the drawing board noting that elections might as well be sometime in 2013. As of now they have to learn to live together in the wobbling GNU while patching their breaking political houses and planning their next move.

Civil society appears lost in all this and there is a palpable sense that indeed CSO agenda is driven by what the parties do and say. CSOs seem to mobilise around the political parties and when they go silent then they have, as others say, no agenda. This to me is the time to take full advantage to mobilise and drive home the need for peace and the message of reform. This message must be continuously drummed up more so being aware that the next time political parties wake up they are likely to be holding the 'agreed' constitutional document in their hands. CSOs need to continue beating the drum on the need for openness on the constitutional draft document and push citizen concerns on the clear absence of guarantees on peace and free participation in elections. When the politicians are quiet, then it is time CSOs push their agenda more forcefully. Morgan Tsvangirai says he will have the draft constitution sometime next week, the question is do we know what's in there?

By David Mutomba

## Inbrief Around Zimbabwe

### Zanu PF Disband District Coordinating Committees [DCCs]



Zanu PF Spokesperson Rugare Gumbo

Zanu pf central committee on 29 June agreed to disband its DCCs, blaming the structures for causing the current serious divions which have rocked the party ahead of elections and a possible battle to succeed Muagabe

### 5 Gokwe MDC Activists Acquitted by Magistrate

5 MDC activists from Gokwe who were facing charges of political violence were acquitted by Gokwe Magistrate. Chirisa Chibaro, Stania Nzamba, Shadreck Kana,Vavarirai Moyo and Sallas Mangwiro were accused of torching the house of Chief Madzivadondo of Gokwe-Kubuyani during the 2008 election. The witnesses in the matter, Farai Ku-rova and Chamunorwa who are known Zanu pf supporters said the accused were arrested on false charges since

they are well known MDC activists.

### Foreign Owned Banks Given a Year to Hand over 51% Shares to Locals



Minister of Youth, Indeginesation, and Economic Empowerment, Saviour Kasukuwere[Zanu Pf

Zimbabwe gives foreign owned banks one year to hand over 51% stakes to locals as Mugabe ramps up a drive to force all foreign owned business to surrender majority control to blacks. Government notice released last week said all foreign owned banks with a minimum net value of \$1 had one year to reduce their share holding to 49%. The move is finding opposition from the Finance minister as he described it as a move to gain and win votes ahead of elections by Zanu pf.

By Crisis in Zimbabwe Coalition ,Media Department



# Devolution is the Panacea to the Failed Unitary System of Governance in Zimbabwe

The increasingly elusive panacea to Zimbabwe's governance crisis under the current unitary system of governance calls for revision. Growing evidence suggest that under the unitary system of governance, there has been massive centralization of power within bureaucrats particularly within the head offices which are mostly in Harare. However, the authorities in Harare have tended to perpetuate the myths that devolution is encouraging provincialism and further division of the country. This contribution seeks to debunk these myths and argue that devolution is the way to go based on various socio-economic and political advantages that it offers the nation.

## Myths on Devolution

The most common myth to deal with devolution in Zimbabwe is that devolution is provincialism or entrenchment of tribal politics. Most particularly will be to try and reduce devolution to a 'Ndebele cry' in Zimbabwe. Of which this is not the truth but that it finds currency with politicians in that (i) it feeds into the stereotypes of a separate Ndebele State, and this has been perpetuated by some mischievous political leaders creating 'fear of others'; (ii) devolution is an un-popular call within the 'Mashonaland Territory', and this has also found currency with some politicians seeking to cement their hegemonies as the authentic voice and champions of addressing the problems in Matabeleland.

Both these notions of devolution advanced within Zimbabwe's local governance reform has stymied debate and creating two polarized and misinformed positions. The only emerging reality of unitary governance has been the prioritization and development of Harare as the center of commerce and public activities. Thus, Harare has become the major beneficiary while other areas have lagged behind in terms of infrastructural development as well as other basic service provisions. This actually calls for the need to revisit the relevance of the unitary system of governance in particular given all this capital city sided biased development. This evidence actually rebuts that the above arguments that devolution is a Ndebele issue, and that devolution is not a Mashonaland issue.

