



The Judicial Institution in Zimbabwe



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FOREWORD



South Africa's transition to a constitutional democracy began formally just on ten years ago, in the context of a substantial shift to such a means of government in many parts of the world, most notably Central and Eastern Europe, and parts of South America, Asia and Africa. Our first decade of democracy has seen many testing times for the courts as part of government, yet as custodian of the values foundational to our Constitution. Among the most significant such values, endorsed in s 1(d) of the 1996 Constitution, are the nurturing of a 'multi-party system of democratic government, to ensure accountability, responsiveness and openness'.

The formation of the African Union has proposed the extension of this principle among all its members, enforceable through an African Court of Justice and a less formal 'peer-review mechanism', whose members have been named in the past few months. While there is a fair degree of scepticism about the potential efficacy of such bodies to achieve the laudable goals of the African Union, they at least need to be given a chance to show whether they can work or not.

The situation in Zimbabwe must surely be close to the top of the urgent agenda of the African Union and its constituent parts in their bid to uphold good governance and the rule of law. Zimbabwe came to independence in a significantly different political climate from South Africa at the beginning of a decade dominated by the socio-economic conservatism of Thatcher and Reagan and with the Cold War still very much being waged. The war for freedom from colonial oppression had been bitter and of long duration, and the white minority in Rhodesia insisted on entrenched guarantees which perpetuated resentment, if not hatred. The administration of justice had to contend with its own history under the rebel regime of the 1960s and 1970s, in an increasingly polarised society.

The Faculty of Law at the University of Cape Town has long played a role in public debate on such matters and as a protagonist of the rule of law and the implementation of democratic rights. Over the past three years the Department of Public Law has resolved to undertake research into the general state of 'good governance' in Southern Africa, with the aim of promoting the implementation of democratic rights. The Department's partnership with the Institute for Democracy in South Africa (IDASA) in the Open Democracy Advice

Centre (ODAC) is one such project. This publication is another. Prompted by the increasingly desperate situation in Zimbabwe, it was decided early in 2003 that research should be undertaken into the position of the judiciary in that country. This publication sets out its finding to try to set out a public record of what has been occurring in the Zimbabwean administration of justice, to draw attention to the dangers, but to do so constructively, with the objective of aiding as rapid a return to democratic governance and the rule of law as possible.

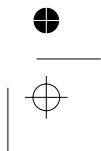
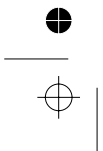
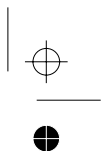
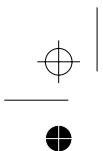
It is hoped that this publication will assist in this aim. The research will continue this year, and a new project will focus more widely on judicial appointment mechanisms in southern and East Africa, under the auspices of the Democratic Governance and Rights research unit, soon to be established. The author of this account, Karla Saller, will be joined by other researchers in carrying out the work of the unit, under the leadership of the Head of Department, Professor Christina Murray, and myself. We welcome comment on and criticism of this report, and the wider project.

HUGH CORDER
Dean of the Faculty of Law
University of Cape Town
24 April 2004

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CHAPTER 1

INTRODUCTION



A central feature of a functioning democracy is the judicial institution as guardian of the rule of law and protector of basic human rights. Such a judiciary not only serves the immediate interests of individuals but also promotes a stable society governed by an efficient system of civil and criminal law.

Distrust of the judicial institution as an elite, unelected and generally conservative institution has been exacerbated in Zimbabwe since 2000 by the government's use of racial discourse against individual judges, which has affected the judicial institution as a whole. In addition, the years after independence in 1980 were punctuated by repeated, though not always successful, attempts by the courts to protect human rights from encroachment by executive policies and this led to antagonism between the different branches of government.

Democratic institutions may be struggling to remain relevant in Zimbabwe but they have not become obsolete. The ruling Zimbabwe African National Union Patriotic Front (ZANU-PF) understands that democracy lends legitimacy to government institutions, as is evident from the lip-service it continues to pay to democratic principles, its formal adherence to democratic procedures and its appeal to shows of popular support in the face of growing disillusionment in the party. It is perhaps least of all in Zimbabwe that ZANU-PF seeks legitimacy; rather it is in relation to the Southern African region that most efforts are made in this regard. African leaders' reluctance to condemn the situation in Zimbabwe publicly has been facilitated by the veneer of democratic procedure that overlies public affairs in that country.

The main objectives of this book are

- ❑ to explore events that have shaped Zimbabwe's jurisprudential history;
- ❑ to provide an account of the present functioning of the judicial institution in Zimbabwe; and
- ❑ to link past events to the current political crisis that has seen Zimbabwe slide into a state of near chaos.

Zimbabwe has a recognised tradition of judicial independence and concern for human rights that spans not only the years since independence but dates back to colonial times. In particular, both before and after independence judicial interpretation of draconian legislation and orders for arrested and detained persons to be produced

in court have provided some measure of judicial control over government abuses of human rights.¹

The relationship between the post-independence government and the judiciary was problematic from the outset. Court structures and judicial officers remained in place during the transition period in 1979 and after independence in 1980. Since the judiciary at the time was mainly white and had served under the pre-independence government, it was accused of being wedded to the old order and doubts were cast on its claims to legitimacy. Police and government impunity as well as the government's publicly expressed hostility to the demands of the judiciary preceded 2000.

Distrustful of the motives of the legal profession, and in particular the judiciary, the government gave early indications of attitudes that would harden over time. On 13 July 1982, in the context of a legal battle concerning the lawfulness of the arrest of two farmers, the Young brothers, the home affairs minister made the following comments in Parliament:

We are aware that certain private legal practitioners are in receipt of moneys as paid hirelings, from governments hostile to our own order, in the process of seeking to destabilise us, to create a state of anarchy through the inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed in breaking up the unholy alliance between the negative bench, the reactionary legal practitioners and governments hostile to us, some of whose representatives are in this country.²

The Young brothers were released and immediately re-detained three times. Only the third detention was ruled as lawful. The tension arising out of the arrests and the minister's statements about attacks on the legal profession was eventually defused through consultations between the Chief Justice and the Minister of Justice, and after public statements by the Minister of Justice endorsing the independence of the judiciary.³ However, an indication of things to come was evident from the conflicting statement made by then Prime Minister Robert Mugabe in Parliament on 29 July 1982:

[T]he Government cannot allow the technicalities of the law to fetter its hands in what is a very clear task before it, to preserve law and order in the country . . . We shall, therefore, proceed as Government in a manner we feel is fitting . . . and some of the measures we shall take are measures which will be extra legal.⁴

¹ Amnesty International *The Toll of Impunity* AI Index: AFR 46/034/2002 (Amnesty International, London June 2002) ('AI') at 46–7.

² Parliamentary Debates, 13 July 1982, quoted in Greg Linington *Constitutional Law of Zimbabwe* (Legal Resources Foundation, Harare 2001) para 454.

³ Linington op cit n 2 paras 455–7.

⁴ Parliamentary Debates 29 July 1982, quoted in Linington op cit n 2 para 456.

An indication of the worsening relationship between the judiciary and the executive arose in 1999 when the army detained the editor of *The Standard* newspaper, Mark Chavunduka, and a journalist colleague, Ray Choto.⁵ The detentions followed reports in *The Standard* alleging that twenty-three army officers had been arrested for attempting to incite an overthrow of the government. Three times, without success, the High Court of Harare ruled that the editor had been detained unlawfully and ordered his immediate release. Neither the Defence Minister nor his legal representatives appeared in court to explain their refusal to abide by the rulings. Instead, the Permanent Secretary of Defence issued this statement: 'The court cannot direct us. We will move at our own pace. We are interrogating him [Chavunduka] at the moment.' Soon afterwards Choto was taken into police custody.⁶

Only Judge Nicholas McNally, Judge Ahmed Ebrahim and Judge Simba Mubechete were in the country at the time. These members of the Supreme Court bench addressed a letter to President Mugabe asking him to denounce the illegality of the detentions and the impunity with which the army had acted in the face of court orders. Instead, Mugabe reacted strongly against the letter, calling on the judges to resign. He said that

... the judiciary has no constitutional right whatsoever to give instructions to the President on any matter as the ... judges purported to do. Their having done so can clearly be interpreted as an action of utter judicial indiscretion or as one of imprudence, or as, as I regard it, an outrageous and deliberate act of impudence.⁷

The constitutional crisis precipitated by the army's actions was allowed to peter out rather than being resolved. The detained editor and journalist were released by the army and police respectively. No affirmation of the rule of law was forthcoming from the government. The judges did not resign.⁸

These examples of government impunity reveal tensions that eventually erupted in 2000. However, there were also more subtle indicators of the struggle between the two branches of government. Prior to 2000 the government by and large appeared to respect judicial rulings even as it sought legal means to circumvent the implications by passing amendments to the Constitution, by passing legislation and by making extensive use of clemency orders.

An example is the inclusion of s 15(5) and 15(6) of the Constitution, which specifically exclude delays in the execution of the

⁵ *Misa Zimbabwe Alert* 21 January 1999.

⁶ See (1999) 1 *Legal Forum* 7, quoted in Linington op cit n 2 para 458.

⁷ See (1999) 1 *Legal Forum* 7–8, quoted in Linington op cit n 2 para 460.

⁸ Linington op cit n 2 para 462.

death penalty from the right to be free from inhuman punishment contained in s 15(1). The subsections were inserted after the Supreme Court, in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, & others*⁹ found such delay to be contrary to s 15(1). In the subsequent case of *Nkomo & another v A-G & others*¹⁰ Gubbay CJ accepts expressly that the Constitution of Zimbabwe Amendment (No 13) Act was passed with the intention of overcoming the effect of the court's judgment.

A further instructive case dealing with an attempt at legislative ouster of judicial protection is that of *Forum Party of Zimbabwe & others v Minister of Local Government, Rural and Urban Development, & others*,¹¹ dealing with a challenge to the validity of the mayoral election for the city of Gweru. The election was held in terms of the Presidential Powers (Temporary Measures) (Urban Councils) Regulations 1995, which had been made under the Presidential Powers (Temporary Measures) Act.¹² Subsequently, the legislature passed the Urban Councils Act,¹³ which expressly validated mayoral elections made in terms of the regulations irrespective of the validity of the regulations. In determining the intention of the legislature in enacting s 321(2) of the Urban Councils Act, the court accepted that 'the aim of the legislature in enacting s 321(2) of the Urban Councils Act was to ensure that there was no possibility of the elections held pursuant to the Regulations being voided by the courts'.¹⁴ Writing for the full court, Gubbay CJ accepts that the unequivocal and express language of the Act has the effect of rendering the elections immune from challenges against the validity of the regulations under which they were held.

Another example is the Constitutional Amendment of 1992 allowing corporal punishment of minors after the Supreme Court ruled that caning of minors constituted cruel and inhuman punishment.¹⁵ In addition, in 1996 the Constitution was again amended¹⁶ to deny women the right to confer automatic residency on their foreign spouses. This was in apparent response to a ruling by the Supreme Court in 1994 declaring that women should have the same rights as men to confer residency and citizenship on their spouses.¹⁷

⁹ 1993 (1) ZLR 242 (S).

¹⁰ 1993 (2) ZLR 422 (S).

¹¹ 1997 (2) ZLR 194 (SC).

¹² [Chapter 10:20].

¹³ [Chapter 29:15].

¹⁴ At 197B.

¹⁵ Constitution of Zimbabwe Amendment (No 11) Act 30 of 1990.

¹⁶ Constitution of Zimbabwe Amendment (No 14) Act 14 of 1996.

¹⁷ *Rattigan & others v Chief Immigration Officer & others* 1994 (2) ZLR 54 (SC).

Legislative reaction to judicial interpretation is not in and of itself something that gives rise to concern. Indeed, it might be regarded as a sign of healthy interaction between the various branches of government. The line between legitimate override of judicial interpretation of human rights and constitutional safeguards and the illegitimate abuse of the democratic process is not one that is easily defined or identified. However, the tendency in Zimbabwe after 2000 for the government to disregard judicial pronouncements that went against its perceived interests started a development that can only be described as the progressive breakdown of the rule of law.¹⁸

Events have clearly escalated since then. In the parliamentary elections of June 2000 the opposition Movement for Democratic Change (MDC) won fifty-seven of the 120 seats despite credible allegations of voting irregularities that saw almost 15 per cent of voters turned away at the polls.¹⁹ In addition to the 120 elected seats, the president appoints a further 20 Members of Parliament at his discretion while ten traditional chiefs bring the number up to 150. Despite the strong performance of the MDC, ZANU-PF retains a comfortable majority in the House.²⁰

Numerous challenges to the election results in the various constituencies have been brought to the courts. Commentators have said that it was the indication of popular dissent in the form of the MDC's success at the polls, potentially supported by an independent judiciary, that marked the turning point in the Zimbabwean government's approach to political opposition and judicial institutions. Several draconian pieces of legislation have been passed over the last two years, while the run-up to the presidential election in 2002 has seen an increase in presidential proclamations. There has been a significant turnover in the composition of the bench, at the level of the High Court and particularly in the Supreme Court. Political violence, implicitly sanctioned by the government or actively perpetrated by its agents, has escalated significantly.

In March 2001 a delegation of the International Bar Association (IBA) travelled to Zimbabwe. Upon returning to South Africa, George Bizos, a prominent human rights lawyer and member of the delegation, commented:

¹⁸ Ibid at 5–6.

¹⁹ US Government Delegation to the 57th Session of the UN Commission on Human Rights *Department of State Human Rights Reports for 2000 — Zimbabwe* February 2001, available at <http://www.humanrights-usa.net/reports/zimbabwe.html> (last accessed 10 June 2003).

²⁰ Ibid.

We had a lengthy meeting with the minister of justice. He really spoke along the same lines as the President. But I believe, with due respect to him, that he does not distinguish between the rule of law and rule by law.²¹

The IBA's report said the rule of law in Zimbabwe was 'in the gravest peril' as the government openly ignored court rulings and encouraged the intimidation of judges, thereby putting 'the fabric of democracy at risk'. In a subsequent article, Lord Goldsmith, co-chairperson of the IBA's Human Rights Institute and a participant in the IBA's visit to Zimbabwe, summarised the conclusions of the IBA:

We met at length with key ministers . . . with President Mugabe, and [held] separate discussions with the country's Attorney-General and Minister of Justice. What we saw dismayed us: intimidation and threats to judges which the government appeared to condone; unconstitutional pressure by government ministers on judges to leave the Bench; a failure by the government to enforce orders of its own courts; and a widespread belief that there is selective prosecution of crime where political violence is at issue. Despite reassurances we were given — and which we record in our report — we were gravely concerned that all this was leading to a culture of lawlessness in the country . . . The losers are the people of Zimbabwe, for judicial independence is not a privilege of judges, but a right of every citizen.²²

Commentators warn not merely of the breakdown of the rule of law in Zimbabwe, but of its flagrant and open abuse.²³ In September 2002 a journalist was arrested for stating that in his opinion the country's Chief of Police, Augustine Chihuri, was unfit for duty. The response by the Minister of Information, Jonathan Moyo, was that if the newspaper's editor could not run 'a professional paper, the law will have to assist him'.²⁴ When a prominent member of a repressive regime considers the law an ally, it is cause for grave concern.

In exploring the themes outlined in this introduction, this book considers in Chapter 2 the rights in the Zimbabwean Declaration of Rights. This is followed in Chapter 3 by a discussion of the higher court structures and practitioners. The fourth chapter considers the separation of powers, in particular the executive's law-making powers, as well as repressive legislation that has allowed the amassing of regulatory power by the government. Also discussed are the lower court structures, which are part of the civil service.

²¹ International Bar Association *Report of the Zimbabwe Mission 2001* 23 April 2001, available at <http://www.derebus.org.za/archives/2001Jun/news/iba.htm> (last accessed 10 June 2003).

²² Ibid.

²³ Ibid.

²⁴ *Mail & Guardian* (SA), 15 September 2002.

CHAPTER 2

THE CONSTITUTION OF ZIMBABWE



In 1965 a white minority government unilaterally declared the 'independence' of Rhodesia from its colonial mistress, England. A protracted and violent war of liberation followed. The primary liberation movements were the Zimbabwe African National Union (ZANU) under Robert Mugabe and the Zimbabwe African Peoples Union (ZAPU) under Joshua Nkomo.

In 1979 political leaders of Rhodesia and the Patriotic Front (PF), consisting of representatives from ZANU and ZAPU, met in London with British government representatives to discuss the imminent independence of the country. These talks became known as the Lancaster House Conference and lasted an arduous fourteen weeks. One factor in the reaching of an accord was that the resistance movements wanted to ensure that neo-colonial puppets did not head the new government.¹ Another was that African leaders who were feeling the economic and military repercussions of their support for the resistance during the war exerted strong pressure on the PF during the talks.²

Among the most contentious features of the Lancaster House Conference were the 'sunset clauses' demanded by the white Rhodesian minority as a way of retaining substantial privileges. These clauses covered a wide range of issues from private schooling to the powers of the attorney-general. The most controversial of these clauses related to land ownership.³

The Zimbabwean Constitution that emerged from the Lancaster House Conference is known as the Lancaster House Constitution. It was published as a schedule to the Zimbabwe Constitution

¹ A readable and informative introduction to these issues is contained in D Surendran *Introduction to the Situation in Zimbabwe* June 2003, <http://people.cs.uchicago.edu/~7Edinoj/zimsummary.html> (last accessed 15 November 2003). The Lancaster Conference is dealt with under the heading *Land Redistribution*.

² Bertus de Villiers *Land Reform: Issues and Challenges* (Konrad Adenauer Stiftung, Johannesburg 2003) 8.

³ Surendran op cit n 1. The specific question of land redistribution will be dealt with in greater detail below, '3.1.1 The land issue in court'.

Order 1979 of the United Kingdom, by which Zimbabwe formally attained independence. The first largely democratic elections⁴ were held in Zimbabwe in 1979 in terms of the new Constitution. Mugabe's ZANU won a resounding victory. In April 1980 Zimbabwe formally attained full independence and recognition within the Commonwealth.

The Constitution has been amended at least sixteen times since independence in 1980. Most of the amendments have had the effect of increasing the power of the president relative to the legislature.⁵ In the original Constitution a prime minister was elected by Parliament; now there is a president who is directly elected. In terms of Constitutional Amendment 9, the president is empowered to declare a state of emergency unilaterally for a period of up to fourteen days.⁶ Constitutional Amendment 10 grants the president the sole power to dissolve Parliament and to appoint or remove a vice-president and any minister or deputy minister. It also allows for the president to appoint twenty of the 150 members of Parliament.⁷

In the 1990s civil society and non-governmental organisations (NGOs) became concerned about the growing social and economic crisis in Zimbabwe as well as the ever-increasing scope of presidential powers. In 1997 these organisations banded together under the umbrella organisation of the National Constitutional Assembly (NCA).⁸ The NCA initiated and co-ordinated a process of public debate and participation on the need for a new constitution. This culminated in the publication of a proposed constitution on 1 December 2001. It was forwarded to the government with a demand that it be enacted.⁹ The NCA's draft constitution provides for an executive prime minister and a largely ceremonial president, thereby undoing Mugabe's amendments. The prime minister, though directly elected, is under effective control of a strong Parliament. Oversight is further exercised by a series of independent institutions such as an independent

⁴ In terms of the Lancaster Agreement, 20 per cent of parliamentary seats were elected by the white minority for the first seven years after independence.

⁵ US Department of State op cit ch 1 n 19; Anthony R Gubbay *The Challenge to Judicial Independence: The Zimbabwe Situation* Paper delivered at the Inaugural World Bar Conference, Edinburgh, 28 June 2002, available at <http://www.derebus.org.za/archives/2002Jul/between/gubbay.htm> (last accessed 20 June 2003).

⁶ Constitution of Zimbabwe Amendment (No 9) Act 31 of 1989.

⁷ Constitution of Zimbabwe Amendment (No 10) Act 15 of 1990.

⁸ The NCA's informative website can be found at <http://www.nca.org.zw/>.

⁹ Statement by the NCA on the Final Draft Constitution for Zimbabwe can be found at http://www.nca.org.zw/html/fdraft/fdraft_stmt.htm (last accessed 15 December 2003).

Auditor-General, a Human Rights Commission and an Anti-Corruption Commission. A final noteworthy element of the proposed Constitution is that it provides for compulsory acquisition of land for equitable redistribution but requires fair compensation to be paid.¹⁰

In response to mounting pressure for constitutional reforms, in May 1999 the president established a separate Constitutional Commission chaired by Judge Godfrey Chidyausiku.¹¹ This commission consisted of almost 400 members, who embarked on an extensive public consultation process in the short time period set by the president. Serious concerns exist regarding the extent to which the constitution published by the Constitutional Commission reflected popular concerns. The control exerted over the process by the president was near absolute. All members of the commission were presidential appointments. The draft produced by the commission was sent to the president for approval and he proceeded to make amendments without further consultations with the commission or comments from the public.¹²

The draft constitution that emerged from this process strengthened the executive while weakening the oversight powers of Parliament. It created a puppet prime minister while maintaining a powerful president. It included several provisions allowing for compulsory acquisition of land without compensation. It curtailed justiciable rights in the proposed bill of rights by excluding rights such as freedom of the press and the right to strike.¹³

The draft constitution put forward by the Constitutional Commission was put to a national referendum in February 2000. It was strongly opposed by civil society organisations and NGOs as well as the newly formed opposition party, the Movement for Democratic Change (MDC). It was rejected by the people of Zimbabwe in a development that appeared to come as a surprise to many commentators and to the government. The government did not adopt the alternative draft constitution put forward by the NCA in 2001. As a result, Zimbabwe continues to be governed by the Lancaster House Constitution.

¹⁰ Summary of the main features of the draft constitution provided for by the NCA at http://www.nca.org.zw/html/fdraft/fdraft_summ.htm.

¹¹ US Department of State op cit ch 1 n 19.

¹² See Angela Cheater *Human Rights and Zimbabwe's June 2000 Election* (Zimbabwe Human Rights NGO Forum, Harare January 2001) 8–13 for a comprehensive overview of the constitution drafting process. The paper is available from the Forum's Research Unit at research@hrforum.co.zw.

¹³ Ibid; see also a report by Human Rights Watch *Fast Track Land Reform in Zimbabwe* Vol. 14, No 1(A) March 2002 at 9 ('HRW'); and the NCA's reasons for opposing the Constitutional Commission's draft constitution at http://www.nca.org.zw/html/fdraft/fdraft_summ.htm.

2.1 Chapter III: The Declaration of Rights

The Constitution contains in Chapter III (ss 11–26) the Declaration of Rights, listing the rights and freedoms of Zimbabweans. The Declaration of Rights concentrates on traditional civil and political rights. The rights protected in ss 12–23 of the Declaration of Rights are the following:

- 12 The right to life.
- 13 The right to personal liberty.
- 14 The right to protection from slavery and forced labour.
- 15 The right to protection from inhumane treatment.
- 16 The right to protection from deprivation of property.
- 17 The right to protection from arbitrary search or entry.
- 18 The right to secure protection of law.
- 19 The right to freedom of conscience.
- 20 The right to freedom of expression.
- 21 The right to freedom of assembly and association.
- 22 The right to freedom of movement.
- 23 The right to protection from discrimination.

Only those rights most prominently affected by recent events will be discussed here.

Section 12 protects the right to life. It is subject to certain qualifications. Section 12(1) expressly provides for the death penalty. Section 12(2)(a)–(d) allow for the lethal use of lawful force in preventing listed unlawful activities. The provision that gives rise to particular concern is s 12(2)(c), which allows for lethal force ‘for the purpose of suppressing a riot, insurrection or mutiny or of *dispersing an unlawful gathering*’.¹⁴ This provision is particularly open to abuse in light of the repressive legislation enacted over the past three years, making it exceedingly difficult to hold lawful gatherings.

With regard to the death penalty, s 12 must be read in conjunction with s 15(5) and 15(6), which are express exclusions from the provisions of s 15(1), providing for protection from cruel, inhuman or degrading punishment. In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, & others*¹⁵ Gubbay CJ (as he then was), writing for the unanimous court, found that a significant delay in the execution of convicted prisoners offended s 15(1). The court ordered that the sentences be set aside and substituted with sentences of life imprisonment.

¹⁴ Own emphasis.

¹⁵ 1993 (1) ZLR 242 (S).

In doing so, he concluded in relation to s 24(4) that 'it is difficult to imagine language which would give this court a wider and less fettered discretion' in awarding 'a meaningful and effective remedy for the breach of section 15(1)'.¹⁶ In reaction to the decision in *Catholic Commission*, the Constitution was rapidly amended by the addition of subsecs 15(5) and 15(6), which provided explicitly for the imposition of the death penalty.¹⁷

In the subsequent case of *Nkomo & another v A-G & others*¹⁸ Gubbay CJ bluntly states that 'it was generally known to well-informed persons that the decision in *Catholic Commission* . . . which was handed down on 24 June 1993, met with the disapproval of Government . . . So, with comparative expedition, the Constitution of Zimbabwe Amendment (No 13) Act was passed.'¹⁹ He also accepts 'that the object of parliament was to remedy a perceived "mischief" that the judgment had caused'.²⁰ Although the particular applicants in the matter before the court were not affected retrospectively by the amendments, Chief Justice Gubbay acknowledges that '[t]he fundamental right that previously existed and the remedy that was afforded, have been totally extinguished'.²¹

Section 13 of the Constitution provides for the right to personal liberty, subject only to such lawful exceptions as are provided for in s 13(2). The grounds listed relate to the execution of judicial or parliamentary authority, the prevention of or punishment for criminal activities, and individual rehabilitation. This section is of particular relevance in light of reports of the increasingly common practice by police to detain persons in excess of forty-eight hours, often subjecting them to abuse and/or torture, and then releasing them without charge.²²

It is also of interest to consider how repressive legislation enacted over the past three years has impacted on the protection offered by s 13 of the Constitution. In terms of s 13(2)(e) a person may be detained 'upon reasonable suspicion of having committed, or being

¹⁶ At 283C–D and 284B–C.

¹⁷ Constitution of Zimbabwe Amendment (No 13) Act 9 of 1993; see also Gubbay op cit n 5.

¹⁸ 1993 (2) ZLR 422 (S).