A visit to Mutoko and Mudzi will show you agitated communities as black granite is mined leaving a degraded environment and nothing for the locals. Similarly a visit to Marange and Chimanimani will show you communities agitated by the exploitation of diamonds while there is no meaningful development for the locals. A further visit to Chisumbanje will highlight villagers that have been dispossessed of their land and livelihood by the controversial ethanol project that has now been thrown in limbo due to government bickering and confusion. The same cries also echo from Lupane as timber is felled everyday and ferried away to make furniture in distant places while local schools do not have desks and benches. The examples are numerous but one clear emerging trend in this is marginalized communities that have been disempowered from making decisions that can cater for their interests. Therefore national interests become a terrain that is only defined and dominated by politicians



From Left, Morgan Tsvangirai, Prime Minister, Arthur Mutambabira, Deputy Prime Minister and Robert Mugabe, President of Zimbabwe

in Harare. Thus one can argue that the history of local governance in Zimbabwe has been its Hararenisation (with apparent reference to all things being built around the Ministry of Local Government, Rural and Urban Development). The voices that are ultimately heard become those of the Minister

eighty by the Chinese in collaboration with a few elites. In a devolved system of governance such deals would have been easier to challenge and would not have survived. Ironically Marange lies in one of the areas whose sons and daughters contributed largely to the liberation struggle. It would be amaz-



## PROVINCIAL GOVERNMENT PROVINCE OF KWAZULU-NATAL

Logo of Kwazulu-Natal provincial government of South Africa

of Local Government and his fellow Party elites.

The other most recent myth is that devolution is an attack of Zimbabwe's sovereignty and a negation of the Liberation struggles. Such irresponsible and clumsy assertions are not founded on any truth, but an attempt to muzzle democratic principles and ethos. Devolution seeks to protect Zimbabwe's sovereignty in that it confers power to the locals rather than to a handful politicians and bureaucrats in Harare, who think that Zimbabwe begins, and end where there shadows cast and do not cast.

The recently exposed Anjin case in the mining of diamonds in Zimbabwe is a case in point where central government has mortgaged the country's resources in return for a paltry \$10million from the Chinese to build a defence college, despite that the same company has milked more than an estimated \$1billion. More so, the venture was always praised as a 50/50 venture yet, it was nothing anywhere near that but just masked mafia deal that sought to benefit a few clique of individuals. All this point to, is the undermining of Zimbabwe's sover-

ing if the Marange villagers say they participated in the liberation struggle to allow the Chinese to come and plunder local resources and displace them whilst they are wallow in poverty. This calls for devolution of powers to communities to have a say about their resources.

## Brief Lessons From South Africa.

Crossing over the Limpopo River there is a good template of what devolution of power may mean. Provinces and local municipalities are empowered to have own budgets, programmes and the power of taxation that helps them to generate income. Therefore municipalities do not only produce brilliant pieces of plans without any funds to finance them. This explains why municipalities like Durban have independently managed to attract major investments and events and the same time are able to create an economy that meets the entrepreneurial and job needs of its citizens. Even the philosophy of the central government is seen in that it even tries to spread its essential functions. For instance Parliament is found in Cape

Town whilst the Central Government Offices are based in Pretoria. This spreading of functions has an agglomeration effect of service provisions within the cities that they are put. Zimbabwe may need to look at the same model in terms of reforming its governance system.

## Devolution is the Way to Go

Devolution offers quite a number of advantages in that:

- ◆ Entrenches democracy and accountability at a local level
- ◆ Enables speedier decision making and reduces red tape
- ◆ It means easy access of basic service to citizens
- ◆ Promotes local economic development
- ◆ The agglomeration effect and encourages even development.

Where central government interference may be entertained may be only in circumstances where there are struggling provinces that may have a limited tax base upon which to fund its fiscus. However, a scan of Zimbabwe's provinces pontificate to that all provinces are endowed with natural activities that when fully exploited, there will be no struggling province resource wise. There is need to revisit the mentality around devolution in Zimbabwe and begin to realise that giving decision making power to the provinces and districts is the way to go. Ministerial interference in local governance need to be removed and this form government can not keep on being at the minister's mercy through a statute of parliament. We need to move towards constitutionalising local government and with clearly spell out powers, roles and responsibilities between central and local government.

There is serious need within the current constitutional dispensation to revisit the system of governance and consider the merits for the case of devolution as an alternative. The Unitary system of governance has failed almost all communities and provinces in Zimbabwe and thus the calls or devolution transcends the tribal innuendos that have been used to suppress debate on this issue. There is also need to steer away the debates from the narrow myths that have been peddled regarding devolution. Devolution is more about empowering communities to make decisions on socio-economic and political issues affecting them. It is also about fostering accountability and speeding decision making in terms of basic service provision, developing local economies and meeting the entrepreneurial and job needs of citizens. Given the litany of failure of the unitary system of governance, devolution is the way to go.