¹⁹ At 431F–G.

²⁰ At 432A.

²¹ At 434F.

²² This practice is widespread and has been confirmed in interviews with civil society activists such as Brian Kagoro on 24 February 2003, Brian Raftopolous on 24 February and 9 December 2003, and David Coltart on 4 December 2003; see also Human Rights Watch *Under a Shadow: Civil and Political Rights in Zimbabwe*, Briefing Paper, June 2003.

about to commit, a criminal offence'. The increasing criminalisation of political activity and peaceful protest means that the ambit of the protection offered by s 13(2)(e) is narrowed considerably.

Section 13(4) provides that a person shall be brought before a court without undue delay. Powerful tools in the hands of courts throughout the political upheavals of the past decades have been *habeas corpus* applications and applications for mandatory interdicts *de libero homine exhibendo*. The latter require the production of the applicant before the court at a specified time. The respondents are called to show cause why the applicant should not be released from detention. However, the effectiveness of these remedies depends to a great extent on compliance by the police or other government agencies. With increasing state impunity, the efficacy of the courts as protector of the personal liberty of Zimbabweans has been severely compromised. There are many reports of persons being detained despite court orders for their release or of instances in which there are significant delays in producing persons in court despite the court ordering their attendance.

Section 13(4) further provides that a person has a right to be tried within a reasonable time or to be released from custody, although the section expressly allows proceedings against that person to continue. A similar provision is contained in s 18(2), which requires that a person charged with an offence be afforded a fair hearing within a reasonable time before an independent and impartial court. In civil matters this is provided for by s 18(9). It appears that these provisions are violated on a regular basis. Interviews with practitioners indicate that matters that are considered politically sensitive are delayed for unreasonable periods before being enrolled. In addition, criminal trials of opposition members and civil society activists are often delayed for months, even years. It appears that most prominent opposition members have been charged with an offence in past years but that few of these cases are ever brought to trial.

The second element of the provisions contained in s 18(2) and (9) is that the court is required to be impartial and independent. Real doubt has been cast on the impartiality of several members of the bench of the Supreme Court, a matter that is discussed in more detail later in this report.²³

Subsection 18(7) provides the constitutional framework for the exercise of pardons by prohibiting criminal prosecution once a person has been pardoned. Section 18(8) further provides that a person pardoned for the commission of an offence may also not be required to

²³ Above, 3.1.

give evidence. The constitutional text does not set out conditions or impose limitations under which the power to pardon should be exercised. As discussed later, pardons have been exercised with some frequency in the years since independence, fostering a culture of impunity.

Section 16 of the Constitution provides for the right to property. In view of the central role played by the need for land redistribution in Zimbabwe's recent history, this right is of particular importance. It is a lengthy and complex section and has been subject to significant amendments over the years. Initially, it permitted land acquisition by the government only on the basis of the 'willing seller, willing buyer' principle. Compensation was to be paid at market-related prices and in a country and currency of the seller's choice. This was supposedly entrenched for ten years. Nevertheless, the section was amended in 1985²⁴ by allowing for compensation to be paid at a 'fair' rate fixed by the government and in local currency only. In 1990, when the entrenchment effected by the sunset clauses fell away, the section was again amended several times²⁵ to allow for compulsory acquisition of land at rates fixed by the government. The land acquisition process remained subject to numerous substantive and formal limitations, however.

In April 2000 the Constitution was again amended with the insertion of s 16A into the property clause.²⁶ The effect was, first, that compensation would be payable by the Zimbabwean government only for improvements effected to the property. The second, and more radical, effect of the insertion of s 16A was the attempt to shift the obligation to pay compensation for land acquired for resettlement to the 'former colonial power' through 'an adequate fund established for the purpose'. The text further provides that 'if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement'.²⁷ As a matter of law, it is of course not possible for one country unilaterally to impose constitutional obligations on another. In the absence of a bilateral agreement between Zimbabwe and the 'former colonial power' it appears that the insertion of s 16A has deprived Zimbabweans of the

²⁴ Constitution of Zimbabwe Amendment (No 5) Act 4 of 1985.

²⁵ Constitution of Zimbabwe Amendment (No 11) Act 30 of 1990; Constitution of Zimbabwe Amendment (No 12) Act 14 of 1993; Constitution of Zimbabwe Amendment (No 14) Act 14 of 1996.

²⁶ Constitution of Zimbabwe Amendment (No 16) Act 5 of 2000.

²⁷ Section 16A(1)(i) and (ii).

constitutional right to any compensation for agricultural land forcibly acquired for resettlement.

Section 20 of the Constitution provides for the right to freedom of expression, that is, to 'freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence'.²⁸ The importance of freedom of expression to the maintenance of a democratic order is crucial. It was recognised in *Chavunduka & another v Minister of Home Affairs*,²⁹ where the court accepted that:

[F]reedom of expression constitutes one of the essential foundations of a democratic society and it is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society.³⁰

Two years later a newly constituted Supreme Court spoke differently. In *Morgan Tsvangirai & others v The Registrar General of Elections*³¹ an application by the leader of the opposition MDC for an electronic copy of the voters' roll, the court states, albeit *obiter*, that the right to freedom of expression does not include the right to receive information as a core element of that right.³² The court also found that the right to freedom of expression cannot be called upon where an applicant seeks information for the purpose of giving effect to other rights.³³

Media freedom is not expressly provided for in s 20. The structure and content of s 20(2), which contains a closed list of interests that may be protected by curtailing the right contained in s 20(1), further casts some doubt on the effective constitutional protection of media freedom. Section 20(2)(a) allows for laws making provision for 'public safety, public order, . . . public morality' that derogate from the freedom of expression. Section 20(2)(b)(iv) further allows for derogation *inter alia* for the purpose of the 'general efficiency of . . . wireless broadcasting, or television or creating or regulating any monopoly in these fields'. Such derogation must, however, be shown to be reasonably justifiable in a democratic society. Legislation that has recently been enacted is unlikely to pass this test. It has created a complex bureaucracy with close links to government and has all but

²⁸ Section 20(1).

²⁹ 2000 (1) ZLR 552 (S).

³⁰ At 559G–H.

³¹ Unreported Case No SC 93/2002.

³² This case is discussed in detail below, ch 3.

³³ At typed page 23.

silenced the independent media. To date, only one section, s 80 of the Access to Information and Protection of Privacy Act,³⁴ has been declared unconstitutional.³⁵

Section 21 provides for freedom of assembly and association, which expressly includes the right to 'form or belong to political parties or trade unions'. The right is expressly limited in s 21(3)(a)–(d). Section 21(3)(a) deals with laws making provisions 'in the interests of defence, public safety, public order, public morality or public health'. Paragraph (b) provides for the protection of the rights and freedoms of others, (c) allows the registration of associations *other than* political parties, trade unions or employers' organisations, and (d) allows for restrictions to be imposed on a public officer's right to freedom of association.³⁶ For a restriction to be within the ambit of the Constitution it must be reasonably justifiable in a democratic society. Subsection (4) expressly excludes from the ambit of the constitutional right the exercise thereof 'in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles'. This exclusion is most relevant in urban areas, where the MDC continues to dominate the political landscape.

This right appears to have been seriously infringed by legislation and government conduct. Legislation that was recently enacted has established a bureaucratic network that tightly controls public gatherings, without which no public organisation can reasonably function. There have also been many incidents in which gatherings have been broken up even though either they were exempt from the statutory requirement to obtain permission for the meeting or the permission had been granted.

On 13 February 2003 police disrupted a meeting by the Evangelical Fellowship of Zimbabwe and detained Bishop Trevor Manhanga for several hours. The required notification of the meeting had been given to the police, and in terms of the Public Order and Security Act³⁷ church meetings should be exempt from applying for permission for meetings.³⁸ On 28 February 2003 a peaceful petition march was attended by twenty-three pastors and other members of the clergy in protest against the arrest and detention of clergy, including

³⁴ [Chapter 10:27].

³⁵ Unreported Case No SC 280/2002.

³⁶ Own emphasis.

³⁷ [Chapter 11:17].

³⁸ Brian Raftopolous *Crisis Condemns Arrest of Manicaland Pastor* 19 February 2003, available at <http://www.kubatana.net/html/archive/relig/030219ciz.asp?sector=RELIG> (last accessed 15 June 2003).

that of Manhanga. While it initially appeared that the deputy police commissioner would accept the petition, riot police arrived and forcefully arrested all present, supposedly in terms of the Public Order and Security Act. The pastors and other members of the clergy were held for the day at the police station without food, then released without being charged.³⁹

The last right to be discussed under this heading is the right to equality contained in s 23. This section outlaws discrimination on the basis of 'race, tribe, place of origin, political opinions, colour, creed or gender'.⁴⁰ This list has been fairly narrowly interpreted. In *S v Banana*,⁴¹ which concerned sodomy charges against the retired Zimbabwean president, the Supreme Court found that discrimination between homosexual and heterosexual men was not covered by s 23 and hence not unconstitutional.

It is noteworthy that discrimination based on political opinion is expressly prohibited. This is of particular interest in the context of the land resettlement programme that has taken place since independence. Land acquired for the purpose of redistribution is primarily retained by the state and made available to resettlement beneficiaries by way of long leases, for which state permits are issued. This increases state control over the allocation of land and opens the land issue to corruption and nepotism. There are credible reports of large-scale cronyism occurring in the context of land redistribution, as well as reports of land being allocated primarily to persons avowing loyalty to the ruling party.⁴²

The most comprehensive study of farm allocations up to 1999 has been compiled by Margaret Doing, a founder of the War Veterans Association.⁴³ In terms of her study, which used government records, by far the majority of farms leased to private persons in terms of the land redistribution programme have been leased to 'absentee lessor[s]' with 'no previous farming experience'. A large number of such persons

³⁹ Evangelical Fellowship of Zimbabwe *Arrest and Detention of 23 Pastors and Clergy* 28 February 2003, available at <http://www.kubatana.net/html/archive/relig/030228efz.asp?sector=RELIG> (last accessed 15 June 2003).

⁴⁰ Section 23(2).

⁴¹ 2000 (3) SA 885 (ZS).

⁴² HRW op cit n 13 at 7 and 27–31; Centre of Housing Rights and Evictions *Land, Housing and Property Rights in Zimbabwe* (Geneva, COHRE, 2001) ('COHRE report') at 17, available at <http://www.cohre.org/downloads.zimbabwe%report.pdf> (last accessed on 15 December 2003); Surendran op cit n 1.

⁴³ Annex 2 to COHRE report op cit n 42 at 58–75.

are employed by the state,⁴⁴ including ministers,⁴⁵ the attorney-general at the time⁴⁶ and two judges.⁴⁷ Doing identifies Judge Luke Malaba and Judge Mishek Cheda as beneficiaries. Both have since been called to the Supreme Court. Judge Ben Hlatshwayo of the Harare High Court acquired a farm in January 2003 and this is not captured in Doing's data. An application for leave to sue the judge, and for his eviction from the farm on the basis of illegal occupation, has been dismissed in strong terms by Judge President Paddington Garwe.⁴⁸

The trends identified by Doing appear to have been confirmed by an audit commissioned in August 2002 by the president in reaction to complaints of large-scale cronyism. The audit identifies many government officials who were allocated several farms in contravention of the stated policy that a person should only own one farm. Among the more noteworthy high officials is the information minister Moyo, who is reported to have three farms — in Nyanga district, in Mazowe and in Lupane.⁴⁹ There are also credible reports that many known or suspected opposition supporters have been denied access to land in a process that is cumbersome⁵⁰ and has become corrupted and dominated by party political interests.⁵¹

Discrimination on the basis of gender is also an area in which constitutional protection is weak. In terms of s 23(3)(a) the protection does not apply to 'matters of personal law', which is the area of law in which women are most often at a disadvantage. The application of African customary law is specifically excluded from the reach of the right against discrimination. These exclusions from the ambit of protection of s 23 have been expressly recognised and applied by the

⁴⁴ For example, the Director General of the Zimbabwe Defence Forces, P Zvinavashe; the Director General of the Ministry of Environment and Tourism; the Principal Director in the President's office, C Mushowe; the Permanent Secretary in the President's office, M Sibanda; the Permanent Secretary of the Ministry of Home Affairs; the Under Secretary in the Ministry of Industry and Commerce; the Deputy Speaker of Parliament, E Madzongwe; as well as many lesser employees of the various ministries.

⁴⁵ The Minister of Mines, the Hon S K Moyo; the Deputy Minister of Transport, Z Nsimbi.

⁴⁶ P Chinamasa, attorney-general until 2000, when he was appointed Minister of Justice.

⁴⁷ Doing lists Judge L Malaba and Judge M A Cheda. Judge Ben Hlatshwayo acquired his farm in January 2003, as reported by IOL 10 January 2003.

⁴⁸ *The Herald* 13 March 2003.

⁴⁹ *Sunday Times* (SA) 2 March 2003.

⁵⁰ United Nations Development Programme *Zimbabwe: Land Reform and Resettlement: Assessment and Suggested Framework for the Future — Interim Mission Report* (UNDP, New York 2002) at 11 and 28, and see HRW op cit n 13 at 12.

⁵¹ HRW op cit n 13 at 13, 16, 27–31.

Supreme Court.⁵² In addition, women have been all but excluded from the land resettlement programme despite an initial announcement that the government would establish a 20 per cent quota for single women in land redistribution.⁵³

2.2 Chapter VIII: The judiciary

In terms of s 84 of the Constitution the president appoints judges in the Supreme Court and the High Court after consultation with the Judicial Service Commission (JSC).⁵⁴ The president may act against the advice of the JSC, in which case Parliament must be informed of the president's decision as soon as possible.⁵⁵ No provision is made for Parliament to ratify the president's choice or to overturn it. Clearly, the appointment of judges is exposed to significant political interference. Indeed, there is nothing in the constitutional text to prevent a decision that is entirely politically motivated.

Conditions of employment for judges are regulated by s 88 of the Constitution. Section 88(1) provides that remuneration is to be paid out of the Consolidated Revenue Fund. The details of remuneration are dealt with by the Judges Salaries, Allowances and Pensions Act.⁵⁶ The president sets the rate of remuneration as well as the terms and conditions of pension payments.⁵⁷ The Finance Minister must review salaries, pension benefits and allowances payable to judges whenever a general increase is to be awarded to persons employed in the public service.⁵⁸ Salaries and allowances payable to a judge in office cannot be reduced once these are set by the president.⁵⁹ In the current financial situation, however, this hardly offers significant protection. The office of a judge may not be abolished without his or her consent.⁶⁰

Several provisions in the Constitution are concerned with securing a degree of independence in the exercise of a judicial officer's function. The Zimbabwe Constitution makes specific provision for the independence of the judiciary in s 79B, which reads:

In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.

⁵² *Magaya v Magaya* 1999 (1) ZLR 100 (SC).

⁵³ HRW op cit n 13 at 31–2.

⁵⁴ Section 84(1).

⁵⁵ Section 84(2).

⁵⁶ [Chapter 7:08].

⁵⁷ Sections 3(1) and 4(1) of the Judges Salaries, Allowances and Pensions Act.

⁵⁸ Section 5(1) of the Judges Salaries, Allowances and Pensions Act.

⁵⁹ Section 88(1) of the Constitution.

⁶⁰ Section 86(3) of the Constitution.

Nevertheless, in terms of s 79B, a judge may be subjected to 'the direction or control of another member of the judiciary' in terms of a written law providing for this. The extent of this limitation has not been pronounced upon. In its narrow form it appears to facilitate administrative control of the court structures by the judiciary, in the form of the Judge President and the Chief Justice, and independently from executive administrative structures.⁶¹ Considering this provision to be supportive of the independence of the judiciary must assume, however, that no threat is posed to it from within the judicial institution, an assumption that shall be subjected to questioning in this report.

In terms of s 86 a judge has tenure of office until the age of 65, at which age he may retire or, subject to the acceptance by the president of a medical report as to the mental and physical fitness of the judge, elect to continue in office until the age of 70. Section 87 deals with the removal of a judge from office during his or her tenure of office. Such removal is authorised only in the case of the judge's inability to discharge the functions of his or her office or for misbehaviour.⁶² Section 87(1) also provides that a judge may not be removed except in accordance with the provisions of this section. These provisions rose to some prominence in 2003 in the context of the arrest of Judge Benjamin Paradza on charges relating to the exercise of his office. It appears that s 87 must be read with s 79B, which supports the argument that any action which *de facto* prevents a judge from 'exercis[ing] his judicial authority', including a lawfully executed arrest and incarceration, runs contrary to s 87.⁶³

Section 87 further provides for the constitution of a tribunal to investigate charges of misconduct or disability. Members of the tribunal are appointed by the president.⁶⁴ The tribunal is to report to the president and make recommendations regarding the removal of the judge in question. If the tribunal finds that the judge should be removed from office, it will recommend that the president refer the matter to the JSC, which must then advise the president of its decision. The president must remove the judge if the commission so advises.⁶⁵ It is not clear from the wording of the section whether the president has any discretion in the event that the JSC recommends that no further action be taken.

⁶¹ Linington op cit n 2 para 433.

⁶² Section 87.

⁶³ Greg Linington *An opinion on some constitutional issues relating to the arrest, incarceration and prosecution of Judge Paradza* (unpublished paper available from the author, 2003).

⁶⁴ Section 87(2) and (4).

⁶⁵ The language of s 87(6) and (9) is mandatory.

To date, only one tribunal has been set up in terms of s 87. In 1995 a tribunal was established following concerns raised about the conduct of Judge Fergus Blackie in hearing applications for bail, and granting bail, on a Sunday at a police station. In that case the tribunal found that there was no evidence of improper purpose on behalf of the judge. This was in spite of concerns regarding the absence of a state representative at the hearing; that the presence of a High Court judge in the police station was found to have been overwhelming for the officers on duty, who eventually consented to bail being granted; and that the judge had travelled in the same car as the defence counsel. The tribunal accordingly recommended that the matter not be referred to the JSC.⁶⁶ In the course of its reasons the tribunal also discussed the meaning to be ascribed to 'misbehaviour' as contained in s 87. It found that the behaviour complained of had to relate to the fitness of the judicial officer to remain in office, and could not be understood to refer to a judge's error of law or procedure.⁶⁷

The JSC is provided for in s 90. It consists of at least five and at most six persons, three of them directly appointed by the president. The remaining three persons are made up of the attorney-general, the chairperson of the Public Services Commission and the Chief Justice, alternatively the most senior judge of the Supreme Court. The latter three are, however, appointed by the president.⁶⁸ In an effort to provide for a measure of independence s 109(1) provides that no commission established under the Constitution is subject to the authority or control of any person. Section 109(5) provides that the salary of a member of a commission cannot be reduced during the member's tenure. Once again, financial realities have reduced this protection significantly.

The impression of the structural independence of the judiciary in Zimbabwe is a mixed one. On the one hand, there is a significant attempt in the constitutional text to provide safeguards against political interference with the exercise of the judicial function. On the other hand, the direct and indirect role played by the president, especially in the appointment but also in the removal of judges in the higher court structures, allows for considerable political influence over the judicial institution.

⁶⁶ Linington op cit n 2 paras 441, 442 and 444.

⁶⁷ Linington op cit n 2 para 443.

⁶⁸ The attorney-general is appointed by the president in consultation with the Judicial Service Commission in terms of s 76(2) of the Constitution; the chairperson of the Public Service Commission is appointed by the president in terms of s 74(1); and the Chief Justice is appointed by the president in consultation with the Judicial Service Commission in terms of s 84(1).

CHAPTER 3

THE SUPERIOR COURT STRUCTURES



The current political upheavals in Zimbabwe threaten the superior court structures in several ways. The external threats range from violent intimidation of judges by militia and the government to political interference by the executive with the judicial process and the stacking of the bench. It is thus feared that the judiciary may no longer be able to fulfil its promise to safeguard human rights and ensure that the rule of law is upheld because its officers are unable, or unwilling, to perform their mandate with impartiality and objectivity.

On an internal level, increasing support for a particular political agenda coupled with an attitude that allows for judges to be politicians first and judges second threatens to subvert the legal institution. An indication of such developments was given early in 2001. At the opening of the High Court Legal Year in Bulawayo, the then Judge President Godfrey Chidyausiku strongly and publicly criticised an earlier ruling of the Supreme Court which had declared land invasions illegal. Moreover, the Judge President refused to follow the Supreme Court's decision in the High Court.¹

Subsequently, in the case of Samson Mhuriro, the Supreme Court expressly ruled that Chidyausiku as Judge President had no power 'to interfere with the order and procedure of this court'.² Chidyausiku at the time openly admitted that he was unable to accept the Supreme Court order, whereupon the then Chief Justice, Gubbay, issued a formal reprimand to the Judge President, which was also made public. Chief Justice Gubbay denied that there was space for judges to engage in politics from the bench and thereby undermine the rule of law that is the foundation of a functioning legal institution:

¹ Legal Resources Foundation *Justice in Zimbabwe* (Legal Resources Foundation: Harare, September 2002) ('LRF') at 57.

² Order issued by consent in Case No S-314-2000, reasons for which are reported as *Commercial Farmers Union v Mhuriro* 2000 (2) ZLR 405 (SC).

The ethics and traditions of the legal profession demand that a judicial officer whose judgement is overturned by a higher court should not appeal to the public to support his view. The reason is obvious. He is seeking to undermine the very legal system of which he is a part . . . The hierarchy of the courts is understood by the simplest layman and thus the Supreme Court has the power and authority to overturn a decision by a judge of the High Court.³

The internal schism in the judiciary has only deepened as a result of the large number of new appointments to the bench, most of which are considered political, including the appointment of Chidyausiku (by then appointed to the Supreme Court) as Chief Justice after the forced resignation of Chief Justice Gubbay.⁴ Just prior to his permanent appointment, Chidyausiku was the most junior member of the Supreme Court bench and his appointment was hugely unpopular in legal circles.

Another internal rift among members of the High Court bench was highlighted by the arrests of retired Judge Blackie and Judge Paradza, both of whom had delivered strong judgments against the government. The arrests were widely debated in the media and legal circles. In particular Judge Paradza's arrest damaged the image of the judicial institution. Not only did the state indicate that it would call colleagues from the bench to testify against him but some of the judges on the state's witness list publicly condemned the manner of his arrest.⁵

3.1 The Zimbabwe Supreme Court

The Supreme Court is presided over by the Chief Justice and is the highest appeal court in Zimbabwe. At present there are six members of the Supreme Court bench. An ordinary case will be determined by a bench of at least three judges, one of whom may not be an acting judge. In constitutional matters the Minister of Justice or the Chief Justice may direct that the matter be heard by a bench of at least five judges, in which case only two members of the bench may be acting appointments. However, where the Chief Justice feels that a matter requires the consideration of a larger bench, its actual size may be determined at the discretion of the Chief Justice.⁶

The Supreme Court has jurisdiction in criminal and civil matters, as well as original jurisdiction to hear constitutional matters in

³ *Daily News* 19 January 2001.

⁴ LRF op cit n 1 at 57.

⁵ These cases are discussed at greater length below, 3.2.4.

⁶ Section 3 of the Supreme Court Act [Chapter 7:13].

terms of s 24 of the Constitution.⁷ Section 3 of the Constitution further contains the supremacy clause, declaring that if ‘any other law is inconsistent with this Constitution that other law shall, to the extent of its inconsistency, be void’. An interesting aspect of the supremacy clause in the Zimbabwe Constitution is that it does not relate to conduct (as, for example, the South African Constitution does) but only to laws. This is somewhat offset by the definition of ‘law’ contained in s 113 of the Constitution, which includes delegated legislation such as regulations, proclamations and other statutory instruments. This is discussed in greater detail in Chapter 4.⁸ The point remains, however, that it is arguably impossible to challenge directly the constitutionality of purely discretionary executive conduct such as

⁷ Section 24 of the Constitution of Zimbabwe reads as follows:

24 Enforcement of protective provisions

- (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.
- (2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.
- (3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1).
- (4) The Supreme Court shall have original jurisdiction —
 - (a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and
 - (b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);
 and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law.

⁸ See below, 4.2 in ch 4.

police raids, decisions by administrative bodies and the like, unless specific safeguards are included in the legislation itself.

Currently, the Harare High Court is considering whether the constitutional jurisdiction conferred upon the Supreme Court by ss 3 and 24 is exclusive. This point has been raised in the petition brought by Tsvangirai against the presidential election of 2002 and currently pending in the Harare High Court. The respondents have put in issue the High Court's jurisdiction, given that the petition is based at least partly on the alleged unconstitutionality of relevant sections of the election laws.⁹ This argument appears to be without merit, in light of the many cases in which the High Court has dealt with the impact of constitutional provisions on legislation, as well as the provisions of ss 3 and 24 of the Constitution. Pending the decision of the Supreme Court, however, the question as to the jurisdiction of the High Courts to determine constitutional issues remains open.

A matter concerning the Declaration of Rights may come before the Supreme Court in one of two ways. A person may approach the court directly for redress if that person alleges that the Declaration of Rights has been, is being, or is likely to be contravened in relation to him or her. Alternatively, a person who is litigating before the High Court may ask the court to refer a question regarding a contravention of the Declaration of Rights to the Supreme Court for decision.¹⁰ As pointed out by Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe*,¹¹ the court is given wide powers by s 24(4) of the Constitution to offer meaningful relief to an applicant who comes before it, providing that it 'may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights'.¹²

The Supreme Court is thus of crucial importance to the enforcement of the rights contained in the Declaration of Rights. In this context it is particularly worrying that over the past three years this court has been stacked with appointments that are widely seen as sympathetic to the government. In addition, commentators now consider this court to be the segment of the judiciary least likely to render impartial justice.¹³ This process appears to have run parallel to the attempts by the government to seek legitimacy for its efforts at land

⁹ This is dealt with in greater detail below, 3.2.2.

¹⁰ Section 24(2) and (4) of the Constitution.

¹¹ 1993 (1) ZLR 242 (S).

¹² At 283C–D and 284B–C.

¹³ Interview Brian Kagoro 24 February 2003; interview David Coltart 4 December 2003; interview Brian Raftopolous 9 December 2003.

resettlement through judicial approval. On 21 December 2000 five members of the Supreme Court handed down the last of several Supreme Court orders declaring the government-supported land invasions illegal.¹⁴ Of the five, only Judge Wilson Sandura remains on the bench of the current Supreme Court.¹⁵ After the forced resignation of Chief Justice Gubbay in February 2001 the ZANU-PF Member of Parliament for Chinhoyi, Philip Chiyangwa, indicated that he was 'delighted but not yet satisfied . . . My mandate is not complete without the removal of the entire Supreme Court justices. These are Wilson Sandura, Simba Muchechetere, Ibrahim and Nicholas McNally.'¹⁶

In November 2000 several hundred war veterans stormed the Supreme Court building. The Minister of Justice, Patrick Chinamasa, subsequently told the Chief Justice that unless he resigned, his safety could not be guaranteed. Similar threats were made against Judge McNally and Judge Ebrahim. Judge Gubbay and Judge Ebrahim retired as a result of intimidation and political pressure. This included frank statements by Chinamasa that ridding the Supreme Court of established judges served to 'exorcise . . . the racist ghost of Ian Smith'.¹⁷ Judge McNally retired in January 2002 at the prescribed age of 70 and Judge Muchechetere died of a malaria-related illness in December 2001.¹⁸

In particular, the appointment of Chidyausiku, first as acting Chief Justice during the period of Chief Justice Gubbay's forced leave and then as Chief Justice after 1 July 2001, has dealt a severe blow to the integrity of the judiciary. In an open letter from the Zimbabwe Law Society to the JSC prior to Judge Chidyausiku's permanent appointment, his legal acumen and personal integrity are questioned in strong terms.¹⁹ At the time of appointment he was the judge with the greatest number of cases overturned by the Supreme Court. The Chief Justice makes no secret of his sympathies for ZANU-PF, though he has publicly reiterated that he is independent from the president in the exercise of his functions.²⁰

Also in July 2001 the court was expanded from five to eight judges, although there was no apparent need for this.²¹ The official

¹⁴ Of which two judges were black, two white and one of Indian descent.

¹⁵ Amnesty International *The Toll of Impunity* AI Index: AFR 46/034/2002 (London: Amnesty International, June 2002) ('AI') at 51.

¹⁶ *Zimbabwe Standard* 4 February 2001.

¹⁷ *Guardian Special Report: Zimbabwe* 13 February 2001; AI op cit n 15 at 53.

¹⁸ *Daily News* 31 December 2001.

¹⁹ *The Standard* 20 May 2001.

²⁰ *The Herald* 14 January 2003; SABC (SA) 7 December 2003.

²¹ AI op cit n 15 at 52.

reason given was that the increase in case loads caused by the land acquisition cases necessitated the appointment of more judges.²² Since land acquisition matters proceeded primarily in the High Courts and the Administrative Court, this reason is not convincing. However, the increase gave the president the opportunity to appoint three judges considered to be sympathetic to the government. One of the appointments, Misheck Cheda, had been Secretary of Justice before his appointment to the bench in the Bulawayo High Court.²³ Both Judge Cheda and Judge Malaba had acquired land under the land acquisition programme.²⁴ Considering that the full bench complement remains five judges and that the Chief Justice assigns cases to particular judges, the perception is easily created that, in politically sensitive cases, opposition affiliates are unlikely to receive an unbiased hearing.

It is difficult to gauge the impact of the change of judges on the jurisprudence of the Supreme Court in the short and volatile period since 2001. However, two particular issues may usefully illustrate the court's approach to politically contentious questions of law. The first is the Supreme Court's approach to land reform that has accompanied the changed make-up of the bench. The second is the Supreme Court's treatment of Tsvangirai. Of concern is not only whether the judges allowed their political opinions to override their professional judgment but also whether the court is reasonably perceived to be impartial, and hence legitimate, in the eyes of the parties before it and Zimbabweans generally. In respect of the latter consideration, the court appears to be failing.

3.1.1 *The land issue in court*

The land issue has been fraught with tension from the very beginning of Zimbabwe's independence. During negotiations leading to the Lancaster House Constitution, the PF said in its submissions that:

The basic objective of the struggle in Zimbabwe is the *recovery of the land* of which the people were dispossessed.²⁵ This dispossession, always without compensation, is not a thing of the distant past; it is something which in most cases is within the memory of people now living . . . The British provisions convert the freedom from deprivation of property into a right to retain privilege and perpetuate injustice. They are unreasonably restrictive

²² LRF op cit n 1 at 57.

²³ *Sunday Times* 7 October 2001.

²⁴ Centre of Housing Rights and Evictions *Land, Housing and Property Rights in Zimbabwe* (Geneva, COHRE, 2001) ('COHRE report') Annex 2, available at <http://www.cohre.org/downloads.zimbabwe%report.pdf> (last accessed on 15 December 2003).

²⁵ Own emphasis.

as to the purposes for which land can be acquired and the stringent provisions to compensation are designed to maintain the status quo.²⁶

Despite the strong objections from the PF, the property clause as it was initially incorporated into the Lancaster House Constitution did include most of the protective elements complained of. To no small extent this was due to promises made by Britain and the United States of financial assistance for a land resettlement programme, though such promises were never formally captured. Reports suggest that the amount promised by Britain was £75 million.²⁷ At the time of the adoption of the Constitution, almost 40 per cent of the land was in the hands of several thousand white commercial farmers, while the overwhelming majority of Zimbabweans were crowded into the communal areas of similar size.²⁸ If a more equitable distribution were to be achieved, a far-reaching redistribution would have to take place.

In the first decade after independence almost 10 per cent of the land was acquired by the state from the large-scale commercial farming sector and made available to settlers. This achievement was at least in part due to the financial contribution by Britain. Indeed, in light of the willing buyer, willing seller constraint imposed on the government, financial contribution from Britain was a necessity. There are conflicting reports as to the amount contributed by Britain to the land resettlement programme, ranging from £30 million to £44 million.²⁹

The 1990s saw a growing crisis take shape in Zimbabwe. In 1989 the Zimbabwe Liberation War Veterans Association (WVA) was formed with the purpose of lobbying the government for increased assistance. The struggling economy was hit by drought in 1992 and 1995.³⁰ The emerging failure of a coherent and effective land resettlement plan contributed to the woes of war veterans from ZANU and ZAPU who had not been absorbed into the national forces. Throughout the 1980s and 1990s land occupations occurred, though government forces usually, and sometimes with great brutality, removed occupiers. Towards the

²⁶ *The Patriotic Front's Response to British Constitutional Proposals* 8 October 1979 available at http://www.gta.gov.zw/Constitutinal/Lancaster/patriotic_front.htm (last accessed 15 June 2003), paras 3.2.1 and 3.2.3.

²⁷ Bertus de Villiers *Land Reform: Issues and Challenges* (Konrad Adenauer Stiftung, Johannesburg 2003) 7.

²⁸ Communal areas held in trust of the state for African tribes comprised 41,41 per cent of the total land, while large-scale commercial farming was conducted on 39,14 per cent of the land. Figures are obtained from COHRE report op cit n 24 at 11.

²⁹ Human Rights Watch *Fast Track Land Reform in Zimbabwe* Vol. 14, No 1(A) March 2002 at 9 ('HRW') at 7; COHRE report op cit n 24 at 16; De Villiers op cit n 27 at 7.

³⁰ HRW op cit n 29 at 8.

end of the 1990s, however, land occupations were growing increasingly frequent. In an effort to pacify the increasingly militant WVA, President Mugabe agreed to the payment of meaningful pensions to war veterans. This appears to have been the turning point in the relationship between the government and the war veterans. By 1999 the war veterans expressed their loyalty to the government.³¹

From 1990 onwards, however, the pace of land redistribution slowed considerably. Mistrust between the British and Zimbabwean governments emerged from reports of cronyism and maladministration. Increasingly, conditions were attached to money paid by international donors, foremost of which was Britain. In 1997 the British government formally disavowed any obligation to assist Zimbabwe with its resettlement programme.³² In Zimbabwe budgetary allocations during this time indicate that comparatively few resources were directed towards land redistribution.³³ Furthermore, where land was sought for resettlement a striking failure to follow legal procedures set out in the newly enacted Land Acquisition Act³⁴ led to a flood of court challenges, many of which were successful.³⁵ The Land Acquisition Act provides for specific notice periods, establishes the Administrative Court as the forum for objections by farm-owners whose farms have been marked for acquisition, and provides for procedures to be followed to effect eviction.³⁶

The flood of litigation surrounding the land acquisition programme was largely a result of the inept handling of procedural legal requirements. On 28 November 1997 a list of 1 471 farms was published in the *Government Gazette* as preliminary notice of the intention by government to acquire such properties for resettlement. Of these, 512 were de-listed in under a year. Of the remaining 959 farms, owners of 841 farms contested the notices by which the owner of the property was informed of the impending acquisition. In November 1998 the government issued some 800 notices in terms of s 8 of the Land Acquisition Act, giving final notice of the intention to acquire these farms. Since objection proceedings were not completed, this necessitated an application to the Administrative Court for confirmation of the notices. In February 1999 the application was

³¹ Ibid.

³² *Mail & Guardian* (SA) 22 December 1997.

³³ COHRE report op cit n 24 at 16.

³⁴ [Chapter 20:10].

³⁵ COHRE report op cit n 24 at 17.

³⁶ LRF op cit n 1 at 54.

dismissed with costs and the notices declared invalid.³⁷ Throughout this and the following year illegal occupations continued and were resisted only half-heartedly by the police, despite court orders to the contrary.³⁸

The Constitution was amended in April 2000³⁹ to allow for the seizure of land with compensation for the value of improvements to the property only, and to shift the burden of payment for the land to Britain. Constitutionally required notice periods remained unchanged. The Amendment was passed into law by proclamation.⁴⁰ The Land Acquisition Amendment Act 15 of 2000, which came into effect in November 2000, retrospectively validated actions taken under the regulations after 23 May 2000. The Amendment Act also had the effect of requiring notice only to persons with registered interests in the land to be acquired, in apparent contravention of the constitutional notice requirement contained in s 16 of the Constitution.⁴¹

Subsequent to the Administrative Court's judgment in February 1999, new notices were issued. On 21 December 2000, in a culmination of numerous applications regarding the government's land acquisition programme, the Supreme Court under Gubbay CJ declared that the manner in which such acquisitions were undertaken was unlawful and was unconstitutional in that it failed to protect the rights of both farmers and farmworkers.⁴²

In declaring the land resettlement programme unlawful the court found that the government was not following the procedures laid down in the Act. In addition, police were failing to ensure that illegal occupants of the farms were removed and to control the violence erupting on the farms. The court considered that such lawlessness was a fatal impediment to the land reform process. It gave the government until 1 July 2001 to show that it had restored law and order on the farms and had produced a land reform programme in keeping with the provisions of the Land Acquisition Act. The court expressly recognised

³⁷ *Minister of Lands and Agriculture v Fick* LA 370–99; COHRE report op cit n 24 Appendix 1.

³⁸ *Commercial Farmers Union* 2001 (2) SA 925 (ZS) at 935; AI op cit n 15 at 47–50.

³⁹ Constitution of Zimbabwe Amendment (No 16) Act 5 of 2000; see above, 13.

⁴⁰ Discussed below, 62.

⁴¹ Discussed usefully in *Land Acquisition Amendment (No 2) Act, 2002 — a Review*, available at <http://www.kubatana.net/html/archive/legisl/020919laa2note.asp?sector=LEGISL> (last accessed 15 September 2003).

⁴² *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZLR 469 (S), discussed in AI op cit n 15 at 49–50.

the dire need for land reform, and for this reason allowed land acquisitions to continue until such date.⁴³

In early July the Administrative Court under Chitakunye J found that it was prevented by the Supreme Court order of 21 December 2000 from confirming land acquisition notices since it could not find that the government had satisfied the demands of the order. The Administrative Court held that, as of 1 July 2001, all land acquisitions were illegal. As a result, the government approached the Supreme Court for an extension of the temporary interdict made by that court on 21 December 2001.⁴⁴ Under Chidyausiku ACJ, sitting with the four members of the bench who had served with Gubbay, the court confirmed that land acquisitions by the government until 1 July 2001 had been lawful in terms of the temporary interdict. Chidyausiku ACJ was alone in finding, however, that the government did not have to comply with the demands of the December order in showing that a proper land reform programme was in place before it could continue with land acquisitions after 1 July 2001.⁴⁵ Consequently, the court confirmed by a majority of four to one that the government now had to satisfy the original terms of the court order handed down in December 2000 before it could lawfully acquire any more land.

In September, and before the expanded court, the government brought another application for an order declaring that law and order had been restored, and that the government had presented a proper land programme in terms of the legislation.⁴⁶ On the government's own argument this application flowed from the hearing of December 2000, though the legal basis for such a submission is unclear since the return day of the interim order was not extended. Despite this submission, and the fact that four of the five judges handing down the judgment in that matter remained on the bench, the court was constituted by the new Chief Justice Chidyausiku, all three recent appointments to the Supreme Court, and only one long-serving appeal judge, Judge Ebrahim.⁴⁷

As chair of the Presidential Constitutional Commission of 1999, Chief Justice Chidyausiku was largely credited with devising the framework for the accelerated land reform programme in place after 2000.⁴⁸ Two of the three recent appointments, Judge Cheda and

⁴³ HRW op cit n 29 at 19–21.

⁴⁴ *Minister of Lands, Resettlement and Rural Development v Paliouras and Another* Section-55-2001.

⁴⁵ LRF op cit n 1 at 58.

⁴⁶ LRF op cit n 1 at 59.

⁴⁷ Ibid.

⁴⁸ US Department of State op cit ch 1 n 19.

Judge Malaba, were direct beneficiaries of the government's land policies. An application for the recusal of the three judges who had an obvious and personal interest in the outcome of the matter was, however, dismissed after perfunctory deliberation.⁴⁹ The court found on a majority of four to one that law and order had indeed been restored, and that the government had a workable programme of land reform in place, under which land acquisitions could lawfully continue.⁵⁰

Land acquisitions have indeed continued since then, not only displacing white farmers but also badly affecting black farmworkers. The farmworkers are implicitly linked to the support given to the MDC by white commercial farmers, and are often forced to attest their loyalty to ZANU-PF. There have been many reports of assaults and intimidation directed expressly at farmworkers who do not, as a rule, benefit from the land resettlement programme.⁵¹

Early in April 2003 over 1 000 farmworkers and their families were evicted from a single estate in Chimanimani when the estate was designated for resettlement. Eviction reportedly took place in defiance of a court order. There are conflicting reports regarding the extent to which ZANU-PF members prevented humanitarian organisations from easing the plight of those evicted.⁵² An urgent application to the High Court resulted in a strongly worded order by Judge Tedi Karwi setting aside the purported designation of the estate for resettlement, and ordering the Minister of Lands, Agriculture and Rural Resettlement, the Minister of Defence, the police commissioner, and the Zimbabwe army commander to desist from any interference with the workers' return to the estate.⁵³ Appointed in 2002, Judge Karwi is a relatively new member of the bench.⁵⁴

3.1.2 *The General Laws Amendment Act 2 of 2002*

It is arguable that the land issue rose to prominence after 2000 when parliamentary elections, and subsequent presidential elections in 2002, placed ZANU-PF under significant pressure to accommodate demands by war veterans and to deflect attention from its poor performance in previous years. The government's use of its law-making powers in the context of these elections is the second area in which it was repeatedly

⁴⁹ LRF op cit n 1 at 59.

⁵⁰ *Minister of Lands, Agriculture and Rural Resettlement and Others v Commercial Farmers Union* Section-111-2001.

⁵¹ HRW op cit n 29 at 19–21.

⁵² *Daily News* 3 April 2003.

⁵³ *Daily News* 9 April 2003.

⁵⁴ *The Herald* 14 January 2003.

brought before the courts after 2000. This section discusses the striking down of the General Laws Amendment Act 2 of 2002 by the Supreme Court in February 2002. The section also deals with Tsvangirai's challenge to the manipulation of voter registration and the voters' roll.

The General Laws Amendment Act attempted to amend more than 40 laws. A large number of amendments to the electoral law were included in the bill only after its second reading. These proposed amendments were not gazetted, nor were they referred to the parliamentary legal committee or the justice portfolio committee. They included a range of electoral issues such as the appointment of monitors, voter education, the security of ballot boxes after the closing of polls, postal voting, and the jurisdiction of the Administrative Court in relation to election petitions. Inter alia, the Act required that election monitors were to be members of the Public Service Commission, effectively ensuring that individuals affiliated to civil society organisations could act only as observers. It also, in s 34, granted the registrar-general the power not only to correct the voters' roll but also to 'change (whether on the oral or written application of a voter or not) the original name or address of the voter to an altered name or address'.⁵⁵ The Act further sought to criminalise voter education by civil society organisations and prohibited the funding of such organisations by foreign donors.⁵⁶

At the same time Electoral (Amendment) Regulations 2002 (No 10) SI 8A of 2002, which provided that observers were not mandatory at every polling station, were promulgated. Only monitors were granted powers to request remedial action in respect of polling irregularities and to ensure the integrity of ballot boxes during transport. In addition, observers were invited to act as such at the Minister's discretion and had to represent local organisations.⁵⁷

The Supreme Court's reasoning in declaring the Act void was based exclusively on its formal deficiencies. On 8 January 2002 the General Laws Amendment Bill went through the normal parliamentary processes and was defeated on its third reading. Only 22 ZANU-PF members were present in the house. Standing order 127 prevents a bill from being offered twice in the same session. Nevertheless, the Minister of Justice, Patrick Chinamasa, gave notice that he would move that the House rescind its decision and that standing order 127 be suspended.

⁵⁵ Brian Kagoro *Implications of the General Electoral Amendment Act*, available at <http://www.kubatana.net/html/archive/elec/020308ciznla.asp?sector=LEGISL> (last accessed 2 September 2003).

⁵⁶ Ibid.

⁵⁷ Ibid.

On 10 January a House dominated by ZANU-PF passed the two motions. The bill was approved on its third reading with a majority of 62 to 47.⁵⁸ The bill was promulgated on 4 February 2002 with immediate effect.⁵⁹

A Member of Parliament challenged the validity of this legislation in the Supreme Court, now without Judge McNally and Judge Muchechetere.⁶⁰ By a majority of three to one, the Supreme Court decided on 27 February 2002 that the legislation was invalid because it had not been properly passed by Parliament. Cheda JA and Ziyambi JA concurred with Ebrahim JA in finding that the third reading vote had been illegally rescinded and that it had thus been illegally presented for another reading on 10 January 2002. The court agreed that standing orders prohibited the course that had been followed and could not be suspended in the manner in which the ruling party had sought to do.⁶¹ Only Malaba J dissented.

The impact of the judgment was, however, limited. Firstly, the Act was invalidated only nine days prior to the presidential election. By this time accreditation of observers and monitors was complete and voter education, especially in rural areas, near impossible.⁶² Secondly, the president made use of ss 157 and 158 of the Electoral Act⁶³ to pass the Electoral (Amendment) Regulations 2002 (No 13) SI 41B on 1 March 2002, and Electoral Act (Modification) Notice 2002 SI 41D on 5 March. Together, these notices mirrored the provisions of the Act in most important respects.⁶⁴ In addition, SI 41D of 5 March 2002 provided for the validation of any action taken in terms of the General Laws Amendment Act. Since the Supreme Court had not expressed itself on the lawfulness of the content of the Act, the regulations had the effect of passing into law the Act rejected by the court only a few days previously.⁶⁵

⁵⁸ *Daily News* 11 January 2002; *Zimbabwe Independent* 8 February 2002.

⁵⁹ Human Rights Forum Zimbabwe *Human Rights and Zimbabwe's Presidential Election: March 2002*, chs 4 and 6, available at http://www.hrforumzim.com/special_hrru/Special_Report_4_2002%20Election/SR_04.htm#_ftn20 (last accessed 10 December 2003); and http://www.hrforumzim.com/special_hrru/Special_Report_4_2002%20Election/SR_06.htm (last accessed 10 December 2003), particularly ch 4.

⁶⁰ *Biti & another v Minister of Justice & another* Section-10-2002.

⁶¹ *Financial Times* (UK) 28 February 2002.

⁶² Kagoro op cit n 55.

⁶³ [Chapter 2:01].

⁶⁴ Human Rights Forum Zimbabwe op cit n 59, particularly ch 6.

⁶⁵ Chapter 4.

3.1.3 *Tsvangirai v Registrar-General of Elections*

Morgan Tsvangirai, leader of the largest opposition party in Zimbabwe and presidential candidate in the 2002 elections, has launched several proceedings in relation to the presidential elections held that year. An indication of the seriousness with which these challenges are viewed by the government is that Mugabe still demands that the challenge to his presidency be withdrawn before he will enter into negotiations with the MDC regarding a peaceful transition of government.⁶⁶

In the run-up to the presidential elections of 2002 the voters' roll was made available for inspection from 19 November to 23 December 2001.⁶⁷ Tsvangirai brought an application in the High Court for an order directing the registrar-general to make available to him an electronic copy of the voters' roll in respect of all registered voters up to 2 January 2002.⁶⁸ The court made the order on 31 December 2001, with which the registrar-general complied on 7 January 2002. However, during January several presidential notices were issued extending the closing date for the registration of voters. There are credible reports of continued voter registration and fraudulent registration until well into March 2002.⁶⁹ Tsvangirai applied again to the High Court on 25 February 2002 to obtain an updated voters' roll, which was resisted by the registrar-general because the updated roll was allegedly not yet available.⁷⁰

As mentioned earlier, on 5 March 2002 the president issued the Electoral Act (Modification) Notice 2002 SI 41D, dealing with a broad range of issues regarding the form and manner in which the election would take place. These included postal voting, the validity and availability of the supplemented voters' roll, the requirements for those persons who had been removed from the voters' roll, the validity of actions taken in terms of the invalidated General Laws Amendment Act, and the voting rights of non-citizens.⁷¹

There are credible reports of police and army personnel having to vote in the presence of their commanding officers, as well as a severe reduction of polling stations in urban areas, where the MDC has the

⁶⁶ *News24* (SA) 31 July 2003; *Financial Gazette* 3 July 2003; *Sunday Independent* 4 January 2004.

⁶⁷ *Daily News* 8 January 2002.

⁶⁸ *Tsvangirai v Registrar-General of Elections* HC 1847/2002.

⁶⁹ Human Rights Forum Zimbabwe op cit n 59 ch 6; *Daily News* 19 February 2002, 6 March 2002, 7 March 2002; *Financial Gazette* 6 March 2002.

⁷⁰ Judge G Friedman *Tsvangirai and Others v Registrar General of Elections of Zimbabwe: Report by Independent Observer to The Forum of Barristers and Advocates of the International Bar Association* 15 January 2003 ('Friedman Report') para 17.

⁷¹ Human Rights Forum Zimbabwe op cit n 59 ch 6.

strongest support base.⁷² MDC supporters reported having been removed from the voters' roll immediately before the elections.⁷³ Tsvangirai then filed an application directly to the Supreme Court challenging the constitutionality of s 158 of the Electoral Act as well as the Modification Notice made in terms of the section.⁷⁴ In this application he included the relief previously sought in the High Court, an application that was abandoned.

At the hearing on 8 March, the day before polling was scheduled to start, it transpired that the voters' roll had been updated until 27 January. Two supplementary voters' rolls existed, of persons registered between 27 January and 3 March, and persons disqualified as voters.⁷⁵ Despite the urgency of the matter the Supreme Court reserved judgment, which was handed down only on 4 April 2002, almost a month after polling began on 9 March 2002. The court found, on a majority of four to one, that the applicant lacked the required standing to seek the requested relief.⁷⁶

The majority found that only those persons who alleged that they had been personally prevented from registering or voting would have standing to bring an application of the kind before them under s 24(1) of the Constitution. The majority came to the startling conclusion that the applicant, as presidential candidate, did not have a constitutional interest in the exercise of his potential supporters' right to vote.⁷⁷

Sandura JA, in the minority, found that there was at least merit in the argument made by Tsvangirai's counsel that s 158 violated the right to due process of the law in terms of s 18 of the Constitution in that it illegally delegated to the president the power to make the Electoral Law. As a result, Sandura JA would have found that the applicant as presidential candidate had established a legal interest in the proper passing of electoral legislation.⁷⁸

It would seem that the majority was at pains to avoid a substantive engagement with the legality of the president's actions. The Legal Resources Foundation, a non-profit public-interest law firm in Zimbabwe, has labelled the majority's judgment 'unsupportable' and has presented a convincing argument against the conclusions

⁷² Ibid.

⁷³ *TimesOnline* 6 March 2002.

⁷⁴ *Tsvangirai & others v Registrar General of Elections of Zimbabwe* (unreported judgment, Case No SC76/2002).

⁷⁵ Friedman Report op cit n 70 para 20.

⁷⁶ Friedman Report op cit n 70 para 23.

⁷⁷ Friedman Report op cit n 70 para 32.

⁷⁸ LRF op cit n 1 at 75–6.

reached by the majority.⁷⁹ The impression of avoidance is strengthened by the fact that it took almost a month for the court to deliver judgment in a matter that came before it as a matter of extreme urgency. Since the Supreme Court did not deal with the merits of the case, Tsvangirai has launched two further applications in the High Court. The first is an election petition in terms of s 102 of the Electoral Act, challenging the results of the presidential election, and will be dealt with below.

The second case, brought with MDC election co-ordinator Nomore Sibanda and the MDC as second and third applicants respectively, sought an order from the High Court directing the registrar-general to make available to the applicants electronic copies of the voters' roll to 10 January, the updated voters' roll to 27 January, the supplementary voters' roll to 3 March, and the supplementary roll of persons disqualified.⁸⁰ The registrar-general indicated that the requested rolls were only available in hard copy, not in electronic format. Makarau J dealt only with the issue of whether the applicants were entitled to an electronic copy of the voters' roll. She found that the text of the Electoral Act referred to printed copies only, and for this reason the applicant was not entitled to electronic copies.