Tamuka Charles Chirimambowa  
Political Economist

# Court Watch 2012

To mark the International Day in Support of Victims of Torture, this bulletin draws attention to two recent court cases in which the State has prosecuted police officers for conduct that can be defined as “torture”. Zimbabwe has been accused for many years of allowing members of the police force, the Defence Forces and the Central Intelligence Organisation, youth militias, and members and supporters of ZANU-PF, to enjoy impunity for violence perpetrated on persons perceived as opposition supporters, including acts undoubtedly constituting torture or inhuman or degrading punishment or treatment. These two cases suggest that cracks in that impunity may be developing, and with them the prospect of amore even-handed application of the law by the police and prosecuting authorities.

## Two Criminal Cases Against Police Officers

1. Policewomen convicted of assaults described by press as “torture” A recent press story about the criminal trial of three women police detectives in Bulawayo headlined it as a case of “torture”. The headline was understandable – the alleged conduct of the police officers certainly fitted the use of the word “torture”. The three detectives subjected two women they had picked up on suspicion of theft to brutal assaults, apparently in an effort to extract confessions. The assaults included beating them on the soles of their feet with pieces of wood and batons. There is a word for this extremely painful process – ‘falanga’, which the dictionary defines as “a form of torture which consists of beating the soles of the victim’s feet with a solid object, which disables the victim and minimises the risk of escape”. But that was only part of the mistreatment. The two women were also beaten elsewhere on their bodies, causing numerous bruises. A sjambok and an empty soft drink bottle were used as well as pieces of wood and batons. One victim sustained a broken leg, with permanent disability. The other ended up with a broken arm. After their beating, they were detained for two days at Bulawayo Central police station and denied food, water and medical treatment. Only after their release without charge could they be taken to hospital for necessary attention.

The police officers were two weeks ago convicted of assault under section 89 of the Criminal Law Code, and sentenced to pay fines of \$200 each; they were given until 27th June to pay, failing which they will have to serve four months’ imprisonment.

2. Senior police officer on trial for murder and assault following acts described by the press as “torture” In a case which came before the High Court on circuit in Mutare this week, a police chief superintendent is being tried for [1] murder, for causing the death of a suspected illegal diamond panner and [2] assault of three other members of the deceased’s family also taken into police custody accused of illegal panning. The charges are based on the officer’s alleged brutal assaults on all the victims after they had been handed over to police in the Chiadzwa area by diamond mine security guards who claimed to have caught them red-handed in the act of panning for diamonds. The victims had apparently

claimed that as residents of the area they were digging a shallow well to obtain water for domestic purposes. The State case is that the accused officer perpetrated the assaults to extract confessions or to punish the suspects for attempting to find diamonds. One of the victims died in a police holding cell shortly afterwards. The others survived; and one of them has testified to having suffered lasting disability as a result of the police officer’s assault. Reports of this case, too, have understandably carried headlines using the word “torture”. This case is continuing in the coming week. The two cases prompt the question why conduct amounting to torture is not prosecuted as “torture”, but as assault or some other offence.

## Torture and Zimbabwean Criminal Law and Law of Evidence

Criminal law: The reason for charging the police chief superintendent with murder is obvious. But, if conduct amounting to torture is unlawful in Zimbabwe – as it undoubtedly is – why were the other charges in these two cases for the crime of assault rather than for “torture” as such? The answer is that Zimbabwean law does not have a criminal offence specifically called “torture”. There is no crime of that name in the Criminal Law Code or in any other Act of Parliament. [Nor was there a crime of that name in the non-statutory Roman-Dutch criminal law that was replaced by the Criminal Law Code when it came into force in July 2006.]

This does not mean that acts amounting to torture are not punishable as crimes. They are – but as the crime of assault, indecent assault, aggravated indecent assault, rape, murder, etc – depending on the what the perpetrator did to his or her victim. [Wemay, at some future stage, find ourselves with a new offence, specifically called “torture”, when Zimbabwe becomes a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but for the time being acts of torture will be prosecuted under other names.] For police officers specifically, conduct amounting to torture is a serious disciplinary offence under the Police Act, which amongst other things condemns “using unnecessary violence towards, or neglecting or in any way ill-treating any person in custody or other person with whom he or she may be brought into contact in the execution of his or her duty”. Again, however, the word “torture” is not used.