The applicants noted an appeal to the High Court's judgment and requested that hard copies of the voters' roll be made available to them in the interim. In reply the registrar-general now claimed that his office did not have the necessary resources to produce the requested copies at all.⁸¹

The bench hearing the appeal⁸² consisted of three judges, Ziyambi JA, Malaba JA and Gwaunza AJA, who wrote the unanimous judgment. The court did not deal with the issue that had been before the High Court and which was in dispute before it. Instead, it found that the applicants were not entitled to a copy of the voters' roll at all, by a process of reasoning that has been labelled 'insupportable' and 'untenable' by an independent observer of the IBA.⁸³

Three outstanding features of the judgment deserve specific mention. The first is that the court in the first place was not entitled, in terms of Zimbabwean common law, *mero motu* to inquire into an issue that the parties had agreed upon without having all relevant facts before it.⁸⁴ Secondly, in a remarkably scathing attack on Gauntlett SC,

⁷⁹ LRF op cit n 1 at 76–8.

⁸⁰ *Tsvangirai & others v Registrar General of Elections of Zimbabwe* (unreported judgment, Case No H 12092/2001).

⁸¹ *Morgan Tsvangirai & others v The Registrar General of Elections* (unreported judgment, Case No SC 93/2002, typed page 7).

⁸² Ibid.

⁸³ This case is very helpfully discussed in the Friedman Report op cit n 70.

⁸⁴ Friedman Report op cit n 70 paras 41–7.

Tsvangirai's counsel, Gwaunza AJA refused to consider supplementary written submissions which Gauntlett SC sought to introduce as a result of the unexpected direction of the bench's questioning.⁸⁵ As pointed out by the IBA's independent observer, this is hardly unusual procedure and certainly not deserving of the expression of grave displeasure that was forthcoming. Thirdly, the court creates worrying precedent in its interpretation of s 20 of the Declaration of Rights, which provides for freedom of expression as discussed earlier.⁸⁶ These three features are cause for concern about the Supreme Court's judgment.

3.1.4 *Conclusions*

The overall impact of the packing of the bench is difficult to assess. The initial assumption is that, with a bench consisting mainly of recent appointments with strongly expressed government sympathies and clear interests in the government's more controversial policies, the Zimbabwe Supreme Court is now a political rather than legal branch of government. The court's apparent reluctance to engage substantively with politically sensitive issues is an indication that the integrity of the Supreme Court, dependent on its real and perceived impartiality, has been compromised.

3.2 The High Courts

With fewer than twenty judges, Zimbabwe has a relatively small High Court bench. There have been a significant number of resignations and retirements over the past three years as well as the necessary appointments. Judges have experienced intimidation and threats from the militia and politicians. Among the most politically contentious issues in the High Courts in recent years have been the election petitions relating to the parliamentary election in 2000 and the criminal trials of MDC leader Tsvangirai. This section will also deal with the widely condemned arrests of retired Judge Blackie and Judge Paradza, both members of the High Court bench.

3.2.1 *The election petitions*

In terms of s 132 of the Electoral Act, any person claiming to have had a right to be elected at an election, or any person alleging to have been a candidate at such an election, or any registered voter in the constituency concerned, may lodge a petition complaining of undue election of a Member of Parliament. Such a petition lies to the High Court in terms of s 133. Within a month of the election in June 2000 the MDC

⁸⁵ At typed page 3–4.

⁸⁶ See above, 14–15.

filed petitions with the High Court challenging the electoral results in thirty-seven parliamentary constituencies. In the petitions the party alleged vote-rigging, intimidation and other irregularities. The Legal Resources Foundation says success in only eighteen of these petitions would have been sufficient to give the MDC a majority in Parliament.⁸⁷

Upon the lodging of a petition the matter is to be set down by the registrar of the court. The Judge President assigns a judge for hearing. Before such allocation the president purported to place the petitions brought by the MDC beyond judicial reach by way of a presidential notice⁸⁸ in terms of s 158 of the Electoral Act. The notice sought to prohibit the nullification of the election of any Member of Parliament by declaring that the elections had been free and fair and that the petitions lodged were vexatious.⁸⁹ The Supreme Court, still under Gubbay, found this to be an unconstitutional attempt to deny the applicants the right afforded them by s 18(9) of the Constitution to a court hearing.⁹⁰

When the petitions were finally allocated for hearing they were given to only three judges.⁹¹ This appears to be in defiance of the provisions of the electoral rules demanding that they be dealt with as speedily as possible.⁹² It virtually ensured that the petitions could not be heard and determined as required. A few matters were dealt with speedily,⁹³ but most others have been seriously delayed.⁹⁴ It appears that only fifteen petitions have been dealt with at the level of the High Court, which leaves the majority of petitions pending more than three years after they were filed.⁹⁵ Where results have been overturned, which has occurred in about half the cases heard,⁹⁶ this has largely been on the basis of credible evidence of violence and intimidation. For example, in overturning the election result for the Gokwe North and East constituencies, Makarau J found that 'uncontroverted and reliable

⁸⁷ LRF op cit n 1 at 99.

⁸⁸ Electoral Act (Modification) (No 3) Notice 2000 SI 318.

⁸⁹ LRF op cit n 1 at 100.

⁹⁰ *MDC & another v Chinamasa NO & another* 2001 (1) ZLR 69 (S).

⁹¹ *MDC & another v Chinamasa NO & another* supra under the heading *The Factual Background*; LRF op cit n 1 at 101 puts the number at four judges.

⁹² In terms of s 31 of the Electoral (Applications, Appeals and Petitions) Rules 1994 SI 74A.

⁹³ For example, Devittie J heard the Mutoko South election petition (2001 (1) ZLR 308) in mid-March and delivered judgment on 27 April 2001; and Garwe J heard the Chinhoyi election petition (2001 (1) ZLR 334) in February and March 2001 and delivered judgment (dismissing it) on 9 May 2001.

⁹⁴ LRF op cit n 1 at 101.

⁹⁵ Interview with David Coltart 4 December 2003.

⁹⁶ Ibid.

evidence has been led from not less than ten villagers in the constituency that they were subjected to intimidation and violence on account of their membership of the MDC during the run-up to the election'.⁹⁷

Further delays have been encountered in the preparation of the appeals. For the purposes of an appeal to the Supreme Court the record of proceedings in the High Court must be transcribed, a cause of delay in all appeals, not just those involving elections. With regard to the petitions, concerns have been voiced that delays are deliberate.⁹⁸ It appears that transcription of only one record has been completed and that record is for an appeal by a leading ZANU-PF member, Olivia Muchena for the Mutoko South election district. Delays and continuing intimidation have persuaded several petitioners to withdraw their matters or not to take the High Court's decision on appeal.⁹⁹ Significant levels of violence have marred by-elections, especially in the Harare regions of Kuwadzana and Highfield.¹⁰⁰ These by-elections have also been marked by improper election procedures and credible allegations of significant vote-rigging by election officials.¹⁰¹

3.2.2 *Morgan Tsvangirai v Robert Gabriel Mugabe & others*

Since the Supreme Court refused to engage substantively with the presidential election petition initially brought before it,¹⁰² Tsvangirai launched a further application on 12 April 2002. He was, however, unable to obtain a date for hearing from the registrar of the High Court. Despite an order by Garwe JP on 15 January 2003 that the registrar set the matter down, the MDC's legal team had to bring an urgent application for enrolment of the matter.¹⁰³ The registrar, an officer of the court, took the unusual step of opposing the application instead of abiding by the decision of the court. Even more unusually, the same legal team represented all respondents, including the registrar. On 4 July 2003 Hlatshwayo J issued an order that the matter be set down for hearing in accordance with Garwe JP's ruling.

The Judge President, in his ruling of 15 January 2003, had further ordered that the proceedings be separated, with an initial hearing dealing with legal issues only. This hearing was eventually set

⁹⁷ *Daily News* 16 January 2003.

⁹⁸ *Weekend Tribune* 26–7 April 2003.

⁹⁹ Interview with David Coltart 4 December 2003.

¹⁰⁰ Amnesty International Urgent Action Release 11 March 2003.

¹⁰¹ *Daily News* 26 February 2003; *Daily News* 28 March 2003; *Zimbabwe Independent* 28 March 2003; IOL 1 April 2003.

¹⁰² See above, 34–5.

¹⁰³ *Daily News* 19 June 2003.

down for the week of 3 November 2003. At the hearing the respondents' counsel sought the court's permission to remove the fourth respondent (the Electoral Supervisory Commission) from the matter, an attempt that was opposed by the applicant. It is not clear what effect the respondents sought to achieve, aside from a further postponement. The court reserved judgment on this question.

Tsvangirai's case rests on several grounds, the most important of which relate to the constitutionality of s 158 of the Electoral Act. So far, the courts have not substantively engaged with this section, which gives the president sweeping powers to amend electoral legislation.¹⁰⁴ However, the petitioner also relies on the alleged formal invalidity of the various election regulations and notices, the interpretation of s 149 of the Electoral Act, and the unlawfulness of various voting and registration procedures. As the petitioner says in his heads of argument, success on any of the grounds raised will have the effect of deciding the petition without the need to resort to hearing further evidence.

The respondents have put in issue the High Court's jurisdiction to hear the matter, which is based in part on the alleged unconstitutionality of s 158. The respondents' argument is based on an interpretation of ss 3 and 24 of the Constitution that confers on the Supreme Court exclusive jurisdiction to hear matters concerning the constitutionality invalidity of laws.¹⁰⁵ Though the argument appears to have little merit, it potentially offers the court a technical ground on which to avoid dealing with the legal substance of the matter. It also offers the government a ground on appeal against an adverse decision by the High Court to the Supreme Court. The creation of precedent at either level would have the effect of depriving Zimbabweans of the protection of the Declaration of Rights in ordinary litigation.

3.2.3 *Criminal charges against Morgan Tsvangirai*

There are two criminal prosecutions against Tsvangirai under way. Both arise out of his activities as leader of the opposition party. Along with Welshman Ncube and Renson Gasela, Tsvangirai was charged with treason as a result of allegedly employing Ari Ben-Menashe to kill Mugabe ahead of presidential elections in 2002. Tsvangirai and his alleged co-conspirators were charged two weeks before polling began.¹⁰⁶

Evidence presented to date in much publicised hearings has created strong doubt regarding the integrity of Ben-Menashe, the state's

¹⁰⁴ See above, 34–5.

¹⁰⁵ Petitioner's Heads of Argument, Section C *The High Court's Jurisdiction*.

¹⁰⁶ *News24* (SA) 9 June 2003.

main witness, a man who has been implicated in underhand dealings with the government. Presiding judge Garwe JP has ruled in favour of the accused in several interlocutory applications relating to the admissibility of evidence. For example, Garwe JP refused to accept a certificate issued by the Minister for State Security which purported to prohibit Ben-Manashe from revealing details of his contract with the government for national security reasons. This forced Ben-Manashe to answer questions directed at him, though evidence was led *in camera*.¹⁰⁷

In May 2003, however, Garwe JP upheld a similar certificate, thereby preventing Tsvangirai's counsel from accessing documents relating to transactions between Zimbabwe's Central Intelligence Organisation (CIO) and Ben-Manashe's company.¹⁰⁸ The state's remaining evidence, consisting in the main of a badly recorded videotape of the meeting between Tsvangirai and Ben-Manashe, whose credibility has been convincingly attacked by Tsvangirai's counsel, George Bizos, appears at best inconclusive.¹⁰⁹ At the close of the state's case counsel for Tsvangirai applied for the accused's discharge, arguing that the state's evidence did not establish a *prima facie* case.¹¹⁰ The court did not dismiss the case against Tsvangirai, but discharged Ncube and Gasela.¹¹¹ The trial continues before Garwe JP.

All three accused were released on bail in relation to these charges. The state sought what has been described as a 'gagging order' from the High Court, banning Tsvangirai and his co-accused from making statements which are 'inflammatory' or 'incite public disorder' during the period of their trial. Garwe JP refused to make such an order on procedural grounds.¹¹²

An independent observer of the IBA, Judge JW Smalberger, attended the opening of the trial on 3 February 2003. In his report he confirms media reports of serious attempts by the police to refuse journalists, diplomatic representatives and international observers entry to proceedings.¹¹³ The court ordered with some apparent reluctance that the public be allowed to witness proceedings. Judge Smalberger says that nevertheless circumstances were 'such as to

¹⁰⁷ IOL 12 February 2003.

¹⁰⁸ *Daily News* 30 May 2003.

¹⁰⁹ *Mail & Guardian* (SA) 26 June 2003.

¹¹⁰ SABC (SA) 27 June 2003; *The Herald* 7 July 2003.

¹¹¹ *The Natal Witness* 9 August 2003.

¹¹² *The Telegraph* 4 July 2003.

¹¹³ *The Natal Witness* 10 February 2003.

discourage potential spectators from attending proceedings'.¹¹⁴ Though the matter was initially set down for one month only, proceedings continue at present. If convicted, the accused faces the death penalty.

On 6 June 2003 Tsvangirai was again arrested, along with Ncube, in connection with mass protests organised by the MDC. The protests were widely considered to have successfully shut down most urban centres for almost a week.¹¹⁵ Ncube was later released and charges against him were dropped.¹¹⁶ It appears that Tsvangirai was charged for contravening provisions of the Public Order and Security Act relating to police approval for the demonstration. The initial order was for him to be detained until 10 July. After spending fourteen days in prison, Tsvangirai was released by Judge Susan Mavangira on extremely high bail conditions amounting to about US \$132 000, to be paid in the form of a cash bail bond and other property deeds or rights to assets.¹¹⁷ Judge Mavangira further ordered Tsvangirai to refrain from advocating the removal of Mugabe and his government by 'violent or other unlawful means'.¹¹⁸

3.2.4 *The arrests of retired Judge Blackie and Judge Paradza*

Among the most conspicuous steps taken by the state in interfering with Zimbabwe's judiciary are the arrests of retired Judge Blackie and Judge Paradza. Since both High Court judges handed down several judgments going against the government's interests, the arrests were widely regarded as a retributive move. Both cases have since been withdrawn.

Judge Blackie's most prominent anti-government action from the bench was the conviction of the Minister of Justice for contempt of court, sentencing him to three months' imprisonment, an order that has been ignored by the police.¹¹⁹ Judge Paradza issued several recent orders that were unpalatable to the government. In late 2002 he struck down fifty-four eviction notices on the ground of formal deficiencies. He also ordered the government to issue a passport to human rights activist Judy Todd, daughter of the New Zealand-born former prime

¹¹⁴ Judge J W Smalberger *In Re: (1) The State v Mr Justice Fergus Blackie, (2) The State v Mr Morgan Tsvangirai and Two Others: Report by Independent Observer to The Forum of Barristers and Advocates of the International Bar Association* 18 February 2003 ('Smalberger Report') para 9.

¹¹⁵ IOL 6 June 2003.

¹¹⁶ SABC (SA) 10 June 2003.

¹¹⁷ *Mail & Guardian* (SA) 23 June 2003.

¹¹⁸ *Ibid.*

¹¹⁹ *Mail & Guardian* (SA) 23 June 2003 at 12.

minister of Rhodesia, Sir Garfield Todd. In January 2003 Judge Paradza ordered the release of Harare mayor Elias Mudzuri, a prominent MDC member. The police ignored this order for two days.¹²⁰

In both cases the charges put to the arrested judges relate to the performance of their office. Witnesses in both cases would have to have been other members of the bench. In the case of Judge Paradza, the government had indicated the intention to call at least Judge Cheda, Judge Malaba and Judge Lawrence Kamocha as state witnesses, thereby publicly pitting judges against one another. Moreover, where one judge acts as a hostile witness to another in criminal proceedings, he or she will be subjected to cross-examination and the inevitable attacks on his or her credibility.

Judge Blackie had been attacked in the government press already in 1995 when he took the extraordinary step of travelling to a police station to hear bail applications on a Sunday afternoon. It was alleged that the judge's motivation was that the primary accused was white. However, as discussed earlier, the judge was cleared of such charges by the investigations of a tribunal set up in terms of s 87 of the Constitution.¹²¹

The arrest of Judge Blackie in 2002 related to his hearing of the appeal of Tara White, a woman accused of theft.¹²² The appeal was due to be heard by Blackie J and Hlatchwayo J as one of several criminal appeals from the magistrate's court. On the relevant day Judge Hlatchwayo did not arrive, and Judge President Garwe assigned Judge Makarau to the matter to make up the full bench.¹²³ Since Judge Makarau had not had an opportunity of properly perusing the papers relating to the appeals, Judge Blackie played the lead role during the hearings. He also prepared the judgments for the relevant appeals, including that of White, whose conviction was overturned. There is some confusion about whether Judge Makarau saw and agreed with the judgment written by Judge Blackie, but he received no complaint either from Judge Makarau, Judge President Garwe or Chief Justice Chidyausiku prior to his arrest.¹²⁴

He was persuaded to leave his home in the company of police officers at 4 am on Friday 13 September 2002 and only later told that he was under arrest.¹²⁵ The charge eventually put to him was that of

¹²⁰ IOL 18 February 2003; IOL 8 July 2002, 5 July 2002.

¹²¹ See above, 20.

¹²² LRF op cit n 1 at 12.

¹²³ Ellis, *G Memorandum Concerning the Arrest of the Honorable Mr Justice Blackie* 26 September 2003, available from ellis@maths.uct.ac.za.

¹²⁴ Ibid.

¹²⁵ Ibid.

defeating or obstructing the course of justice, alternatively contravening the Prevention of Corruption Act.¹²⁶ The particulars of the charge were that Blackie J knew White and had for that reason caused the judgment in the matter to be written and handed down without the knowledge or agreement of Makarau J.¹²⁷ In Justice Smalberger's report to the IBA attention is drawn to the fact that the reasons advanced by Blackie J for allowing the appeal appear to be convincing.¹²⁸

Charges laid against White include an allegation of a sexual relationship with Judge Blackie. Both White and Judge Blackie denied the charges and were eventually released on bail. The matter was remanded to 30 June 2003 for trial in the Regional Court.¹²⁹ After a further postponement the state withdrew all charges against Judge Blackie on 30 June 2003.¹³⁰

The arrest of Judge Paradza on 17 February 2003 is of particular significance since he was an active judge at the time of his arrest. This arguably brings him within the ambit of s 87 of the Zimbabwe Constitution. Judge Paradza was arrested in chambers shortly before he was due to hear an urgent application. He was taken to the police station in Harare and detained for twenty-four hours before being released on bail. It has been alleged that the arresting police officers told the judge that his arrest was retribution for a string of anti-government decisions.¹³¹ These statements have been denied in the state-sympathetic media.¹³²

In a letter signed on 5 March 2003 ten High Court judges including Judge Kamocha, who was expected to testify for the government, condemned the manner of arrest of Judge Paradza.¹³³ In doing so they drew attention to s 87 of the Constitution as laying down the correct and exclusive procedure for acting against a judge alleged to have committed misconduct. They point out that any other procedure, and particularly any procedure that allows a police official to arrest an active judge on mere suspicion of illegal action, has the effect of intimidating judges and severely undermining the rule of law.

¹²⁶ [Chapter 9:16].

¹²⁷ Reuters 14 September 2002.

¹²⁸ Smalberger Report op cit n 114 para 3.

¹²⁹ Ellis op cit n 123.

¹³⁰ *Mail & Guardian* (SA) 30 June 2003; General Council of the Bar of South Africa *Media Release* 10 September 2003.

¹³¹ IOL 18 February 2003; *Daily News* 18 February 2003.

¹³² *The Herald* 19 February 2003.

¹³³ *Daily News* 7 March 2003; *The Herald* 7 March 2003; *The Herald* 6 March 2003; *Daily News* 3 July 2003.

In an interview with the *Zimbabwe Independent* the president of the Law Society of Zimbabwe, Sternford Moyo, said the procedure adopted by the police was premature. Criminal prosecution was possible only once a judge had been lawfully suspended on advice from a tribunal constituted in terms of s 87 of the Constitution, since it no longer interfered with the exercise of a judicial function.¹³⁴ Condemnation of the police action was expressed in more reserved language in a joint statement issued on the same day by the Chief Justices for the Southern African region: Botswana, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Uganda and Zambia.¹³⁵ The United Nations special rapporteur on the independence of the judiciary also condemned the arrest, stating that it was 'but one [development] in a series of institutional and personal attacks on the judiciary and its independent judges . . . which has left Zimbabwe's rule of law in tatters'.¹³⁶ He added that '[w]hen judges can be set against one another, then intimidated with arrest, detention and criminal prosecution there is no hope for the rule of law which is the cornerstone of democracy. It paves the way for governmental lawlessness.'¹³⁷

An indication of the line of argument that might have been taken by the government was given in a report published in the state-sympathetic *Herald*. In the report, unnamed legal experts argued that s 87 did not apply to criminal conduct by judges such as 'rape, murder, fraud or corruption'. The argument continues that the Uniform Rules of Court provide in Rule 18 that no civil process of court may be instituted against the president or any of the judges of the High Court without leave of the court. No similar provision exists in relation to criminal charges.¹³⁸ This line of argument, should it ever have been accepted by the Supreme Court, would have placed all judicial officers under immense political pressure, particularly in the context of the widespread abuse of power by the police in arresting persons considered to be a threat to the state agenda.¹³⁹

Pursuant to his arrest, Paradza J sought to bring an application to the Supreme Court relating to the constitutionality of his arrest and imprisonment. In his papers to the Supreme Court he alleged that the Judge President and the Chief Justice had prior knowledge of the intended unlawful arrest and had failed to take steps to stop the arrest

¹³⁴ *Zimbabwe Independent* 21 February 2003; and see Linington op cit n 2 1–2.

¹³⁵ Media statement by Southern African Chief Justices 5 March 2003.

¹³⁶ *Daily News* 27 February 2003.

¹³⁷ United Nations Press Release 19 February 2003.

¹³⁸ *The Herald* 6 March 2003.

¹³⁹ This is discussed in greater detail below, 4.3 in ch 4.

from taking place or to warn the judge of the impending arrest. Paradza J alleged that the Judge President and the Chief Justice acted under the dictation of the government.¹⁴⁰

Judge Paradza's submissions squarely put the independence of the judiciary in issue. They appeared to be an attempt to force the Supreme Court to deal substantively with the question.¹⁴¹ They also made it difficult for the Chief Justice to preside over the matter, as he has done over most politically sensitive cases since his appointment. The application to the Supreme Court was accompanied by an application for the recusal of the Chief Justice and Judge Cheda. Cheda's brother, Maphios, a judge in the High Court in Bulawayo, was listed as one of ten state witnesses in the case against Judge Paradza.

The Supreme Court initially refused an application for recusal. However, after several months of adverse reaction in legal circles the Chief Justice and Judge Cheda withdrew from the matter.¹⁴² This meant that Judge Sandura presided over the matter as the most senior judge. He is the last remaining member of the Supreme Court as it was constituted before the resignations of Chief Justice Gubbay, Judge Ebrahim and Judge McNally.¹⁴³

The hearing was set for 16 September 2003. Judge Paradza's legal team contended that the arrest was not reasonably required to secure the judge's eventual attendance at his trial. They said the arrest was in conflict with the constitutional provision for the establishment of a tribunal in cases of judicial misconduct. Under the leadership of Judge Sandura, the state's justification for the arrest and detention of Judge Paradza was subjected to critical scrutiny from the bench and rapidly collapsed as the state conceded that there was no reasonable basis for the arrest, imprisonment and remand of Judge Paradza. After a short adjournment Sandura J issued an order declaring the actions by the state unconstitutional and granting costs in favour of Judge Paradza, as well as ordering the bail money to be returned.¹⁴⁴

It is of course impossible to speculate how the hearing might have progressed under the leadership of Chief Justice Chidyausiku. One cannot but notice, however, that the court's strong and swift reaction to the state's failure to answer adequately the case made out by Judge Paradza is indicative of the continuing independence of

¹⁴⁰ *Zimbabwe Independent* 7 March 2003.

¹⁴¹ *The Herald* 6 March 2003; *The Independent* 7 March 2003.

¹⁴² *Financial Gazette* 7 May 2003; *The Herald* 10 July 2003.

¹⁴³ General Council of the Bar of South Africa Media Release, 17 September 2003.

¹⁴⁴ *Ibid.*

Judge Sandura, who has delivered minority judgments in many politically sensitive cases brought before the Supreme Court to date.

The impact of this ruling is not yet clear. The criminal charges against the judge have been dropped.¹⁴⁵ There has been virtually no reaction against the ruling in the state-sympathetic press or from the government, despite a strongly worded defence of the arrest by the Justice Minister in its immediate aftermath.¹⁴⁶ Judge Paradza has not been suspended or dismissed and will have to continue fulfilling his judicial functions alongside those colleagues who were reportedly prepared to testify against him.

3.2.5 Conclusions

The state has successfully appealed against unfavourable rulings on politically sensitive matters by High Courts. Coupled with the apparent support of the government's political agenda by the majority of Supreme Court judges, it is probable that judges at the level of the High Courts are experiencing a sense of impotence in such matters. If so, this is likely to inhibit judicial activism in the face of the limited impact that a judgment in the High Court will have. This provides the conditions for self-censorship.

In this climate it is remarkable that there continue to be forceful judgments that run counter to the government's interests, including judgments on land reform and election challenges. Though roughly a quarter of High Court judges have resigned in the past three years, members of the remaining bench have shown remarkable courage. Not least is the response of the ten High Court judges who put their names to an open letter to the president condemning Judge Paradza's arrest.¹⁴⁷ The Judge President, while appearing sympathetic to the government in matters that have come before him, has on several occasions ruled against the state in highly sensitive matters, though overwhelmingly on procedural grounds without engaging substantively with the issues. Overall, the impression gained from a review of reports concerning the High Court is that a measure of independence remains intact.

¹⁴⁵ Interview with David Coltart 4 December 2003.

¹⁴⁶ *The Herald* 19 February 2003.

¹⁴⁷ *Daily News* 7 March 2003; *The Herald* 7 March 2003; *The Herald* 6 March 2003.

3.3 The Administrative Court

The Administrative Court was established in 1979 by the Administrative Court Act.¹⁴⁸ Its jurisdiction is dependent on conferral thereof by a specific statute and it acts as a court of appeal from a wide range of administrative tribunals.¹⁴⁹ In recent years the Administrative Court has played an increasingly important role in Zimbabwe's legal and political landscape as the court of appeal in relation to land acquisition matters as well as in matters of broadcasting licences and media accreditation.

The court's presiding judicial officer is the president of the Administrative Court, appointed by the president of Zimbabwe on the recommendation of the JSC.¹⁵⁰ The president of Zimbabwe also determines the conditions of service of the president of the Administrative Court, including salary, pension benefits and allowances.¹⁵¹ In terms of s 92(2) of the Constitution, however, the conditions of service of the president of the Administrative Court 'shall not be amended and his office shall not be abolished without his consent'.

The Land Acquisition Act (LAA)¹⁵² establishes the Administrative Court as the court of appeal from administrative decisions declaring land subject to resettlement.¹⁵³ In that capacity the court has heard many cases, largely relating to formal deficiencies in notices issued in terms of the LAA. In September 2002 the Land Acquisitions Amendment Act (No 2) of 2002¹⁵⁴ removed substantive and formal requirements from the Act that had given the Administrative Court leverage to intervene meaningfully in the acquisition process. Section 5 of the LAA was amended to require notification of secondary parties only. This removed the requirement which had been confirmed by the Administrative Court¹⁵⁵ that notice be served on all parties with a financial interest in the property, such as mortgage holders.¹⁵⁶ Section 7 of the LAA previously required the acquiring authority to apply to the Administrative Court for confirmation of an acquisition order where

¹⁴⁸ [Chapter 7:01].

¹⁴⁹ Geoff Feltoe *A Guide to Zimbabwean Administrative Law* 3 ed (Legal Resources Foundation, Harare 1998) 10–11.

¹⁵⁰ Section 92(1) of the Constitution, read with s 5(1)(a) of the Administrative Court Act [Chapter 7:01]. See also Linington op cit n 2 paras 427 and 464.

¹⁵¹ Section 92(2) of the Constitution.

¹⁵² [Chapter 20:10].

¹⁵³ See above, 29–30.

¹⁵⁴ *Land Acquisition Amendment (No 2) Act, 2002 — a Review*, available at <http://www.kubatana.net/html/archive/legisl/020919laa2note.asp?sector=LEGISL> (last accessed 15 September 2003).

¹⁵⁵ *Tengwe Estates (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & another* 5181–12.

¹⁵⁶ Section 2 of the Land Acquisition Amendment (No 2) Act of 2002.

an objection was received, showing that the land was suitable for resettlement. This is now presumptively the case upon a written statement from the acquiring authority.¹⁵⁷ Finally, the notice period was severely curtailed in cases in which any formal invalidity of the notice is cured by the acquiring authority. If the defect is corrected at any time within the statutory notice period of ninety days, then the notice period is not extended. If it is corrected thereafter, it is only extended by a further seven days after such correction.¹⁵⁸ The Administrative Court remains the court of appeal in terms of the LAA but is currently confined to determining the lawfulness of land acquisitions in terms of a very limited statute.

The Administrative Court is also the designated court of appeal in relation to the various publication laws, such as the controversial Access to Information and Protection of Privacy Act (AIPPA).¹⁵⁹ As such it has been in the spotlight particularly in the latter half of 2003, during which time the Zimbabwe government has exerted strong pressure on the independent media in the country. Of particular interest in this regard is the recent case of the *Daily News*, one of the last independent daily newspapers to be published in Zimbabwe.

The *Daily News* has been engaged in a legal battle since the enactment of the AIPPA. The High Court and the Supreme Court dismissed the newspaper's applications to have sections of the AIPPA relating to registration with the Media and Information Commission (MIC) declared unconstitutional. Since then legal proceedings have continued in the Administrative Court. The High Court and Supreme Court applications will be dealt with in greater detail.¹⁶⁰

The paper, forced to comply with the AIPPA and to exhaust remedies provided therein, was refused registration with the MIC. In terms of the AIPPA the publishers of the *Daily News*, the Associated Newspapers of Zimbabwe (ANZ), appealed to the Administrative Court against the MIC's refusal. On 24 October 2003 the appeal was upheld by a unanimous decision by the Administrative Court, delivered by the president of the Administrative Court in Harare. Majuru J ordered the MIC to issue a certificate of registration to the paper, permitted the paper to continue publishing in the interim, and declared the MIC to

¹⁵⁷ Section 3 of the Land Acquisition Amendment (No 2) Act of 2002.

¹⁵⁸ Section 4 of the Land Acquisition Amendment (No 2) Act of 2002.

¹⁵⁹ [Chapter 10:27], discussed in some detail below, 4.3.1 in ch 4.

¹⁶⁰ Judgment in that matter was delivered as *Associated Newspapers of Zimbabwe Private Limited v The Minister for Information and Publicity in the President's Office & others* (unreported judgment, Case No SC20/03, delivered on 11 September 2003).

have been improperly constituted.¹⁶¹ The MIC appealed against the Administrative Court's decision to the Supreme Court, thereby effectively suspending the effect of the order of 24 October 2003.

The paper returned to court on 12 November 2003, seeking an order that the judgment of 24 October be implemented pending the appeal to the Supreme Court. In accordance with court rules the matter was to be decided by the same bench that handed down the judgment that was taken on appeal. However, on 25 November 2003 the state-sympathetic *Herald* ran a report accusing Judge Michael Majuru of having pre-determined the matter.¹⁶² The allegation and evidence for such an accusation has been strongly condemned.¹⁶³ Although no application for recusal was made, Judge Majuru withdrew from the matter.¹⁶⁴

The matter then came before Judge Selo Nare, president of the Administrative Court in Bulawayo. On 19 December 2003 the judge ruled to allow the publication of the newspaper pending the decision by the Supreme Court, despite intense pressure and threats against him.¹⁶⁵ The ruling was harshly criticised by Information Minister Moyo, who indicated that the government would not accept it because it was 'blatantly political'.¹⁶⁶ The police have refused to act in accordance with the court order.¹⁶⁷

3.4 The administration of Zimbabwean courts

Clearly, government agencies such as the police and army have shown unwillingness to carry out court orders perceived to be going against the interests of government. In addition, the administration of the legal system is in disarray. There have been many reports that messengers of court and sheriffs have been, and continue to be, assaulted, threatened and prevented from carrying out their duties.¹⁶⁸ Attacks appear to be randomly perpetrated against officers of the court, rather than related to the parties that are the subjects of the orders. Without messengers of court and sheriffs, court judgments are not capable of enforcement and the court process grinds to a halt as persons

¹⁶¹ *Mail & Guardian* (SA) 18 October 2003; SABC (SA) 24 October 2003.

¹⁶² *The Herald* 25 November 2003.

¹⁶³ Statement by ZLHR, published on kubatana.net on 25 November 2003, available at http://www.zimbabwesituation.com/nov26_2003.html#link2 (last accessed 30 December 2003).

¹⁶⁴ News24 (SA) 25 November 2003; SABC (SA) 25 November 2003.

¹⁶⁵ BBC 19 December 2003.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid. Police impunity in relation to this case is discussed below, 4.6 in ch 4.

¹⁶⁸ *Financial Gazette* 21 November 2002.

are not informed of proceedings, or at the least can credibly claim not to have received court papers. It seems that no assistance has been forthcoming.¹⁶⁹

A similar problem has arisen out of the petrol shortage that has crippled Zimbabwean society as a whole. In the context of the judicial system the petrol shortage plays a role in both law enforcement and court procedure. While government vehicles remain supplied with petrol, it appears to be increasingly regarded as a commodity to be used in the service of government interests as opposed to the everyday performance of duties. This leads not only to decreasing investigation of 'ordinary' criminal activity, but also requires citizens to undertake the journey to the closest police station to lay a charge or complaint. It is safe to assume that this further contributes to the alienation that characterises the relationship between many Zimbabweans and government agencies such as the police.¹⁷⁰

The court process itself is primarily affected by the petrol crisis since transport to and from prisons is affected, making it on occasion impossible to transport prisoners who have not been released on bail. Already in January 2003 it was reported that instead of the daily 150–200 suspects usually brought to court by the Zimbabwe Prison Services, only a few individuals were brought to the Harare Magistrate's Court for hearings because of a lack of petrol.¹⁷¹ In such cases the matter can only be postponed or continued in the absence of the accused, neither of which is acceptable.

The central administrative figure in the Zimbabwean court system is the registrar of the relevant court. A registrar's function is primarily formal but can easily impact substantively on the quality of justice offered to parties through the court system. For example, the registrar fixes the amount of security to be lodged by an applicant upon filing an election petition.¹⁷² It also lies in the discretion of the relevant registrar to allow access to court records in the High Courts and the Supreme Court, an increasingly important discretion as the reporting of judgments has become erratic since the third quarter of 2000 and ceased entirely after the second quarter of 2001.

The registrar is the person administering the court roll and therefore in control of assigning dates for the hearing of matters. Practitioners have reported repeated difficulties in enrolling politically sensitive matters at all, or find that their cases are enrolled in a manner

¹⁶⁹ Ibid.

¹⁷⁰ *The Herald* 18 January 2003.

¹⁷¹ *The Herald* 28 January 2003.

¹⁷² Section 133(3) of the Electoral Act [Chapter 2:01].

prejudicial to the application. So, for example, there have been several reports of urgent matters being enrolled on the semi-urgent or the ordinary roll, with the result that the relief prayed for becomes irrelevant. As a further consequence parties will often remove such matters from the roll.¹⁷³

A prominent example of the political handling of the court administration is the presidential election petition discussed earlier. Though, as a matter of practice, election petitions are dealt with urgently, it was necessary in January 2003 for Judge President Garwe to order the registrar to set the matter down. In February an official of the registrar's office in Harare gave the assurance that the matter would be heard in April 2003, more than a year after the outcome of the election was announced.¹⁷⁴ A further application was necessary in June 2003. In a move strongly suggestive of government sympathies, the registrar of the High Court opposed this application to have the election petition set down as a matter of urgency. This registrar was represented by the same counsel as the other respondents, including the president. On 4 July 2003 the court issued a further order directing the registrar to set the matter down. It was eventually set down for hearing in accordance with the Judge President's instructions for November 2003.

The failure of the registrar's office to enrol matters for hearing plays into the hands of the police and government agents abusing their official powers to effect wide-scale arrests of persons perceived to be hostile to the government. In most cases the person is kept in custody for several days, often subjected to beatings and torture, charged, and then remanded or released on bail. After this the matter rarely proceeds to the trial stage with any speed, if at all. In many cases there are strong suggestions that the required evidence is lacking or that charges are made under incorrect sections of the relevant laws. Most prominent opposition figures at this time have been charged with single or multiple offences, often in terms of the newly enacted public order legislation. If such matters were to come to trial expeditiously, police tactics could be subjected to effective and public scrutiny.

On an individual level there have been reports of corruption charges levelled against the Registrar of the High Court of Harare, Jacob Manzunzu. He is said to have profited from his position in acquiring properties auctioned by his office. There are also allegations that he was involved in a scam involving the cancellation of an agreement relating to the development of Highlands property.¹⁷⁵

¹⁷³ Interview with Brian Kagoro 24 February 2003.

¹⁷⁴ *Weekend Tribune* 26–7 April 2003; *IOL* 24 April 2003; *The Herald* 24 February 2003.

¹⁷⁵ *Daily News* 20 February 2003.

3.5 The Zimbabwe Law Society

Heading the Law Society of Zimbabwe are its president, Sternford Moyo, and secretary, Wibert Mapombere. Both as individuals and on behalf of the law society, they have proved to be measured but forthright critics of the government's attempts to take control of the judicial process.¹⁷⁶ When the government started using allegations of racism as a way of removing independently minded Supreme Court judges, the law society was firmly supportive of the bench. In January 2001, in an open statement issued to the media, the law society reiterated that '[it] has not seen any evidence of bias or predisposition on the part of our courts'.¹⁷⁷ The appointment of Chidyausiku as acting Chief Justice was greeted with outspoken criticism. It resulted in an open letter to the JSC questioning both his legal abilities and personal integrity.¹⁷⁸

On 17 April 2002 the Minister of State for Information and Publicity, Jonathan Moyo, made a statement attacking the Law Society of Zimbabwe and Sternford Moyo. The Minister accused the law society of working with its British and other 'imperialist' donors to dilute, if not destroy, Zimbabwe's sovereignty by invoking 'fictitious notions of judicial independence'. He condemned the law society president for questioning the competence of some of the decisions made by the Supreme Court and for calling for constitutional reforms to prevent the packing of the Supreme Court with pro-government judges. This, according to the Minister, amounted to being 'an anti-Government, anti-black and pro-British sponsored opposition to African nationalism in Zimbabwe'.¹⁷⁹ The Minister also said that:

[T]he time has come for Zimbabweans, especially those in the legal profession, to demand that the court should not offer lawyers who have such open contempt for judges for clear political reasons, the right of audience. Instead, such bad lawyers, like Sternford Moyo, should join open politics and become the poor politicians that they are.¹⁸⁰

The legal profession is regulated by the Legal Practitioners Act,¹⁸¹ which provides for the registration of practitioners as well as for legal education. The scope for executive interference in either process is

¹⁷⁶ LRF op cit n 1 at 107.

¹⁷⁷ Anthony R Gubbay *The Challenge to Judicial Independence: The Zimbabwe Situation* Paper delivered at the Inaugural World Bar Conference, Edinburgh, 28 June 2002, available at <http://www.derebus.org.za/archives/2002Jul/between/gubbay.htm> (last accessed 20 June 2003).

¹⁷⁸ *Zimbabwe Standard* 20 May 2001.

¹⁷⁹ *The Herald* 18 April 2002.

¹⁸⁰ Ibid.

¹⁸¹ [Chapter 27:07].

limited but does exist. Registration procedures for admission as legal practitioner to the High Court of Zimbabwe remain firmly in the hands of the court, constrained by a substantial body of common law. Section 5 of the Act requires, in addition to certain standard requirements relating to formalities and the candidate's financial standing, that the candidate be a 'fit and proper person'. This assessment rests with the court, which is empowered to grant condonation for non-compliance with any formal requirement.¹⁸² In terms of s 6 the Minister has the power to exempt a practitioner temporarily from the residency requirement contained in s 5(1)(c). This has been done in the case of Bizos SC and Gauntlett SC, both senior counsel ordinarily resident in South Africa and members of the South African Bar. They are appearing for the MDC and Tsvangirai.

However, s 5(b) requires that the candidate 'possesses the qualifications prescribed in rules made by the Council for Legal Education in terms of section forty-nine and has had such practical experience, if any, as may be prescribed in such rules'. In terms of s 36 of the Legal Practitioners Act the Council for Legal Education consists of eight members, who are appointed by the Minister. Two appointments are direct ministerial selections, while the Chief Justice and the attorney-general each nominate two further appointments. The remaining four members are appointed from a selection of four nominations each by the Zimbabwe Law Society and the University of Zimbabwe Law Faculty Board. In the current political climate this implies that the council is at least potentially sympathetic to the political concerns of the government. No public reports of abuse of this kind have been forthcoming, however. It appears that interference with the legal profession takes the form of violent intimidation rather than systemic institutional interference.¹⁸³

During the night of 3 June 2002 both Sternford Moyo and Wilbert Mapombere were arrested by police from the law and order section.¹⁸⁴ They were released that evening, then re-detained on the instructions of senior police officers, although the investigating officer had decided that there were no reasonable grounds for detaining them. Charges laid against Moyo and Mapombere apparently originated from two letters supposedly written by them to the British High Commission and the MDC urging the removal of the current government by means

¹⁸² Section 5(3).

¹⁸³ Interview with David Coltart 4 December 2003.

¹⁸⁴ A comprehensive discussion of the arrests is found in the LRF report op cit n 1 at 107–17.

other than peaceful negotiations. It was widely accepted among non-government agencies that the letters were forgeries.¹⁸⁵

For the next forty-eight hours both men were moved around and denied access to their lawyers. On 5 June Moyo and Mapombere were taken to Chivero National Park, about 50 km west of Harare, together with the entire staff of the Law Society of Zimbabwe. There they were separated and questioned. Though other detainees were later released, the police received further instructions from senior police officers to keep Moyo and Mapombere in detention.¹⁸⁶

Lawyers for Moyo and Mapombere had meanwhile brought a *habeas corpus* application before the Harare High Court, which was heard by Judge President Garwe. At the hearing it transpired that the prosecution was unable to obtain instructions as to the reasons for the repeated and ongoing detention of the men, despite the time and opportunity afforded to the prosecution by the Judge President to obtain such instructions. The investigating officers, who were present at the hearing, were not in a position to explain the two men's detention. The Judge President issued the *habeas corpus* writ.¹⁸⁷

The next day Moyo and Mapombere were allowed access to their legal representatives and were produced in court, albeit with some delay. No opposing papers had been filed by the state regarding the continued detention of the two men. Nevertheless, Garwe JP found that their arrest and detention had been reasonable. The arrest appeared to have occurred in terms of a non-existent section in the Public Order and Security Act, but the court was satisfied that another section could have justified the arrest. Although the court did not expressly order their release, Moyo and Mapombere were released immediately after the hearing by the investigating officers who were present at the High Court, and placed on remand. No further action has been taken in this matter.¹⁸⁸ The reasoning employed by Garwe JP in this matter has been subjected to severe criticism.¹⁸⁹

A further noteworthy factor in the case is the apparent rift between the investigating officers and the prosecution on the one hand, and higher-ranking officials from the law and order section on the other. The lack of communication between these government agencies was apparent, and commented on by the court. Garwe JP made his disapproval of senior police officials clear. Their lack of

¹⁸⁵ At 108.

¹⁸⁶ At 110.

¹⁸⁷ Ibid.

¹⁸⁸ At 111–12.

¹⁸⁹ At 112–14.

co-operation with the prosecution forced the court to decide the application without argument from the respondent. It should be noted that in terms of the court rules it is questionable whether the court was entitled to do so at all. Garwe JP called for an inquiry into the failure to give instructions to the prosecution.¹⁹⁰

Violent intimidation of legal practitioners has increased over the past year. Increasingly, lawyers are refused access to their clients who are being detained, physically assaulted, or even detained alongside their clients when they arrive for consultations.¹⁹¹ On 5 July 2003 Zimbabwe Lawyers for Human Rights reported that two lawyers, Kossam Ncube and Trevor Ndebele, were detained and subjected to verbal abuse and threats at the Bulawayo police station. They had accompanied two members of a civil rights organisation, Women of Zimbabwe Arise, to the prison to provide food for two detainees. At the police station their practising certificates from the law society were removed. They were released only after they had phoned colleagues for assistance.¹⁹²

At a rally on 10 December 2003, held to mark International Human Rights Day, the chairperson for Zimbabwe Lawyers for Human Rights, Nokuthula Moyo, strongly condemned the police for their actions against legal practitioners. She reflected on the increasing pressure on legal practitioners in the ever-worsening climate of human rights abuses by police and other state actors. It is, however, noteworthy that the rally, attended by about seventy practitioners and law students, was one of the very few demonstrations approved by the police in terms of Public Order and Security Act. No arrests were made despite the strongly worded condemnation of the authorities' conduct.¹⁹³ In light of the violent and near instantaneous reaction to demonstrations by trade unions and civil rights organisations, official reaction in this instance stands out. While this could be interpreted as a sign of respect, it could also indicate that the state does not feel threatened by the legal profession.

¹⁹⁰ At 112.

¹⁹¹ Arnold Tsunga *The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe in 2003* available at http://www.legalbrief.co.za/view_1.php?artnum=13709 (last accessed 7 January 2004); see also the statement by Zimbabwe Lawyers for Human Rights *General Concerns of Lawyers on Arrests and Detentions so Far*, 3 June 2003, available at http://www.lchr.org/defenders/hrd_zimbabwe/ZLHR_statement_060303.pdf (last accessed 15 November 2003); *Daily News* 11 April 2003.

¹⁹² Tsunga op cit n 191; Legalbrief 9 June 2003.

¹⁹³ Newzimbabwe.com 10 December 2003; SABC (SA) 10 December 2003; *Zimbabwe Standard* 15 December 2003.

CHAPTER 4

THE SEPARATION OF POWERS



The context in which the judicial institution functions is an important source of its ability to protect its integrity and promote the rule of law. The judiciary does not exist in isolation but is shaped by its interaction with the other branches of government. The separation of powers, and the independence of a country's judiciary that is required thereby, is indispensable for a functioning democratic state that can lay claim to respecting the rule of law.

Before independence and during the turbulent years that followed, the Zimbabwean judiciary had earned the respect of international organisations in this regard, especially in dealing with the state of emergency declared by the Rhodesian government in 1965 and lifted in 1989. However, there are strong indications that the independence of the judiciary has been severely compromised over the past three years. This section will examine some of the contextual factors that have contributed to this development.

4.1 Clemency orders

Zimbabwe's recent judicial history has been shaped to an extent by the generous use of pardons and amnesties both before and after independence. As early as 1975 the Rhodesian government passed the Indemnity and Compensation Act,¹ largely in response to prosecutions of government forces for acts committed during the violent liberation war against the Smith regime. The Act sought to indemnify members of the police, the armed forces and the security forces from criminal or civil liability for illegal acts committed in 'good faith'.²

The negotiated agreement that led to Zimbabwe's independence in 1980 included a provision for amnesty to any person involved in the liberation war, whether on the side of the erstwhile government or the resistance.³ The Amnesty Ordinance of 1979⁴ and the Amnesty

¹ 45 of 1975.

² Amnesty International *The Toll of Impunity* AI Index: AFR 46/034/2002 (Amnesty International, London, June 2002) ('AI') at 8.

³ At 9.

⁴ Amnesty Ordinance (3) of 1979.

(General Pardon) Ordinance of 1980⁵ provided for a complete amnesty for human rights violations of any kind committed during the struggle for independence.

After independence a more general indemnity was purportedly extended to government forces through the Emergency Powers (Security Forces Indemnity) Regulations.⁶ These provided

that no liability for damages should attach to the President, any Minister or Deputy Minister or any member of the Security Forces in respect of any thing done by him in good faith for the purposes of or in connection with the preservation of the security of Zimbabwe.⁷ A certificate by the Minister of Defence stating that any thing was done in good faith and for those purposes was to be prime facie proof of the fact that such a thing was so done.

This provision was declared unconstitutional in *Granger v Minister of State*.⁸

In 1988 the settlement between ZANU and ZAPU was again accompanied by a sweeping amnesty provision contained in a clemency order.⁹ It also provided amnesty for perpetrators of human rights violations on either side of the conflict. Amnesty International argues that the clemency order primarily benefited government forces since state security forces were mostly implicated in the commission of atrocities in Matabeleland.¹⁰

Section 31(1) of the Zimbabwe Constitution provides for unconditional presidential power to pardon offenders in the widest terms. It reads as follows:

- (1) The President may, subject to such lawful conditions as he may think fit to impose —
- (a) grant a pardon to any person concerned in or convicted of a criminal offence against any law; or
 - (b) grant a respite, either indefinite or for a specified period, from the execution of any sentence for such an offence; or
 - (c) substitute a less severe punishment for that imposed by any sentence for such an offence; or
 - (d) suspend for a specified period or remit the whole or part of any sentence for such an offence or any penalty of forfeiture otherwise imposed on account of such an offence.

⁵ Amnesty (General Pardon) Ordinance (12) of 1980.

⁶ Emergency Powers (Security Forces Indemnity) Regulations of 1982.

⁷ Section 4.

⁸ 1984 (2) ZLR 92 (SC).

⁹ Clemency Order (1) of 1988.

¹⁰ AI op cit n 2 at 9.

The power granted to the president has been used fairly often.¹¹ In several instances it appears to have been used with a view to exonerating government forces, thereby effecting through executive fiat what legislation itself was unable to provide: immunity for government forces from the reach of judicial sanction.¹² Amnesty International reports an example of the particularly partisan use of the presidential pardon in 1993 in the case of a CIO agent and a ruling party activist who had tried to kill an opposition candidate, Patrick Kombayi, in 1990. Upon the conviction of the two men by the Supreme Court in 1993 the president immediately issued a presidential pardon, ensuring their release.¹³

Clemency orders issuing blanket pardons to ZANU-PF forces for politically motivated crimes were issued by the president in the aftermath of elections throughout the 1990s. In terms of the general amnesty contained in Clemency Order No 1 of 1990 the president proclaimed a pardon for members of the defence force, the police, the intelligence service and any other force or organisation employed by the government on anti-dissident operations

in respect of any offence committed by him during anti-dissident operations by the Security Forces, if that offence was committed in good faith for the purpose of or in connexion (*sic*) with the restoration or maintenance of good order and public safety in Zimbabwe or any part thereof.¹⁴

Presidential clemency orders backing government forces and supporters were proclaimed after the 1995 elections and again in October 2000 after the violent parliamentary elections in June that year. These orders were slightly narrower in scope, granting pardon to those liable for criminal prosecution or who had been convicted of politically motivated crimes excluding rape, murder and fraud.¹⁵ The latter pardon came in the wake of the parliamentary elections of June 2000, which had been marred by unprecedented violence both in the electioneering process as well as during the rapidly escalating violence that accompanies land invasions.¹⁶

¹¹ Anthony R Gubbay *The Challenge to Judicial Independence: The Zimbabwe Situation* Paper delivered at the Inaugural World Bar Conference, Edinburgh, 28 June 2002, available at <http://www.derebus.org.za/archives/2002Jul/between/gubbay.htm> (last accessed 20 June 2003).

¹² Ibid.

¹³ At 9–10.

¹⁴ Clemency Order No 1 of 1990.

¹⁵ *Al op cit* n 2 at 10.

¹⁶ For a comprehensive report of violence during this time, see Zimbabwe Human Rights Forum *Politically motivated violence in Zimbabwe during 2000–2001: A report on the campaign of political repression conducted by the Zimbabwe Government under the guise of land reform* (2001) ('ZHRF'), available at

Courts have on occasion tried to limit the applicability of such orders to acts 'genuinely done predominantly for the purpose of or in connection with the restoration or maintenance of good order and public safety as provided for', as happened in *Ruzario v Minister of Justice, Legal and Parliamentary Affairs & another*.¹⁷ In that case the court held that even though an offence may have the effect of restoring or maintaining good order and public safety, this would not assist the perpetrator if his predominant motive was the satisfaction of a personal grudge.¹⁸ However, the significant lack of reported cases dealing with clemency orders would indicate that such opportunities rarely arose.