## Law of Evidence

The abhorrence of what can be described as torture in Zimbabwe is also exemplified by a rule in the law of evidence. In a criminal trial the court will not accept evidence of a confession or statement extracted from an accused person by any form of duress [which includes torture, although the word torture is not normally specified in formulations of the rule. If duress is alleged, the prosecution must satisfy the court it did not take place. A celebrated example of the application of this rule in practice occurred in the early years after Independence during the High Court trial of senior Air Force officers accused of complicity in sabotage leading to the destruction of Air Force planes. The accused officers said the confessions attributed to

them had been extracted by acts of extreme torture. The presiding judge, Justice Dumbutshena – later to be the Chief Justice of Zimbabwe –held a “trial within a trial” to determine the admissibility of the confessions. Having heard evidence on the point, the judge refused to admit the confessions into evidence because he found they had been extracted by torture. He went on to acquit the accused officers as there was no other evidence connecting them with the sabotage.

## Torture in the Zimbabwe Constitution

The present Constitution’s Declaration of Rights outlaws torture: “No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.” [Constitution, section 15(1).] No definition of torture is provided, which means that it is for the courts, and particularly the Supreme Court, to say authoritatively what does and does not constitute torture. No derogation from this constitutional protection against torture is permitted, even in time of emergency or war– which means, for example, that no Act or regulation, and no order by the President or any other Government official, can authorise the commission of conduct amounting to torture.

This constitutional provision does not make torture a criminal offence. Nor, for that matter, does the Constitution create any other criminal offences. This is not the function of a constitution. Criminal offences are left to be created and penalties prescribed by or under Acts of Parliament. But the Declaration of Rights does provide, in section 24, for the enforcement of all its provisions, including section 15’s prohibition of torture, by order of the Supreme Court. Thus, section 24 allows any person who alleges that the Declaration of Rights has been contravened, or is likely to be contravened in relation, to him or her, to apply to the Supreme Court for “redress”; and it gives the Supreme Court extremely wide powers to make such orders and give such directions ”as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights”.

Section 24 was successfully invoked in another celebrated case by human rights activist and torture victim Jestina Mukoko, one of the 2008 abductees. In September 2009 the Supreme Court granted her a permanent stay of prosecution, ruling that her constitutional rights – including her right not to be subjected to torture – had been violated to such an extent by State security officials that she could not be prosecuted on the charges of which her tormentors had accused her. Unfortunately, the Supreme Court’s written reasons for judgment have never been provided, meaning that nearly three years later other courts, the legal profession, the police and prosecuting authorities, and the country are still awaiting the court’s guidance on such cases. Similar applications to the Supreme Court by other 2008 abductees indicted for trial are awaiting hearing.

Civil lawsuits for damages in cases of conduct amounting to torture Independently of section 15 of the Constitution, ordinary Zimbabwean law recognizes conduct amounting to torture as a civil wrong for which victims of

torture are entitled to sue for monetary damages from the perpetrators – and from those authorities vicariously liable for the actions of the perpetrators. Thus, the two complainants in the Bulawayo case discussed in this bulletin have already commenced legal action, against all three police officers for damages in their personal capacities and against the Government, for their medical expenses and the pain and suffering they endured at the hands of the policewomen. And Jestina Mukoko and seventeen other 2008 abductees have launched civil lawsuits claiming substantial damages for the wrongs they suffered; these cases are currently stalled, pending Judge-President Chiweshe’s decision on a Government application for the cases to be dealt with in groups rather than in separate trials.

## The Draft New Constitution

In section 4.5 of its Declaration of Rights, the latest available draft constitution provides for the protection of persons from torture and inhuman and degrading punishment under “fundamental rights”: “No one may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.” The addition of the words physical and psychological is significant and an advance on the present constitution; there are instances where torture is not only physical but is manifested psychologically and the consequences of psychological torture can be as dire if not worse than physical torture. Also important is section 4.41, which makes spells out that the protection against torture and inhuman or degrading treatment is absolute and may not be derogated from: “No law may limit the following rights enshrined in this Chapter, and no one may violate them ... (c) the right not to be tortured or subjected to inhuman or degrading punishment or treatment”. [Note: The final draft of the new constitution is not yet ready, but these provisions are unlikely to be changed, as they have not been identified as controversial by those objecting to aspects of the various drafts that have emerged from the constitution-making process.] But again criminal offences are left to be created, and penalties prescribed, by or under Acts of Parliament.

## A Case for Zimbabwe’s Acceding to UN Convention Against Torture

Zimbabwe has also been criticized for its failure to become a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the later Optional Protocol to the Convention. But that may change relatively soon – during Zimbabwe’s recent Universal Periodic Review proceedings before the UN Human Rights Committee in Geneva, Minister of Justice and Legal Affairs Patrick Chinamasa told the Committee that Zimbabwe will be acceding to this Convention.

*By Veritas*