The recurring justificatory themes of such clemency orders are the need to maintain law and order as well as the influence that political motivation has on government actors. This is mirrored in the public reasons given for the recent passing of draconian legislation, the clampdown by government forces on opposition activities, and particularly in the fact that increasingly, matters that are considered to be 'political' are no longer investigated and/or prosecuted.¹⁹

On the other hand, the term 'political' appears to include any offence committed by a government agent or any offence committed against an opposition supporter, particularly in relation to land acquisition. There are many reports of police inactivity in the face of abuses conducted by government agents, or even by police forces themselves, as well as reports of long delays and outright failures to prosecute 'political' offences, or even to accept charges relating to 'political' offences.²⁰ The argument that 'political' matters were beyond substantive purview of the courts appears to have been accepted by the recently constituted Supreme Court. In *Minister of Lands, Agriculture and Rural Resettlement & others v Commercial Farmers Union*²¹ Chidyausiku CJ commented that 'land acquisition and redistribution is essentially a matter of social justice and not strictly speaking a legal issue. The only legal issue of substance is whether the acquisition is done within the procedures set out by the law.'

In a talk presented by Chen Chimutengwende of ZANU-PF the Member of Parliament pointed to the continuing 'war mentality' that

<http://www.hrforumzim.com/evmp/evmpreports/polmotviol0108/polviol0108.htm> (last accessed 15 June 2003).

¹⁷ 1992 (1) ZSC 201 (SC) at 205A-B.

¹⁸ At 204D-G.

¹⁹ *AI op cit* n 2 at 37.

²⁰ *Ibid.*

²¹ *Minister of Lands, Agriculture and Rural Resettlement & others v Commercial Farmers Union* Section-111-2001.

persists in Zimbabwe and is exacerbated in the current crisis.²² People are perceived to belong to one side of an ongoing conflict rather than to a collective whole. The argument presented is that in a climate of polarisation it appears acceptable to make use of political power to provide benefits for one's supporters, including pardons for supporters who have crossed lines that are unacceptable in peace time.

4.2 Government by regulation and proclamation

In s 113(1) of the Constitution of Zimbabwe, 'law' is defined as:

- (a) any provision of this Constitution or of an Act of Parliament;
- (b) any provision of a statutory instrument; and
- (c) any unwritten law in force in Zimbabwe, including African customary law;²³

'Statutory instrument' is defined as

any proclamation, rule, regulation, by-law, order, notice or other instrument having the force of law made by the President, a Vice-President, a Minister or any other person or authority under this Constitution or any Act of Parliament.²⁴

The effect of these sections read together is that relevant members of the executive, including the president, are constitutionally empowered to legislate. In addition the Presidential Powers (Temporary Measures) Act²⁵ of 1986 allows the president to pass regulations that are valid for six months, after which they lapse unless passed into law by Parliament.²⁶

In addition many pieces of legislation permit the relevant Minister to prescribe by regulation 'all matters which by this Act are required or permitted to be prescribed *or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act*'.²⁷ Examples of this kind of legislative delegation of law-making powers are found in s 157 of the Electoral Act, s 7 of the Political Parties (Finance) Act,²⁸ s 22 of the Citizenship of Zimbabwe Act,²⁹ s 24 of the Legal Aid Act,³⁰ s 72 of the Police Act³¹ and s 26 of the War Veterans Act,³² among others. The wording of this standard clause effectively

²² Talk presented to the Institute for Justice and Reconciliation by Chen Chimutengwende on 7 March 2003.

²³ Constitution of Zimbabwe s 113(1).

²⁴ Ibid.

²⁵ [Chapter 10:20].

²⁶ Section 6(1).

²⁷ Own emphasis.

²⁸ [Chapter 2:11].

²⁹ [Chapter 4:01].

³⁰ [Chapter 7:16].

³¹ [Chapter 11:10].

makes a challenge against administrative action based on the allegation of *ultra vires* near impossible by reducing it to a substantive assessment by the relevant Minister.

Two areas in which the president's extraordinary executive powers have been used with significant impact are the land reform programme and election legislation. When the Constitution was amended in April 2000³³ the president proceeded to amend the Land Acquisition Act by way of the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000 to give immediate effect to the constitutional amendments. The Land Acquisition Amendment Act 15 of 2000, which came into effect on 7 November 2000, retrospectively validated actions taken under these regulations after 23 May 2000 as required in terms of the Presidential Powers (Temporary Measures) Act.³⁴

The Electoral Act itself provides for the president to have far reaching powers. Section 158 reads:

(1) Notwithstanding any other provision of this Act but subject to subsection (2), the President may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.

(2) Statutory instruments made in terms of subsection (1) may provide for —

- (a) suspending or amending any provision of this Act or any other law in so far as it applies to any election;
- (b) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;
- (c) validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law;
- (d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;
- (e) penalties for contraventions of any such statutory instrument, not exceeding the maximum penalty referred to in section one hundred and fifty-five.

The president has made use of s 158 on many occasions. Electoral district boundaries have been changed by decree, and there have been numerous changes to voting procedures and deadlines for voter registration contained in Electoral Act (Modification) Notice

³² [Chapter 11:15].

³³ See above, 13 and 29.

³⁴ The legislative framework to the land acquisition amendments is set out in *Commercial Farmers Union* 2001 (2) SA 925 (ZS) under the heading *The Legislative Background*.

2000 and Electoral Act (Modification) (No 2) Notice 2000. An attempt at retroactively removing any challenges to the outcomes of the parliamentary elections from the jurisdictions of the courts through Electoral Act (Modification) (No 3) Notice 2000, published on 8 December 2000, was blocked by the Supreme Court in *The Movement for Democratic Change & another v Chinamasa & another*.³⁵ As noted by Gubbay CJ writing for the full court, the preamble takes a highly unusual, and clearly political, line. It deserves quotation in full:

RECOGNISING that the general elections held following the dissolution of Parliament on the 11th April 2000, were held under peaceful conditions and that the people who voted did so freely and that the outcome thereof represents a genuine and free expression of the people's will;

NOTING that the candidates who lost in that general election have instituted civil suits challenging the results and that these suits are frivolous and vexatious as evidenced by the results of the recount of the ballot papers relating to some constituencies;

REGRETTING that the litigation referred to above is sponsored by external interests whose motives and intentions are inimical to the political stability of Zimbabwe;

CONCERNED that the institution of such litigation has placed intolerable burdens on duly elected Members of Parliament and is compromising their duties as Members of Parliament;

CONCERNED further that the multiplicity of such suits has already overstretched the limited resources of the Registrar-General of Elections and the judicial system and other national resources and that the involvement of external interests is undermining the political stability of Zimbabwe and the democratisation process;

NOW, THEREFORE, in the interests of democracy and the peace, security and stability of Zimbabwe it is hereby notified that His Excellency the President, in terms of s 158 of the Electoral Act [Chapter 2:01], has made the following notice.

The notice goes on to attempt to oust the court's jurisdiction in declaring the election of any candidate void because of contravention of the Electoral Act. The applicants in that case had submitted that the notice, alternatively the rights conferred on the president in s 158, infringed the right to protection of the law and the right to a fair and impartial hearing. They further submitted that even if the notice or s 158(2)(c), under which it was made, were held to be constitutional, they would offend against the fundamental rules of natural justice expressed in the maxim *nemo debet esse judex in propria causa* and the *audi alteram partem* principle. The court agreed with the applicant's first submission, making it unnecessary to decide upon the further grounds of attack.³⁶

³⁵ SC 7/2001.

³⁶ Under the heading *The Issues*.

In the run-up to the presidential election in 2002 the government again issued no fewer than nine presidential and general notices. It also promulgated nine sets of regulations between 1 January 2002 and the first day of polling on 9 March 2002.³⁷ The largest proportion of such statutory instruments came into effect subsequent to the Supreme Court's striking down of the General Laws Amendment Act for procedural reasons on 27 February 2002. The Act had purported to effect significant changes to the electoral law. The cumulative effect of the notices and regulations passed in the nine days prior to polling was that most of the provisions in the Act relating to voting procedures were reinstated.³⁸ A further effect was that non-citizens were stripped of the vote in response to a High Court ruling by Judge Makarau.³⁹ Of particular importance are three notices extending the closing date for

³⁷ Petitioner's Heads of Argument in the matter of *Morgan Tsvangirai v Robert Gabriel Mugabe & others* HC3616/2002 at xiii–xv; Legal Resources Foundation *Justice in Zimbabwe* (Legal Resources Foundation: Harare, September 2002) ('LRF') at 99. The various notices and regulation are the following:

- Electoral (Presidential) Notice 2002 SI 3A, 10 January 2002;
- Electoral (Amendment) Regulations 2002 (No 10) SI8A, 17 January 2002;
- Electoral (Modification) Notice 2002 SI 13A, 23 January 2002;
- Electoral (Presidential Election) (No 2) Notice 2002 SI 14B, 29 January 2002;
- General Notice 55B of 2002, 1 February 2002;
- General Notice 55D of 2002, 4 February 2002;
- General Notice 55F of 2002, 6 February 2002;
- Electoral (Amendment) Regulations 2002 (No 11) SI 17A, 6 February 2002;
- Electoral (Amendment) Regulations 2002 (No 12) SI 34, 22 February 2002;
- Urban Councils (Election) (Amendment) Regulations 2002 (No 3) SI35, 22 February 2002;
- Electoral (Presidential Election) (No 3) Notice 2002 SI 41A, 1 March 2002;
- Electoral (Amendment) Regulations 2002 (No 13) SI 41B, 1 March 2002;
- Public Holidays and Prohibition of Business (Declaration of Public Holidays) Notice 2002 SI 41C, 5 March 2002;
- Electoral Act (Modification) Notice 2002 SI 41D, 5 March 2002;
- Urban Councils (Election) (Amendment) Regulations 2002 (No 4) SI 41E, 5 March 2002;
- Electoral (Amendment) Regulations 2002 (No 14) SI 41F, 5 March 2002;
- Electoral (Amendment) Regulations 2002 (No 15) SI 42A, 8 March 2002;
- Electoral (Modification) (No 2) Notice 2002 (No 15) SI 42B, 8 March 2002;
- Electoral (Electoral Code for Conduct for Political Parties and Candidates and Multiparty Liaison Committee) Regulations 2002 SI 42C, 8 March 2002;

³⁸ LRF op cit n 37 at 100; and see the discussion above, 32 and 33.

³⁹ HH22-2002; *Zimbabwe Independent* 8 August 2003; ZHRF op cit n 16 ch 4.

voter registration from 10 January to 27 January and again to 3 March 2002, and authorising the compilation of an unpublished supplementary voters' roll in apparent breach of the Electoral Act. These issues have become the subject of the election challenge brought by Tsvangirai, which is dealt with in greater detail earlier in this report.⁴⁰

4.3 Repressive legislation allowing for executive abuse of powers

As part of its continuing clampdown on dissenting voices, the government has introduced, and selectively used, legislation to severely restrict the rights of Zimbabweans to associate, assemble and express themselves freely.⁴¹ The most obviously invasive aspect of these pieces of legislation has been their draconian content, which aims at criminalising much of what might be considered to be the ordinary political process. Less obvious is that these pieces of legislation have had the effect of increasing police and executive powers by way of broadly defined and subjective jurisdictional requirements that minimise the protective role that the courts can play.

The most recent pieces of legislation that will be discussed here are the Public Order and Security Act⁴² and the Access to Information and Protection of Privacy Act,⁴³ both passed in 2002. The government has appeared to use the provisions of these Acts systematically to take control of public debate and political activity in Zimbabwe.⁴⁴ Both Acts have been justified in terms of the need to protect national security and of regulating access to information. However, human rights groups have warned that, instead, they render impossibly narrow the scope for free political debate and discussion.⁴⁵ By allowing for wide executive powers these Acts appear to have become a tool for police intervention

⁴⁰ See above, 33, 35; LRF op cit n 37 at 72.

⁴¹ LRF op cit n 37 at 49.

⁴² [Chapter 11:17].

⁴³ [Chapter 10:27].

⁴⁴ For a comprehensive overview of the impact of these pieces of legislation on Media Law in particular, see Geoff Feltoe *A Guide to Media Law in Zimbabwe* available at <http://www.kubatana.net/html/archive/resour/0211011rf.asp?sector=LEGISL> (last accessed on 2 December 2003). For a more general study of the impact of these statutes as well as other statutes, see Amnesty International *Rights under Siege* AI Index AFR 46/012/2003 (Amnesty International, London May 2003) ('AI') at 13–32.

⁴⁵ Talk presented to Institute for Justice and Reconciliation by Lovemore Madhuku, Brian Raftopolous and Brian Kagoro 24 February 2003; see also for examples AI op cit n 44 at 24.

rather than judicial prosecution.⁴⁶ Stringent legislation is the reaction of a government that perceives itself to be under threat.⁴⁷ The following is a brief analysis of each piece of legislation, the context in which it was introduced and the implications it has had for the rights to freedoms of expression, assembly and association in Zimbabwe.

4.3.1 *Access to Information and Protection of Privacy Act*

The Access to Information and Protection of Privacy Act (AIPPA) was passed and came into operation in March 2002, in advance of the presidential elections. The bill experienced significant delays in its passage through the parliamentary process. The delays were due to parliamentary debate and adverse reports issued by the Parliamentary Legal Committee. This reflects a level of dissent even within ZANU-PF regarding the bill's restrictions on the right to freedom of expression. Several of the journalists charged in terms of the AIPPA have raised the constitutionality of the Act, arguing that it violates the right to freedom of expression.⁴⁸ The ZANU-PF chairperson of the Parliamentary Legal Committee, Eddison Zvobgo, described the bill in its original form as 'the most calculated and determined assault on our liberties guaranteed by the Constitution'.⁴⁹

An amendment bill, the Access to Information and Protection of Privacy Amendment Bill, was passed in June 2003 after a further lengthy and controversial passage through the parliamentary process.⁵⁰ Officially, the amendment is a result of pressure on the Zimbabwean government to relax the stringent measures contained in the AIPPA. Information Minister Moyo has claimed that the amendment is the result of domestic and international pressure to ease restrictions on the media.⁵¹ However, there are few signs of this in the amendment,

⁴⁶ Interview with David Coltart 4 December 2003; interview with Brian Raftopolous 9 December 2003.

⁴⁷ Talk presented to the Institute for Justice and Reconciliation by Chen Chimutengwende on 7 March 2003.

⁴⁸ Geoff Feltoe *Whose Hands were Dirty? An Analysis of the Supreme Court Judgment in the ANZ Case* (unpublished paper available from the author) at 3.

⁴⁹ Media Monitoring Project Zimbabwe Submission to the African Commission on Human and Peoples' Rights (June 2002) as quoted in *AI op cit* n 44 at 22.

⁵⁰ Kubatana *Access to Information and Protection of Privacy Act (AIPPA) — showing amendments just approved by Parliament* 11 June 2003, available at <http://www.kubatana.net/html/archive/legisl/030611aippamd.asp?sector=LEGISL> (last accessed 15 September 2003).

⁵¹ BBC 13 March 2003.

which instead holds the potential for further tightening of the regulatory framework established to control the flow of information.⁵²

To the extent that the bill does ease restrictions against the media, the rationale for the introduction of the amendment appears to be an attempt by the government to pre-empt further challenges to the AIPPA. The Independent Journalists Association of Zimbabwe (IJAZ) challenged ss 79, 80, 83 and 85 of the AIPPA in late 2002.⁵³ The Supreme Court has reserved judgment, which remains outstanding. Commentators regard it as unlikely that the court will decide this matter until it has considered an appeal by the Media and Information Commission (MIC) against the Administrative Court's *Daily News* decision of 24 October 2003, finding that the MIC is not properly constituted. The Media Institute of Southern Africa (Misa) has also made an application to the High Court, inter alia challenging the composition of the MIC.⁵⁴

The MIC is provided for in ss 38–42. It is granted a wide range of regulatory powers over the media.⁵⁵ In terms of s 40, the MIC is controlled and managed by a board consisting of between five and seven members. They are appointed by the Minister of Information 'after consultation with the President and in accordance with any directions that the President may give him'. Section 40(2) requires three members to be 'nominated by an association of journalists and an association of media houses'. In the first version of the Amendment Bill this was to be deleted, with no requirement for media involvement in the appointment of the MIC. The final Amendment Act, however, has abandoned this and retained the original text. Nevertheless, the Minister is able to ensure that media nominees remain in the permanent minority.

The Act's stated objects are diverse and potentially contradictory, including 'to foster freedom of expression in Zimbabwe'⁵⁶ and 'to promote the preservation of the national security and integrity of Zimbabwe'.⁵⁷ The MIC is empowered to register any body or agency that qualifies as a mass medium⁵⁸ or provides a mass media service in

⁵² AI op cit n 44 at 24; Misa-Zimbabwe *Amendments to media law passed* 13 June 2003, available at <http://www.kubatana.net/archive/media/030613misaz.asp?sector=LEGISL> (last accessed 1 December 2003). The Amendment Bill was gazetted as HB 9, 2002 in *Government Gazette Extraordinary* dated 11 October 2002 and is available in electronic format at <http://www.kubatana.net/docs/legislation/aippaamdbill021011.pdf> (last accessed 1 December 2003).

⁵³ Unreported Case No SC 202/2002. See also AI op cit n 44 at 26.

⁵⁴ *The Independent* 31 October 2003.

⁵⁵ AI op cit n 44 at 24.

⁵⁶ Section 39(2)(a).

⁵⁷ Section 39(2)(e).

⁵⁸ Section 39(1)(p).

terms of the wide definitions contained in s 2 of the Act. In terms of the AIPPA foreign involvement in Zimbabwean news media is severely restricted. No one may be registered unless that person is a Zimbabwean citizen or, in the case of a company, unless it is controlled by Zimbabwean citizens.⁵⁹ It is also interesting to note that the repeated reference to shares held in a mass media service, for example in s 65(2), implies that a mass media service may refer to the company itself, as opposed to the service it provides.

The term 'mass media' is defined broadly and vaguely so as to include any medium which transmits voice, visual, data or textual messages to an unlimited number of people. It covers advertising agencies, publishers and news agencies. In terms of the definition of 'mass media services' it also includes a body that merely produces 'mass media products' but does not disseminate them. Mass media products are defined widely enough to include 'the total data or part of the data of any electronically transmitted material, or audio or video recorded programme'. 'Dissemination', in turn, is defined to include any periodical publication, whether written, recorded or electronically distributed. Taken together, the definitions in s 2, as amended, could arguably cover personal e-mail or written updates, web postings or regular lobbying efforts by private persons as well as social and political organisations in addition to media publications properly so called.

So far the state has not ventured into this area to a significant degree, but there have been indications that the continued and effective dissemination of information to the international community over the internet has taken its toll on the regime. Already in 2002, during criminal proceedings against foreign journalist Andrew Meldrum, the state claimed that publication of articles written by the journalist and published outside of Zimbabwe could nevertheless be considered to be published in Zimbabwe if the article was available on the internet, and hence accessible from within the country. This brings the journalist within the ambit of the AIPPA's criminal prohibitions. Though acquitted, Meldrum was illegally deported on 16 May 2003.⁶⁰

On several occasions in early December 2003 the president lashed out at spies and neo-colonialists using the internet as a tool for

⁵⁹ Sections 65 and 72 of the Act, and particularly s 65(2). In terms of s 11(2) of the Amendment Act, a person not qualifying for ownership of a mass medium or shares therein is obliged to dispose of 'his controlling interest or shares, as the case may be, to a person who is so qualified' within three months of the Act coming into effect in June 2003.

⁶⁰ *Daily News* 14 May 2003; *Mail & Guardian* (SA) 15 May 2003; *Mail & Guardian* (SA) 17 May 2003; *Mail & Guardian* (SA) 18 May 2003. This case is also discussed below, 74.

threatening Zimbabwean sovereignty. Media reports indicate that at least 14 people have been arrested for writing insulting e-mail messages about the president and are awaiting trial.⁶¹ The department of information and publicity has been reported (by the state-sponsored as well as the independent media) to be spending billions on the acquisition of software that would allow it to monitor the exchange of electronic messages as well as official web postings.⁶²

Section 80 is headed 'Abuse of journalistic privilege'. In its original form the section was declared unconstitutional by the Supreme Court on 7 May 2003, in the case of Geoff Nyarota and Lloyd Mudiwa.⁶³ Nyarota, editor-in-chief of the *Daily News*, and Mudiwa, the newspaper's municipal reporter, were arrested after the publication of an article on 23 April in which the *Daily News* reported the beheading of a woman in the rural area of Magunje, allegedly by ZANU-PF supporters. Four days later, the paper published a retraction and apology after some doubt was cast on the credibility of the journalist's source. However, the two were arrested and charged in terms of s 80 of the AIPPA for abusing their journalistic privilege.

Despite reports that the government acknowledged in October 2002 that s 80 was unconstitutional,⁶⁴ the prosecutor was reported as admitting that she had not considered the pending Amendment Bill regarding s 80, but had received instructions to have the journalist's case remanded. The case was then referred to the Supreme Court on 23 July for constitutional muster in that the section failed to define journalistic privilege and falsehood, and did not specify that intent was a prerequisite for the offence. The state did not oppose the application, conceding the unconstitutionality of the section, which was subject to amendment. The Supreme Court then made an order by consent, declaring s 80(1)(b), as read with s 80(2) of the AIPPA, to be *ultra vires* s 20. Section 80 has since been amended by including the required definitions and removing the provisions imposing strict liability.⁶⁵

In terms of s 93 of the Act, existing mass media owners were granted a period of three months within which to submit applications for registration to the MIC (that is, until 15 June 2002). However, the regulations required for registration in terms of s 93 were gazetted only

⁶¹ News24 (SA) 25 November 2003; Newzimbabwe.com 12 December 2003.

⁶² *Sunday Independent* (SA) 14 December 2003; *The Daily Mirror* 9 December 2003; IOL 14 December 2003.

⁶³ Unreported Case No SC 280/2002. This case is discussed by Misa on 31 October 2003, available <http://www.ifex.org/en/content/view/full/17799/> (last accessed 10 December 2003).

⁶⁴ Misa Update 31 October 2002.

⁶⁵ Section 80 has been substituted by s 18 of Act 5 of 2003.

on 15 June, making compliance impossible. Indeed, it appears that the unavoidable illegality of any mass media service carrying out its business after 15 June 2002 motivated the inclusion of s 8(2) of the regulations.⁶⁶ Section 8(2) provides in an unqualified manner that once a person has submitted an application for registration, that person is permitted to carry on the activities in question while the application is considered. In terms of s 11(2) of the Amendment Act a further grace period of three months was granted after the coming into effect of the Amendment Act in June 2003.

Regulations in terms of the AIPPA were finally gazetted on 15 June 2002,⁶⁷ one day shy of the three-month grace period provided for in the Act within which applications for accreditation and registration of the various media services had to be made. Regulation 8(2) specifically provides that any applicant for accreditation or registration may continue to carry on their activities pending the determination of the application. A further interesting feature of the regulations is that reg 3, read with reg 5, requires an applicant for registration as a mass media service or a news agency to provide a business plan. This must give a detailed projected assessment of the business venture as well as information pertaining to its target market and financial sources.

The registration of a mass media service may be cancelled in terms of s 71 of the AIPPA. The MIC may suspend registration on the basis of error, fraud, misrepresentation and non-disclosure, as well as failure to commence with publication within twelve months. Section 71(1)(c) further provides that the MIC may suspend or cancel registration if the mass media service is owned or controlled by a foreign person, if it fails to send deposit copies to the National Archives, if it fails to include the publisher's imprint on its publications, or if it does not afford the statutory right of reply to a person about whom it has published information. Grounds for suspension or cancellation, though unduly strict, are limited to the grounds expressly provided for and thus circumscribed.

However, this must be seen in light of the serious consequences that may flow from relatively minor infringements in terms of s 72, which makes it a criminal offence to carry on a mass media service without a valid registration. Non-compliance with the requirement to lodge a deposit copy of the publication with the National Archives in

⁶⁶ See the comments in this regard by Omerjee J in the unreported 'Opposed Chamber Book Application' *ANZ v Chief Superintendent Madzingo* HC 8191/03, delivered on 18 September 2003 at typed pages 1 and 4 of that judgment.

⁶⁷ Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002 (SI 169C of 2002).

terms of s 76, for example, may lead to imprisonment and the imposition of a heavy fine because it is expressly provided for in s 71.

Further provisions in s 71 that offer potential to be used as a political tool are the provisions contained in s 71(6)–(10). In terms of these the MIC may require a mass media owner ‘to do, or not to do, such things as are specified in the order for the purpose of rectifying or avoiding any contravention or threatened contravention of the Act’. Sanctions provided for in these subsections do not include criminal sanction but refer to a penalty to be imposed at the discretion of the MIC.

The AIPPA further tasks the MIC with the development and monitoring of a code of conduct in consultation with representative journalist organisations. However, s 85(1) gives the MIC a subjective discretion in determining which organisations are to be regarded as ‘representative’. These powers are enhanced by the provisions of s 85(2), which provide for enforcement mechanisms as well as penalties to be imposed by the MIC.

In addition, comprehensive powers vest in the Minister, both in relation to the MIC as well as the implementation of the AIPPA directly. Information Minister Moyo, who is central to the operation of the Act’s provisions, has openly expressed his hostility towards the private media in Zimbabwe. He has verbally attacked foreign correspondents and labeled some of them ‘terrorists’.⁶⁸ The fact that all the members of the board controlling the MIC are appointed by the Minister certainly creates doubt as to the MIC’s independence.⁶⁹

The MIC is further charged with accrediting journalists in terms of ss 79–84. So far the government’s repressive attentions have been directed at journalists and editors rather than at media owners.⁷⁰ The rights of journalists are severely restricted under the Act. No journalist or foreign correspondent can practise his profession in Zimbabwe unless he or she is accredited with the MIC. Journalists who are not Zimbabwean citizens or permanent residents can be accredited only for limited periods.⁷¹ A journalist can be sent to prison for up to two years for various ill-defined offences such as falsifying or fabricating information, publishing falsehoods and ‘contravening any of the provisions of [the] Act’.⁷² In addition to these controls the MIC is empowered to develop a code of conduct for journalists and to punish journalists who fail to comply with the code.

⁶⁸ LRF op cit n 37 at 51.

⁶⁹ At 50.

⁷⁰ At 51.

⁷¹ Sections 79 and 83 of the Act.

⁷² Section 80 of the Act.

A recent and illustrative example of the state's efforts to prevent independent media activities is the battle fought between the state and the *Daily News*, published by Associated Newspapers Zimbabwe Pty (Ltd) (ANZ). Upon the passing of the AIPPA, ANZ brought an application to the Supreme Court⁷³ for an order declaring many sections of the AIPPA to be unconstitutional in that they unduly interfered with the paper's freedom of expression. The application was heard on 3 June 2003 and a ruling was handed down on 11 September 2003. During this time the paper had continued to publish. However, on 11 September the Supreme Court ruled on a point *in limine* raised by the respondents, namely, that the applicant paper was required to approach the court 'with clean hands'. The court, led by Chidyausiku CJ, agreed with the respondents and dismissed the applicant's case.

The reasoning of the court has been labelled 'astonishing'⁷⁴ by one commentator. In effect, its judgment means that an applicant may not come to court in advance of being harmed by legislation it considers unconstitutional, but must wait for such harm to occur. The court holds that '[c]itizens are obliged to obey the law of the land and argue afterwards'.⁷⁵ Only where a provision was 'blatantly unconstitutional' and 'totally repugnant'⁷⁶ would a court consider stepping in to assist an applicant before he or she had complied with the law. It is not clear how the court came to the conclusion that the law was not 'totally repugnant' and 'blatantly unconstitutional' without engaging with the merits of the application. The court's we-know-it-when-we-see-it attitude is entirely unhelpful in this regard. In any event, the court's appeal to the clean hands doctrine to defeat the applicant's case has been severely and ably criticised as legally questionable and inappropriate.⁷⁷

The Supreme Court handed down its judgment on 11 September 2003. The *Daily News* published a further edition on 12 September while it prepared to comply with the ruling of the court by putting together an application for registration. On the evening of 12 September armed police entered the *Daily News* premises and evicted all employees. The next morning, however, permission was granted for some members of staff to enter the news offices for the purpose of

⁷³ *Associated Newspapers of Zimbabwe Private Limited v The Minister for Information and Publicity in the President's Office & others* (unreported judgment, Case No SC20/03, delivered on 11 September 2003).

⁷⁴ Sir Blom-Cooper 'Mugabe's Judges are Paper Tigers' *The Times* (UK) 14 October 2003.

⁷⁵ *ANZ v The Minister* supra n 73 at 11.

⁷⁶ At 10 and 11.

⁷⁷ Feltoe op cit n 48.

finalising their application for registration. On 15 September 2003 the application was presented to the MIC and proof of this was furnished to police upon request. The *Daily News* sought to continue with its business while awaiting the decision of the MIC, but was prevented from doing so by the police, apparently acting at the behest of the attorney-general.⁷⁸

On 16 September the police began removing equipment of the *Daily News*, including computers and printers. On 18 September the *Daily News* urgently approached the High Court for an order permitting it to publish while its application was pending. The order was granted by Omerjee J 'on the basis of section 8(2) of the Regulations' expressly permitting the paper to continue publishing pending the outcome of its application. The court further ordered the return of the seized property since the seizure, which was carried out without a warrant, was not in compliance with the Criminal Procedure and Evidence Act⁷⁹ even on the papers before the judge in chambers. The state indicated its intention to appeal by the agreed deadline of 22 September 2003, but only filed supporting papers thereafter.

The police did not return the seized equipment, rendering publication impossible. The MIC rejected the *Daily News* application within a remarkably short time, and only two days after Omerjee J gave judgment against it. An appeal to the Minister against the MIC's decision is pending. In its judgment of 11 September 2003 the Supreme Court had stated that '[f]or the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach the Court on the same papers.'⁸⁰ It is not clear from the judgment whether the *Daily News* is required to wait for the legislative mechanism to run its course, or whether submission to the procedures is sufficient compliance in the court's view. To date, the police have refused to return equipment seized and to allow publication to continue. This is despite two court orders by the Administrative Court to the effect that the paper be allowed to publish, as discussed earlier.⁸¹

The AIPPA has also been used to restrict the activities of foreign journalists severely. In June 2002 Meldrum, a United States national and journalist with the United Kingdom-based newspaper *The Guardian*, was the first journalist to be charged and tried under s 80 of

⁷⁸ These events are set out clearly in *ANZ v Chief Superintendent Madzingo* supra n 66 at 2–3.

⁷⁹ [Chapter 9:07].

⁸⁰ *ANZ v The Minister* supra n 73 at 11.

⁸¹ Above, 3.3 in ch 3.

the AIPPA.⁸² He was charged with 'abusing journalistic privilege by publishing a falsehood' in connection with a report about the alleged beheading of a woman by ZANU-PF supporters.⁸³ Although he was acquitted, within hours of the ruling he was served with a deportation order by the Ministry of Home Affairs. Following a High Court application, his deportation was suspended and the matter was referred to the Supreme Court. No date has been set for his Supreme Court hearing, which has become academic since he was illegally deported on 16 May 2003.⁸⁴

Registration of media services and accreditation of journalists is not unusual internationally. It is usually, however, in the hands of an independent professional body, which ensures that media activities meet clearly defined standards. In Zimbabwe there is a clear tendency to use newly enacted legislation as a vehicle for censorship. The central body controlling the registration of media services and accreditation of journalists, the MIC, is dominated by state interest. The increased restrictions imposed on foreign media in the Act is further evidence of the antagonism with which foreign, and particularly British, interest in Zimbabwe is received by the government.⁸⁵

Criminal sanctions contained in the AIPPA further play into the hands of government agencies that are implicated in the breakdown of the rule of law in Zimbabwe. Usually, laws aimed at regulating the media and its journalists relate to the issue of defamation, or otherwise are found in a country's constitutional or legislative provisions dealing with hate speech. In both instances the matter is usually one of civil, as opposed to criminal, law and largely a matter for judicial definition. However, defamation is effectively criminalised by s 80 of the AIPPA, even in its amended form, as well as ss 12, 15 and 16 of the Public Order and Security Act, which will be discussed in more detail.⁸⁶ The severity of criminal sanctions, coupled with the inaccessibility of information held by the government, leads to tight restrictions being imposed on the ability of journalists to report on the activities of the government.

⁸² *Guardian Unlimited Observer* 18 February 2001.

⁸³ *Ibid.*

⁸⁴ *Daily News* 14 May 2003; *Mail & Guardian* (SA) 15 May 2003; *Mail & Guardian* (SA) 17 May 2003; *Mail & Guardian* (SA) 18 May 2003.

⁸⁵ *Al op cit* n 44 at 25.

⁸⁶ *Ibid.*

4.3.2 *The Public Order and Security Act*

The Public Order and Security Act (POSA)⁸⁷ has been used, perhaps more than any other legislative tool, to inhibit free political activity and clamp down on public political debate.⁸⁸ It replaced the infamous Law and Order Maintenance Act, which had been limited in its draconian application over time by the Supreme Court in the years before and after independence.⁸⁹ After some delays in the drafting of the Public Order and Safety Bill, POSA was eventually fast-tracked through Parliament in December 2001, apparently to enable the government to hamper the campaigning activities of the MDC in the run-up to the March 2002 presidential elections.⁹⁰ A report by the Norwegian Election Observation Mission on the presidential elections of 2002 concluded that 'the application of the Public Order and Security Act has been such as to place wholly unreasonable limitations of the freedom of assembly'.⁹¹

POSA has been used systematically to clamp down on demonstrations and expressions of popular dissent. Its application often appears to be aimed entirely at brutally preventing the political process rather than initiating criminal proceedings. During 2003 it provided the means for government agencies to counteract popular demonstrations throughout the year. Such demonstrations were promptly broken up and hundreds of demonstrators arrested, often to be released without charge or on remand.⁹² Some examples of the use of POSA during 2003 are discussed here.

A telling example of the use of provisions of POSA for political ends is the brutal arrest of Harare mayor Elias Mudzuri, a prominent MDC member, for addressing an unauthorised political rally. Twenty-one councillors and municipal workers were also arrested.⁹³ The alleged rally appears to have been a public meeting in the council hall of Mabvuku in the district of Harare. It sought to address the problem of water shortages in the area as well as sewage problems and the maintenance of roads. There can be little doubt that such issues fall within the mandate of the mayor's office. However, police informed the mayor's legal representatives that he would be charged in terms of

⁸⁷ [Chapter 11:17].

⁸⁸ LRF op cit n 37 at 51.

⁸⁹ AI op cit n 44 at 46–7.

⁹⁰ AI op cit n 44 at 17; Gubbay op cit n 11.

⁹¹ Quoted in AI op cit n 44 at 35.

⁹² IOL 24 March 2003; International Bar Association Press Release 24 November 2003.

⁹³ Amnesty International Press Release 24 January 2003.

s 25(1) of POSA.⁹⁴ Since his release, police have prevented him from resuming his mayoral duties.⁹⁵

In 2003 public protests were organised by the opposition and labour movements. The protests were put down with some success by government forces, with hundreds of opposition supporters arrested before and after the attempted demonstrations and strikes.⁹⁶ Scores of opposition MPs, including Tendai Biti, Tichaona Munyoni and Paul Madzore, were charged in terms of POSA for taking part in demonstrations.⁹⁷

In an unusual move police chief Augustine Chihuri filed an urgent application to the High Court in May 2003 seeking an order preventing the opposition MDC from staging mass action 'intending to remove a legitimately elected President and government'. The MDC had announced plans for such mass action to take place in the first week of June 2003. Hlatshwayo J, a beneficiary under the land reform programme, granted the application on an interim basis.⁹⁸ The order was swiftly appealed to the Supreme Court, inter alia on the basis of lack of impartiality by Hlatshwayo J.⁹⁹ Demonstrations occurred despite the court's order and were violently put down by police.¹⁰⁰

On 18 November 2003 many civil society leaders were again arrested after a demonstration against economic mismanagement in the country.¹⁰¹ They were not informed of any charge against them at the time of the arrests. It was reported that the police tried unsuccessfully to pin several charges to them. Initially, the leaders were informed that they would be charged for contravention of s 19 of POSA, which makes it an offence to disturb the peace, security or public order. However, the attorney-general's office declined to prosecute on this basis. The police kept the men in custody, informing their legal representatives that they would instead be charged under the Miscellaneous Offences Act for conduct likely to breach the peace. However, the police changed their mind and sought then to charge the arrested activists under s 25 of POSA, and later changed that to s 26, in conjunction with s 24, which requires notice to be given of public

⁹⁴ Afrol News 12 January 2003.

⁹⁵ *Mail & Guardian* 9 July 2003.

⁹⁶ *Daily News* 6 June 2003.

⁹⁷ *The Herald* 5 June 2003.

⁹⁸ News24 (SA) 31 May 2003.

⁹⁹ *The Herald* 3 June 2003.

¹⁰⁰ IOL 3 June 2003.

¹⁰¹ In Harare fifty-one people were detained, including the leading figures of Crisis in Zimbabwe Coalition, the Zimbabwe Congress of Trade Unions and others.

gatherings. The trade unions, however, are exempted from s 24 in terms of the schedule to POSA. Three days after the arrest the men were still detained, but quite unsure what offence they would be charged with.¹⁰² Late on 21 November 2003 the men were released and all charges dropped.¹⁰³

POSA has also been used against church organisations, even though such organisations are exempt from its provisions. On 10 and 12 February 2003 Pastor Immanuel Hlabangana was detained and interrogated by CIO officers for several hours about his activities. These included distributing food and taking part in a workshop where he advocated the setting up of a truth and reconciliation commission akin to that in South Africa. Although church meetings may take place without permission in terms of POSA, the pastor was informed that the police wanted to charge him in terms of s 24 of POSA for organising an illegal church meeting on 21 January 2003. No charges were filed.¹⁰⁴

POSA also goes far in criminalising activity that would ordinarily, and according to Zimbabwean common law, be dealt with in terms of defamation law. In terms of the Act a person may be imprisoned for up to five years for publishing a false statement intending inter alia to incite public disorder, for undermining public confidence in a law enforcement agency, or intending adversely to affect the defence or economic interests of Zimbabwe. This sanction applies even if the person only anticipated a risk of such consequences.¹⁰⁵ Where such consequences do occur, the state does not need to prove actual intention; it is sufficient for it to prove that any reasonable person would have anticipated that they would occur.¹⁰⁶

The potential of s 15 to have a chilling effect on free speech and independent reporting is evidently strong. Any critical reporting of government agencies and policies is likely to undermine public confidence therein and may lead to demonstrations or protests. Furthermore, government agencies have shown themselves inaccessible, if not openly hostile, to journalistic inquiry. Witnesses of state

¹⁰² Institute for Justice and Reconciliation *Zimbabwe Police Desperate to Find a Charge* available at http://www.ijr.org.za/monitors/mon_pgs/zim/Articles/ZIMBABWE%20POLICE%20DESPERATE%20TO%20FIND%20A0CHARGE_21nov03.doc (last accessed on 21 November 2003).

¹⁰³ Institute for Justice and Reconciliation Press Release 21 November 2003 available at http://www.ijr.org.za/monitors/mon_pgs/zm/Articles/PRESS%20STATEMENT_21nov03.doc (last accessed on 21 November 2003).

¹⁰⁴ Brian Raftopolous *Crisis Condemns Arrest of Manicaland Pastor* 19 February 2003, available at <http://www.kubatana.net/html/archive/relig/030219ciz.asp?sector=RELIG> (last accessed 15 June 2003).

¹⁰⁵ Section 15(1).

¹⁰⁶ Section 15(2).

brutality will be disinclined to go on record with their complaints, making it close to impossible for a journalist to establish the truth of a critical report.

Section 12 makes it a criminal offence to do or say anything that may cause 'disaffection among the Police Force and Defence Forces'. Offences are punishable by imprisonment for up to two years. An example of the use of this section is the case of MDC official Kenneth Gwabalanda-Mathe. He was arrested in January 2003 and charged under s 12 for making a statement in the *Daily News* about reported harassment and attacks on citizens perpetrated by police and army officers after the murder of an Australian tourist at Victoria Falls that month. Gwabalanda-Mathe has been released on bail and is awaiting trial.¹⁰⁷

Perhaps one of the most draconian provisions of the Act is found in s 16, which is aimed specifically at protecting the presidency from criticism. A person who makes a public statement that actually or potentially has the effect of 'engendering feelings of hostility towards; or . . . causing hatred, contempt or ridicule' of the president may be imprisoned for one year. The same sanction applies to making merely false statements about the president, irrespective of the speaker's intention. Effectively, this criminalises the ordinary political process that takes place in any run-up to presidential elections involving a sitting president since as a matter of course this involves criticism of existing policies and leadership. It also makes impossible the debate in the wider public realm that takes place in the media and other public forums. The concern with the lack of accessibility of state information for the verification of reports applies equally to s 16 as to s 15.

Amnesty International has cautioned that the government is using ss 12, 15 and 16 taken together to target individuals and organisations whose views differ from those of the government.¹⁰⁸ The authorities appear to be using these provisions to target the independent media and human rights activists who document and expose human rights violations perpetrated by the government and its agents. Such reports arguably now fall into the category of undermining public confidence in the security forces or undermining the authority of the president. Moreover, the prospect of arrest on a suspicion of contravention of the Act, even if ultimately the state cannot establish its case against the journalist, is equally threatening.¹⁰⁹ There are many reports of arrests and detentions of journalists and editors, ostensibly in terms

¹⁰⁷ AI op cit n 44 at 18.

¹⁰⁸ At 19.

¹⁰⁹ LRF op cit n 37 at 52.

of POSA, though many of these people were later released without charge.¹¹⁰

Section 5 of the Act criminalises the organisation or setting up of pressure groups targeting government policies. Punishment for this offence includes imprisonment for up to twenty years without the option of a fine. Prohibited conduct includes the use of physical force or violence as well as boycotts, civil disobedience or active or passive resistance to any law when such activities are accompanied by the use or the threat of violence or physical force.

In January 2003 Job Sikhala, MDC Member of Parliament (MP) for St Mary's constituency in Harare, Gabriel Shumba, a lawyer with the Zimbabwe Human Rights NGO Forum, and three other MDC members were arrested and charged under s 5 of POSA. All five were apparently tortured while in police custody. Medical examinations indicated that both Sikhala and Shumba had electric shocks applied to their genitals, mouths and feet. The two men were also forced to drink urine.¹¹¹ The charges against all five were subsequently dismissed for lack of evidence. On 31 March 2003 MDC Vice-President Gibson Sibanda was arrested for allegedly trying to overthrow the government by inciting people to join the national mass stayaway organised by the MDC on 18 and 19 March 2003. He has been charged under s 5 of POSA. After spending eight days in police custody, he was released on bail and required to report to the police twice a week.¹¹²

Sections 17 and 19 of POSA provide that individuals who disturb the peace, or say or do anything considered obscene or insulting, can be imprisoned for up to ten years. These provisions may be used as an excuse by the authorities to target individuals and organisations that engage in, advocate or organise peaceful acts of civil disobedience.¹¹³

In addition to the granting of power to police inherent in the criminalisation of private action the Act explicitly grants extensive powers to control public meetings, assemblies and demonstrations. Sections 23–31 regulate the organisation and conduct of public gatherings. Section 24 requires that police be given four days' advance notice for the holding of public gatherings or meetings.¹¹⁴ Failure to give such notice attracts a maximum sentence of six months' imprisonment. In practice, police are using this provision to refuse

¹¹⁰ Updated reports of media arrests are carried on the website of the International Freedom of Expression eXchange (IFEX) at <http://www.ifex.org>.

¹¹¹ *Al op cit* n 44 at 18.

¹¹² *Ibid.*

¹¹³ At 19.

¹¹⁴ At 20.

permission to hold public gatherings and meetings.¹¹⁵ The Supreme Court found this provision to be constitutional in *Biti & another v Minister of Home Affairs & another*.¹¹⁶ The court found the provision to be reasonably justifiable in a democratic society as it allowed the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or any breach of the peace. The court further found that it was also necessary to ensure that the gathering concerned did not unduly interfere with the rights of other people or lead to an obstruction of traffic, a breach of the peace or public disorder.

Sections 25 and 26 grant the police wide powers to break up and even prevent public gatherings altogether if they are deemed to endanger public order, including a possible ban of one month against public demonstrations in an area if it is believed to be necessary to prevent public disorder.¹¹⁷ The only right of appeal against a prohibition issued by a senior police officer in terms of s 26 is to the Minister in charge of the police. Since POSA's enactment the police have actively used these provisions to police peaceful meetings and have, to some degree, made Zimbabwe a police state where democratic activity is tightly controlled and supervised, and where repression of internationally recognised human rights is commonplace.¹¹⁸

Further police power is provided for in s 32, which allows police to demand production of an identity document by anyone over the age of 16 whom they find in a public place. If a person cannot produce an identity document immediately, and if he or she is present at a public gathering or meeting of a political nature, police can detain the person until his or her identity is established.¹¹⁹ The focus on political activities apparent in this section potentially allows for the police to use this power to discourage people from attending political gatherings organised by opposition parties.¹²⁰

In further support of police activity s 21 of POSA makes acts or statements which engender feelings of hostility towards police officers an offence punishable by up to two years in prison. In February 2003 the deputy news editor of the *Daily News*, Pedzisayi Ruhanya, and a freelance journalist, Ishmael Mafundikwa, were arrested for allegedly obstructing police duties at the opening of Tsvangirai's treason trial.

¹¹⁵ Ibid.

¹¹⁶ Unreported judgment, Case No Section-9-2002.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Section 32.

¹²⁰ *AI op cit* n 44 at 22.

They were subsequently charged under s 21, although they were later released after the attorney-general refused to prosecute them.¹²¹

The government has used provisions of POSA specifically to target the MDC and hamper its ability to campaign and mobilise support, particularly in the run-up to elections. For example, in July 2002, Innocent Gonese, the MDC MP for Mutare Central in Manicaland province, was prevented from addressing a meeting in Beitbridge on the basis that the 'political environment was hostile'. More recently police detained Nelson Chamisa, the winning MDC candidate in the March 2003 parliamentary by-election in Kuwadzana, and ten others in the run-up to the election while they were canvassing door-to-door. Police alleged that they were holding an unauthorised meeting. The eleven were released the same day but were prevented from canvassing any further.¹²²

In February 2002 Munyaradzi Gwisai, former MDC MP for Highfield, and ten members of the National Constitutional Assembly (NCA) were arrested and charged under ss 24 and 26 of POSA for taking part in an NCA-led protest march. They maintain that the arrests were unlawful as the provisions of POSA under which they were charged were unconstitutional. In May 2002 they filed a petition with the Supreme Court seeking the nullification of ss 24 and 26 of POSA.¹²³

Since its enactment in 2002 the authorities have used POSA to target opposition supporters, independent media and human rights activists. The Act has been specifically used to restrict rights freely to assemble, criticise the government and president, and engage in, advocate or organise acts of peaceful civil disobedience. Since the enactment of POSA the police have used it to arrest arbitrarily hundreds of Zimbabweans, mainly opposition supporters. Many have had the charges against them dropped or dismissed in court for lack of evidence. However, the legislation has provided the police with a pretext to intimidate, harass and brutally torture real or perceived supporters and members of the opposition.¹²⁴

It is perhaps instructive to consider the interpretation given to POSA, in terms of which Tsvangirai is currently being charged for treason, by State Prosecutor Morgan Nemadire in that matter:

It is not a question of personally or physically participating in a violent, physical manner . . . Merely to postulate, and to contemplate even while sitting down, can be to commit treason, which is why there is no such thing as attempted treason.¹²⁵

¹²¹ At 18.

¹²² At 20.

¹²³ At 21.

¹²⁴ At 17 and 22.

¹²⁵ Independent Online (IOL) South Africa 13 June 2003.

4.3.3 Conclusions

Two trends are evident in an analysis of the legislation used to control the public sphere in Zimbabwe. On the one hand, newly enacted legislation such as POSA is clearly and explicitly aimed at increasing police powers in order to prevent political activity that is seen as a threat to the government's rule. As long as the public political process is deemed to be a threat by the police and other officials, the provisions of Acts such as these may be used to limit, and even prevent, opposition activities of any kind. This allows police to arrest, often without charging, members of the opposition in the exercise of their political rights. This trend is exacerbated by the enactment of broad, discretionary definitions that provide state agents with a pretext on which to base arrests and charges.

The second trend is the creation of an increasingly complex bureaucratic machinery for exerting regulatory control over the public sphere. This has been particularly evident in relation to the independent media. Here the use of regulatory mechanisms such as registration and accreditation procedures has enabled the state to take all independent print media out of circulation. It has also offered the Supreme Court recourse to technical reasoning without having to engage substantively with the impact of media legislation on the public sphere in Zimbabwe.

4.4 Magistrates' courts

There are roughly 300 magistrates in the public service, though a significant number of open posts have not been filled. Training is conducted through the Judicial College of Zimbabwe.¹²⁶ Magistrates are placed under the justice ministry and are civil servants. The past few years have seen a significant turnover rate of magistrates and, as a result, an increasingly young magistracy. This situation is influenced to some degree by the relatively low salaries for magistrates as compared to the private sector and by mounting political pressure from government forces, especially in rural areas.¹²⁷

As civil servants, magistrates are not protected by tenure and may be removed from office by the Public Service Commission if it decides that they are unsuitable for their posts or that their removal will

¹²⁶ Augustine Deke/ANB-BIA *The Judiciary open to Abuse* Issue 337-01/01/1998, available at <http://ospiti.peacelink.it/anb-bia/nr337/e23.html> (last accessed February 2003).

¹²⁷ An extensive report on attacks on magistrates from 2000 to 2002 is contained in LRF op cit n 37 at 14–18.

'facilitate improvements in the Ministry'.¹²⁸ Magistrates must accept promotions¹²⁹ and may be transferred without their consent to any post in the public service, whether inside or outside of Zimbabwe.¹³⁰ In addition, especially in smaller towns, pressure is mounting from the disaffected litigants with contacts to paramilitary organisations such as the Green Berets, as well as government officials. While a magistrate's salary may not be reduced,¹³¹ in the present economic crisis anything but a colossal increase in salary must be considered to be a *de facto* reduction in pay.

As the courts of first instance in criminal matters, magistrates' courts are in the important position of deciding on bail and remand of accused persons in most cases. The importance of a meaningful hearing at this stage of proceedings is clear when one considers the large number of cases in which detained persons are never charged or charges are withdrawn, cases which are subject to long delays, and incidents of violence and abuse in police custody.

There are many reports of intimidation taking the form of demonstrations, disruption of judicial proceedings, and personal threats to magistrates and their families. Such intimidation is usually the result of rulings against ZANU-PF members or of rulings granting bail to persons perceived to be MDC supporters. Over the past three years incidents of this kind have been reported regularly. With the clampdown of the independent press over the past year, however, reports are becoming less readily available.

A particularly outrageous instance of intimidation occurred on 16 August 2002. The Legal Resources Foundation reported that Chipinge magistrate Walter Chikwanha was assaulted by a group of war veterans. The assault took place in court after the magistrate had refused the state's application to remand five MDC members in custody.¹³² The men had been rearrested one day after their release on \$20 000 bail by Chikwanha. They were detained for several days before being brought back to court. The magistrate again released them without changing the bail conditions.¹³³

¹²⁸ Section 17(1) of the Public Service (General) Regulations 1992, Statutory Instrument 125 of 1992, as quoted in Linington op cit n 2 para 465.

¹²⁹ Public Service (Officers) (Promotion) Regulations, 1980, Statutory Instrument 539 of 1980, as discussed in Linington op cit n 2 para 465.

¹³⁰ Section 25 of the Public Services Act [Chapter 16:04].

¹³¹ Section 109(7) of the Constitution.

¹³² LRF op cit n 37 at 15; Amnesty International Press Release 2 September 2002.

¹³³ LRF op cit n 37 at 15; Zimbabwe Human Rights Forum *Political Violence Report 1–31 August 2002*, available at http://www.hrforumzim.com/monthly/aug_02a.htm (last accessed 1 June 2003).

War veterans are said to have forced their way into court, dragged the magistrate out of the room and made him chant ZANU-PF slogans in public view. Several other court officials were also assaulted as well as Langton Mhungu, who acted on behalf of the accused MDC members. Mhungu has since left the area.¹³⁴ Despite the reported presence of police officials, no action was taken to stop the veterans nor did any subsequent arrests take place.¹³⁵

In the face of such intimidation many magistrates have shown remarkable independence and courage. In protest against these actions magistrates and prosecutors of Manicaland went on strike or participated in a go-slow from 19 to 23 August.¹³⁶ The Chipinge magistrate's court was closed for the week after the attack.¹³⁷ One prosecutor is reported to have said: 'This is unheard of. It is a total breakdown of the rule of law in the country and we cannot be seen to condone it. How on earth can people just walk into a courtroom, drag the presiding magistrate out and assault him?'¹³⁸ Statements condemning the attack were also issued by the Law Society of Zimbabwe, the Legal Resources Foundation, the UN Special Rapporteur on the Independence of the Judiciary¹³⁹ and the Lawyers Committee for Human Rights.¹⁴⁰

On 25 July 2003 Chipinge magistrate Feyi Tito refused to apply s 16(2)(b), which states that '[a]ny person who publicly and intentionally makes any abusive, indecent, obscene or false statements about the President or an acting President whether in respect of his person or office shall be guilty of an offence'. The magistrate accepted that the Act was too vague since it did not define 'the President' and it was thus not clear who was referred to in the Act. Since the Act deprived the accused, Trymore Sithole, of his rights, it was to be narrowly interpreted and could not be stretched by reading in a definition where there was none.¹⁴¹ This argument appears quite clearly motivated by a

¹³⁴ Lawyers Committee for Human Rights Media Alert 22 August 2002 available at http://www.lchr.org/media/2002_alerts/0822.htm (last accessed 1 June 2003); United Nations Press Release 2 September 2002, available at <http://www.unhchr.ch/huricane/hurricane.nsf/0/D9A6BDFB9868CBCEC1256C28004B32A8?opendocument> (last accessed 1 June 2003).

¹³⁵ *Daily News* 17 August 2002; LRF op cit n 37 at 15.

¹³⁶ UN Press Release op cit n 134.

¹³⁷ *Daily News* 27 August 2002.

¹³⁸ *Daily News* 20 August 2002.

¹³⁹ *Mail & Guardian* (SA) 31 August 2002.

¹⁴⁰ Lawyers Committee for Human Rights *Open Letter to President Mugabe and the Minister for Justice, Legal and Parliamentary Affairs* 22 August 2002, available on http://www.lchr.org/defenders/hrd_zimbabwe/zim_let_220802.pdf (last accessed 15 September 2003).

¹⁴¹ *Daily News* 31 July 2003.

desire to limit the applicability of the draconian Act. Nevertheless, no protest was recorded by government, and the Minister of Justice, Chinamasa, is reported as saying that it did not concern him.¹⁴²

The relative independence of magistrates has been commented on widely and this segment of the judiciary has been assessed as the most likely to be rendering independent justice.¹⁴³ Explanations for this vary. It is possible that with government efforts aimed at the higher court structures, the magistrates' courts have escaped large-scale interference because of their relatively lesser importance.¹⁴⁴ This should be seen in the context of the government's efforts overall to be seen as upholding the principles of legality, if not the rule of law. The jurisprudence of a country is established at the level of the superior court structures and it is here that the government has concentrated its efforts.

Another, more pragmatic, explanation that has been offered is that magistrates' working conditions are poor enough to foster sympathy with the opposition's concerns. Magistrates are not part of the elite that has emerged in the past few years and little political favour has been extended to them. On this argument the independence of magistrates is an indication of their close links to the general community, which is struggling to survive.¹⁴⁵

The magistrates' courts are, however, facing serious problems. In May 2003 the state-sympathetic *Herald* reported a backlog of over 60 000 cases in the magistrates' courts. The chief magistrate is reported to have said that fifty-nine magisterial posts were vacant. In Harare, only eight out of twenty positions were filled. The political pressure exerted on magistrates compounds the high rate of employees leaving the public service for the private sector after only a short period of time.¹⁴⁶ In addition politically sensitive cases are kept away from magistrates with perceived opposition sympathies, irrespective of the legal complexities of the case.¹⁴⁷ The result is that inexperienced magistrates are often forced to deal with matters that are beyond their legal capacities since senior magistrates are considered politically undesirable.

¹⁴² Ibid.

¹⁴³ Interview with Brian Kagoro 24 February 2003; David Coltart 4 December 2003; Brian Raftopolous 9 December 2003.

¹⁴⁴ Talk presented to the Harold Wolpe Memorial Trust 9 December 2003 by Brian Raftopolous.

¹⁴⁵ Interview with David Coltart 4 December 2003.

¹⁴⁶ *The Herald* 6 May 2003.

¹⁴⁷ Interview Brian Kagoro 24 February 2003.

Political pressure on the magistrates' courts has increased in the past two years. It is possible that after dealing with the High Courts and the Supreme Court, the government is now turning to the magistrates' courts in an attempt to eradicate independence there. This appears to be borne out by increased reports in the media of statements by the government in this vein, as well as increased reports of intimidation of magistrates and prosecutors by government agents. Minister Jonathan Moyo has strongly criticised prosecution services and magistrates, with claims of partisanship and incompetence,¹⁴⁸ sentiments that have been echoed more recently by the Commissioner of Police, Augustine Chihuri.¹⁴⁹

4.5 Office of the Public Prosecutor

Like magistrates, public prosecutors are employed as civil servants in the public service. As the government's representative in court in criminal matters (for example, in all matters that come to court under POSA), the political pressure on public prosecutors is considerable. By early 2003 two senior public prosecutors, Thabani Mpofu and Kennedy Mupomba, had left the attorney-general's office over what undoubtedly was intimidation by government agencies. The state-sympathetic *Herald* newspaper reported that Mpofu was said to be under investigation for not acting strongly enough against perceived enemies of the state. He has subsequently vanished.¹⁵⁰

In April 2003, and at the age of 50, Attorney-General Andrew Chigovera retired after just under three years in office. The move was generally interpreted as a capitulation to government pressure after repeated attacks by the government, which felt that his office was not prosecuting opposition members vigorously enough.¹⁵¹ Chigovera had succeeded Chinamasa as attorney-general in 2000. Chinamasa is a member of ZANU-PF and was widely considered to have supported the cause of ZANU-PF during his time as attorney-general. Chinamasa went on to be appointed to his current post as Minister of Justice.¹⁵² After Chigovera's retirement his deputy, Bharat Patel, was appointed acting attorney-general.

¹⁴⁸ *Financial Gazette* 21 November 2002

¹⁴⁹ *The Herald* 17 December 2003.

¹⁵⁰ *Daily News* 26 February 2003.

¹⁵¹ *Zimbabwe Independent* 25 April 2003; *Financial Gazette* 24 April 2003.

¹⁵² *Financial Gazette* 24 April 2003.

In more general terms, the past two years have seen the attorney-general's office depleted of independently minded prosecutors, mainly through intimidation leading to large-scale resignations. A senior prosecutor at Mutare magistrate's court, Levinson Chikafu, reported in April that war veterans threatened him in his office after a group of MDC supporters arrested under POSA were granted bail.¹⁵³ The attorney-general's office has become significantly partisan, to the extent that cases against supporters of ZANU-PF often do not proceed and the dockets are lost. Nevertheless, the attorney-general's office has increasingly come under attack from the government.¹⁵⁴ What appears to underlie these attacks is a perception that the prosecution services are 'politically ineffective', as pointed out by Lovemore Madhuku, a constitutional lawyer in an interview with the *Financial Gazette*.¹⁵⁵

In addition, the police services appear to be encouraging a negative perception of the lower court structures. In December 2003 the police were reported to have published a report on alleged court backlogs, corruption and incompetence, which they said were hampering police efforts to bring perpetrators to justice. The report is endorsed by the Commissioner of Police, Chihuri, who is quoted as saying that:

[Public prosecutors] may deliberately fail to cross-examine accused persons and witnesses on crucial issues to enable decisions to be made in the suspect's favour . . . The perennial granting of bail and sometimes light sentences to notorious criminals is negatively affecting the economy.

Police in Masvingo are reported to have complained about the granting of bail, commenting that '[w]hen some criminals disappear, the court expects the police to re-arrest the accused persons without considering the hassles associated with chasing a notorious criminal'.¹⁵⁶

There can be no doubt that the attorney-general's office is facing very real challenges. These include a high staff turnover, the pressure of political interference, and scarcity of resources. Police are also using arrest and detention as tools of immediate repression rather than with a view to trial and conviction.¹⁵⁷ Prosecutors are faced daily with the task of defending trumped-up charges, the absence of

¹⁵³ Arnold Tsunga *The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe in 2003* available at http://www.legalbrief.co.za/view_1.php?artnum=13709 (last accessed 7 January 2004); *Daily News* 8 April 2003.

¹⁵⁴ See above, 86.

¹⁵⁵ *Financial Gazette* 21 November 2002.

¹⁵⁶ *The Herald* 17 December 2003.

¹⁵⁷ Interview with David Coltart 4 December 2003; Brian Raftopolous 9 December 2003.

evidence and policing that is hampered by the scarcity of resources even when it is not politically motivated.¹⁵⁸

Like magistrates, prosecutors are denied entry into the elite group that is ruling Zimbabwe. Even more than magistrates, they have to contend with the harsh reality of daily life in Zimbabwe and are likely to feel much stick and get few carrots. The government's initial focus on the higher court structures has allowed for relative independence to persist in the lower courts, among magistrates as well as prosecution services. Anecdotal evidence seems to suggest that individual members of the attorney-general's office will continue to refuse to prosecute where the charges are clearly insupportable. Two recent examples have been referred to above, namely, the refusal to prosecute the civil society leaders arrested on 18 November 2003 under various sections of POSA,¹⁵⁹ and a refusal to prosecute *Daily Mail* journalists in terms of s 21 of POSA.¹⁶⁰

4.6 Police inaction and impunity

Amnesty International has raised strong concerns about the increasing partiality of police forces in Zimbabwe, pointing to mounting internal pressure on police officers to support the government in its clampdown on political dissent.¹⁶¹ At the same time it appears that officers with suspected loyalty to the opposition party are purged from positions of authority and placed in what has been termed the 'commissioner's pool', a position of administrative limbo without functions assigned to them, or moved to rural and inferior positions.¹⁶² This purge of independent police officials has led to numerous reports of police impunity in the perpetration and investigation of violence by ZANU-PF supporters.¹⁶³

Though not formally part of the judicial institution, the functioning of law enforcement agencies is, of course, closely related to it, and the conduct of the police impacts on the judicial institution in many ways. The police provide the means by which the conduct of criminal proceedings in the widest sense is made possible, in both the apprehension of perpetrators and the collection of evidence. Perpetrators not apprehended by the police are entirely beyond the reach of the courts. Furthermore, the residual threat of forced

¹⁵⁸ Interview with Brian Raftopolous 9 December 2003.

¹⁵⁹ See above, 76–7.

¹⁶⁰ See above, 80–1.

¹⁶¹ AI op cit n 44 at 37.

¹⁶² Ibid; and see *Financial Gazette* 14 June 2001.

¹⁶³ Ibid.

execution, backed by the state's coercive power, underlies the enforcement of civil judgments as well as the deterrent effect of criminal sanctions. Of particular importance in the Zimbabwean context is also that the courts rely on the institutional respect due to them in cases where the courts are in direct conflict with the police force, such as in the case of *habeas corpus* writs. Impunity of the police in the execution of their duties will impact strongly on the functioning of the judicial institution.

In all of the above respects the judicial institution is suffering the effects of police impunity. Reports abound of the unwillingness of police officers to accept complaints against supporters of ZANU-PF, including war veterans and youth brigades. There are also many reports of a general unwillingness by police to investigate offences that relate to 'political' issues, which include most matters of public interest at this point. This is particularly evident in the context of land invasions and election campaigning.¹⁶⁴ For example, it has been reported that police were employed to assist Judge Hlatshwayo in taking over the farm assigned to him in January 2003.¹⁶⁵ Human Rights groups support allegations of partisanship.¹⁶⁶ Many offences go unreported as the police are increasingly perceived to be as likely to cause retribution against complainants as to investigate the matter complained of.¹⁶⁷

A prominent example of this is the case of Tichaona Chiminya and Talent Mabika, who were killed during an attack by ZANU-PF supporters in the run-up to the parliamentary elections in 2000.¹⁶⁸ The alleged perpetrators were identified as Joseph Mwale, a CIO operative, and Kainos Tom 'Kitsiyatota' Zimunya. Witnesses said a police vehicle was parked less than 100 metres away from the scene of the attack. The police, so it is alleged, did not intervene and made no effort to stop the attack or follow the vehicle in which the attackers left the scene. No arrests were made.

Evidence for the attack was led during an election challenge before Devittie J.¹⁶⁹ After hearing evidence on this and other incidents

¹⁶⁴ AI op cit n 44 at 39–40; the Commercial Farmer's Union has published weekly situation reports for the period 2000–2001, available at www.zwnnews.com (last accessed 15 June 2003).

¹⁶⁵ IOL 10 January 2003.

¹⁶⁶ A thorough but slightly outdated report on police partisanship is contained in *Enforcing the Rule of Law in Zimbabwe Special Report 3* (Zimbabwe Human Rights NGO Forum, Harare September 2001) at 29–35.

¹⁶⁷ HRW op cit n 29 at 23–5.

¹⁶⁸ AI op cit n 44 at 43–4.

¹⁶⁹ Reported as *Chavunduka & another v Commissioner of Police & another* 2000 (1) ZLR 418 (S), dealing with the election challenge for Buhera North Election Petition.

of intimidation, Devittie J issued a report to the speaker of Parliament as required by ss 136 and 137 of the Electoral Act,¹⁷⁰ and stated therein that the attorney-general's office should pursue the matter. In July 2001 the attorney-general, Chigovera, ordered the police to investigate the murders.

By September 2002, and despite many requests from the attorney-general's office, the police continued to refuse to hand over the files relating to the killing of Chiminya and Mabika.¹⁷¹ Responding to an inquiry by the *Daily News*, police spokesperson Bvudzijena would not say why the police refused to hand over the docket on Mwale and Zimunya to the attorney-general's office. The report added that the docket was believed to be at the police general headquarters after it had been delivered there early in 2002. There have also been reports that after the presidential elections in 2002, Mwale spearheaded a campaign of retribution against members of the MDC in the Chimanimani area.¹⁷²

Not only are police often failing to carry out their duties with the required impartiality, or at all, but they have also been widely implicated in intimidation and violence. Persons believed to be members or supporters of the opposition are often and repeatedly arrested without being charged, or are charged with offences that are unsupported by evidence.¹⁷³ In the latter case the charged person is then released on bail and the matter is postponed indefinitely for further investigation, which in most cases does not take place. Zimbabwe Lawyers for Human Rights has also drawn attention to the use of the Miscellaneous Offences Act (MOA),¹⁷⁴ which is employed as a complementary instrument to POSA. When persons are arrested on unsustainable charges in terms of POSA, they are often offered the opportunity to plead to a lesser charge under the MOA and released upon paying a fine.¹⁷⁵ Most prominent members of the opposition party and civil society organisations have one if not several matters pending against them. These are unlikely to proceed since in most cases there is a significant lack of evidence supporting the charges.

¹⁷⁰ [Chapter 2:01].

¹⁷¹ *Daily News* 8 July 2002; *Daily News* 5 September 2002.

¹⁷² *The Guardian* 28 March 2002; Zimbabwe Human Rights Forum *Political Violence Report December 2002* available at http://www.hrforumzim.com/monthly/dec_02.htm (last accessed 10 December 2003).

¹⁷³ Interview with Brian Kagoro, David Coltart; HRW op cit n 29; AI op cit n 44 at 17.

¹⁷⁴ [Chapter 9:15].

¹⁷⁵ ZLHR media release 27 October 2003.

Reports of torture and abuse in police custody abound. In many cases these are supported by medical evidence.¹⁷⁶ One such example is the case of Gugulethu Moyo. In March 2003 Moyo, the corporate affairs director of the ANZ, was detained and severely beaten by Jocelyn Chiwenga, the wife of the army commander, Lieutenant-General Constantine Chiwenga. This allegedly took place in the presence of some sixty police officers. Moyo had gone to the police station to try to secure the release of journalist Philimon Bulawayo, who had been arrested while covering demonstrations. Moyo was refused medical treatment and only taken to hospital following a court order. When her lawyer tried to talk to her, however, the police removed her before a doctor could see her. Moyo was again detained, and released only after a further High Court order and the intervention of the attorney-general's office.¹⁷⁷ In addition to this case Amnesty International recorded detentions and abuse in the lead-up to the Cricket World Cup in February 2003.

The government backlash against suspected opposition supporters in the wake of the widely successful strikes of March 2003 reportedly caused the hospitalisation of hundreds of people. Retaliations were reported to last for days, with hundreds of people arrested, often from homes and public places.¹⁷⁸ Those arrested were largely detained in excess of forty-eight hours and refused access to legal representation. The MDC reported at least 265 people in custody for five days or more.¹⁷⁹ Crisis-Zimbabwe, Zimbabwe's largest civil society organisation, has estimated that in the recent clampdown on protest action in June organised by the MDC, over 600 supposed opposition supporters were arrested. Most of them were released without being charged after being held in custody for several days. This included a group of about forty women, two of whom had children with them, who took part in the protests and were detained for two days in terms of POSA.¹⁸⁰

An illustrative example of the attitude of police officials is the treatment reportedly afforded to Mpokiseng Dube. Dube interfered when police officials physically assaulted a client, whereupon he was

¹⁷⁶ Amnesty International Press Release 20 February 2003. The Zimbabwe Human Rights NGO Forum issues regular violence reports. The most recent report is *Political Violence Report October 2003* (2003) to be found at <http://www.swradioafrica.com/Documents/violencerepOct03.htm> (last accessed 1 December 2003).

¹⁷⁷ Tsunga op cit n 153; *Daily News* 21 March 2003.

¹⁷⁸ *Financial Gazette* 10 April 2003.

¹⁷⁹ IOL 24 March 2003.

¹⁸⁰ VOA 26 July 2003.

also subjected to assault and taken to the Victoria Falls police charge office. There he was subject to verbal abuse and reportedly told that: 'You lawyers, you want to show off. You think you can just interfere in matters anywhere . . . you are only a lawyer at court. Here you are nothing.'¹⁸¹

On 12 October 2003 prominent human rights lawyer Beatrice Mtetwa was assaulted by police officers at the Borrowdale police station in Harare. Police had been called to assist her when her vehicle was attacked by hijackers. Instead they took her into custody for allegedly driving while intoxicated. 'They said, "the tables have turned, you are no longer a lawyer, you are a suspect"', Mtetwa is reported to have said. In view of several other officers she was physically assaulted by a police official on duty, sustaining severe bruises and cuts. She was unable to lay a complaint against the abusive treatment received since none of the officers would accept the complaint.¹⁸² On 10 December 2003 Mtetwa was named Human Rights Lawyer of the Year at the annual Human Rights Awards in London.¹⁸³

Human Rights Watch has observed systematic and co-ordinated human rights abuses perpetrated by state forces, in particular members of the military or the law and order section of the police force.¹⁸⁴ This is confirmed by several human rights groups, including Zimbabwe Lawyers for Human Rights.¹⁸⁵ Also of interest is the distinction drawn in POSA between ordinary and senior police officers. In several reported cases a rift appears to have been created between investigating officers on the ground and senior police officials where the latter display a far greater disregard for the integrity of the legal process. Most prominently this was made apparent, and judicially commented upon by Judge President Garwe, in the arrests of the president and the secretary of the Zimbabwe Law Society discussed earlier.

This tendency is only strengthened by the introduction of recent legislation aimed at increasing discretionary police powers of arrest and detention. In particular POSA has been used to justify excessive restrictions placed on the people in the exercise of their public activities. The manner in which such justifications take place is all but arbitrary, with arresting officers frequently unable to cite a specific offence or section in terms of which the arrest is made. Human Rights

¹⁸¹ Tsunga op cit n 153.

¹⁸² Ibid; press release International Bar Association 16 October 2003.

¹⁸³ *The Guardian* 11 December 2003.

¹⁸⁴ HRW op cit n 29.

¹⁸⁵ Zimbabwe Lawyers for Human Rights op cit n 175.

Watch reports the example of one trade union official who was told that 'all arrests are now under POSA'.¹⁸⁶

Perhaps the greatest damage is caused to the standing of the judicial institution through the blatant refusal of police officers to enforce judicial orders, often with the implicit or express support of senior government officials. The earliest sign of such impunity is evident in the police's reaction to court orders relating to the land issue. On 17 March, 13 April and again on 10 November 2000 the Harare High Court ruled that police officials must remove so-called war veterans and other illegal occupants trespassing on commercial farms. The orders of 17 March and 10 November 2000 were made by consent.¹⁸⁷ There was virtually no compliance with the orders. Instead, senior government figures encouraged further land invasions.¹⁸⁸ When the High Court again issued an order in February 2001 specifically directing that the police commissioner deploy police to evict squatters in the Hwedza region near Harare, Vice-President Joseph Msika announced that police and security personnel would not be used to carry out any evictions and that '[n]o courts will be allowed to stand in the way of a just resolution of the land question'.¹⁸⁹

However, impunity in relation to court orders is not confined to the land issue. In a recent incident in April 2003 police in Mutare refused to return cash seized from an arrested MDC member, Pishai Muchauraya, despite two rulings by different magistrates to the effect that all belongings should be returned to the accused, who had been released on bail. While his personal belongings were eventually returned, police refused to return the cash.¹⁹⁰

The most recent and ongoing instance of impunity relates to the continued closure of the *Daily News*. As discussed, the paper was closed pursuant to an order by the Supreme Court stating that until the paper complied with the AIPPA, it could not seek relief from the court. The police seized the paper's equipment and refused to allow it to resume printing once it submitted its application. On 17 September 2003 the Harare High Court ruled that the police conduct was illegal and ordered the return of the seized equipment and vacation of the premises. The police refused. A further application to the High Court to have the equipment returned was denied without reasons by Uchena J

¹⁸⁶ HRW op cit n 29.

¹⁸⁷ *Commercial Farmers Union* supra n 34 at 936.

¹⁸⁸ *The Guardian* (UK) 14 December 2000; *Financial Gazette* 28 September 2000.

¹⁸⁹ *The Star* (SA) February 9 2001.

¹⁹⁰ *Daily News* 14 April 2003.

on 1 October. By that time the MIC had refused the application by the *Daily News* for registration on 19 September 2003, only two days after the ruling of 17 September 2003.

The publishers of the *Daily News* appealed to the Administrative Court against the MIC's refusal. The court upheld the appeal on 24 October 2003. The paper began publishing again on 26 October 2003, leading to an immediate and violent reaction by the police. On 25 and 26 October twenty employees of the paper were arrested, including one director, Washinton Sansole, and another director's niece, Tulepi Nkomo, who had no professional relationship with the paper. It appears from reports that police officials regarded her as a virtual hostage in place of her uncle.¹⁹¹ They were released the next day, when four more directors were arrested and held for three days until 30 October 2003.¹⁹² All directors have been charged with publishing a paper illegally.¹⁹³ The MIC appealed the decision by the Administrative Court to the Supreme Court, effectively suspending the effect of the order of 24 October 2003.

The paper returned to the Administrative Court on 12 November 2003, seeking an order that the judgment of 24 October be implemented pending the appeal to the Supreme Court. On 19 December 2003 the court ruled to allow the publication of the paper pending the decision by the Supreme Court. The ruling was harshly criticised by Information Minister Moyo, who indicated that the government would not accept it. Riot police sealed off entrances to buildings and employees were refused entry. To date, the police have not allowed the paper to resume publishing.¹⁹⁴

The impact of police impunity on the rule of law in Zimbabwe was heralded in a report dated April 2001 by the IBA after a visit to Zimbabwe. It says:

Instead of making a clear and principled call to others to uphold the law, [the government's] own example is of contempt for the law and the orders of the court . . . If the government fails to act to stop illegal conduct and, indeed, is widely believed . . . to be organising and encouraging it, it can only lead to a belief that taking the law into one's own hands is an appropriate way of responding to a personal need.¹⁹⁵

¹⁹¹ *The Witness* (SA) 27 October 2003.

¹⁹² *Mail & Guardian* 27 October 2003; SABC (SA) 29 October 2003; *Mail & Guardian* (SA) 29 October 2003.

¹⁹³ For a detailed chronology, see press releases issued by Reporters without Borders available at http://www.rsf.org/archives_africa03.php3 (last accessed 30 December 2003).

¹⁹⁴ *Financial Gazette* 24 December 2003.

¹⁹⁵ http://www.iol.co.za/general/news/newsprint.php?art_id=qw98800862797z500&sf=68.

CHAPTER 5

CONCLUSIONS



The conclusion appears inescapable that the High Court structures, and in particular the Supreme Court, are compromised. After the Supreme Court ruling in September 2001 declaring that law and order had been restored on the farms, many commercial farmers gave up looking to the courts for support. The same cannot be said for the political opposition to Mugabe, including the MDC and Tsvangirai, who continue to take matters to court with the help of civil society organisations.

In an interview Brian Kagoro of Crisis-Zimbabwe has pointed to the value of publicity that remains inherent in the court process, and the potential for the creation of a public record.¹ The publicity attaching to the Tsvangirai trials attests to the continuing value of publicity at least in relation to high profile matters. A further indication of the importance of judicial proceedings is that during negotiations between Mugabe and the MDC, one of the conditions imposed by the president for continuing negotiations was the withdrawal of the presidential election challenge.² In its attempt to retain the veneer of legitimacy the government has not yet attempted to hold court proceedings *in camera*. Attempts by police to limit the access of international observers and journalists to Tsvangirai's trial were prevented by the court, and media pressure over the trial has been intense.³

Despite some encouraging signs, there can be no doubt that the judicial institution over the past three years has suffered significant damage, both in terms of its ability to perform its institutional role in promoting order in society as well as protecting Zimbabweans against infringements of their rights, and also in terms of its national and international legitimacy. These concerns must be squarely confronted if Zimbabwe is to move towards a new constitutional democratic order at any point in the future.

¹ Interview Brian Kagoro 24 February 2003.

² News24 (SA) 31 July 2003; *Financial Gazette* 3 July 2003; IOL May 6 2003.

³ iafrica.com 5 December 2003.

