JUSTICE IN ZIMBABWE

A Report Compiled by the Legal Resources Foundation, Zimbabwe

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GENERAL INTRODUCTION

Over the last few years considerable harm has been done to the legal system of Zimbabwe. Judicial and professional independence has been undermined and the integrity of the system compromised.

The government said it was trying to rid the legal system of its colonial, reactionary elements so that it would support, rather than obstruct, reforms aimed at advancing the rights of the black majority, especially the programme of land redistribution. In fact, however, the main aim seems to have been to re-mould the legal system into a pliant instrument of State power that would allow the government to curtail organised political opposition and clamp down on criticism and dissent.

The integrity of the legal system has been compromised in various ways which are detailed in this report. In the first place, pressure has been exerted on independent judges to resign, and new judges have been appointed to the High Court and the Supreme Court who are believed to favour the ruling party. Secondly, judges and magistrates who have given rulings contrary to the perceived interests of the government or the ruling party have been severely criticised, sometimes in terms that amount to contempt of court, and some magistrates and prosecutors have been subjected to threats and even physically assaulted. Government officials have also refused to comply with judgments they do not like. Finally, in the police force and the prison service, the government has tried to weed out members whom it considered to be sympathetic to the opposition.

The government has followed in the footsteps of pre-Independence regimes by issuing a series of amnesties and pardons to persons who have perpetrated acts of violence, and this has exacerbated the breakdown of law and order in Zimbabwe. These amnesties and pardons have mostly benefited members of the ruling party and have created the dangerous impression that those who perpetrate violent acts on behalf of the party are immune from the law.

This report seeks to trace what has happened to the legal system of Zimbabwe over the last few years, giving examples of these developments. Where it is necessary to put these developments in a broader context, details are given about events that took place earlier.

The report is divided into two main sections. The first section deals with general developments that have had an adverse impact upon the legal system. The second section contains analyses of various decisions of the courts. Finally, there are four appendixes. Appendix 1 sets out some of the basic principles on the independence of the judiciary that were agreed on by a United Nations congress in 1985; Appendix 2 sets out various statements made following the arrest and detention of a retired High Court judge; Appendix 3 gives specific instances in which the police failed to take action in political cases; and Appendix 4 outlines the country's history of amnesties and pardons.

As further developments take place, additional material will be added to this report.

SECTION A – GENERAL DEVELOPMENTS

Topic 1

1. INTIMIDATION AND ATTACKS UPON JUDICIAL OFFICERS AND LAWYERS

Introduction

Interviewed on ZTV in 1983 the then Attorney-General, Mr Godfrey Chidyausiku, said it was undesirable for Zimbabwe to have a judiciary that pandered to the government's wishes. "I don't think it is desirable that we should have a puppet judiciary," he said. "We should have an independent judiciary rather than one that panders to the wishes of government. We should have a judiciary that is prepared to make a decision that will be unpopular with the government."[1]

Nearly 20 years later, at a judicial conference in April 2002 Mr Chidyausiku, now Chief Justice, quoted from an address given by Mrs Justice Denham of the Supreme Court of Ireland:

> "Judicial independence is a precious jewel of democracy, to be guarded and cherished for the benefit of the people it serves. It is a jewel of the State. It is fundamental to democracy and the rule of law that the judiciary be strong, to withstand pressure from any quarter. Yet the judiciary should be of their times and take account of the changing society within which judges hold office, while retaining the core principle of their independence. … The judiciary should absorb the light from the society it serves."

The next parts of this section will attempt to show how far the government of Zimbabwe is prepared to tolerate an independent judiciary, and how far the judiciary, including Mr Justice Chidyausiku, are prepared to go in asserting their independence.

Attacks on judges

General

Starting in 2000 a sustained campaign was conducted against judges perceived to be anti-government. Senior politicians repeatedly attacked the judiciary. Vice-President Muzenda, at a by-election rally, warned white judges against continuing their policy of "haunting blacks and favouring whites". It was a pity, he said, that the same white judges who passed judgments against black majority rule before independence continued to haunt black Zimbabweans.[2] The Minister of Justice, Mr Patrick Chinamasa, said that the government would not rest until there was a complete overhaul of the judiciary. "Eurocentric" judges regarded as being in conflict with the other arms of government and perceived as constituting "the main opposition to the ruling party" would have to go. Judges should be politically correct, and if they behaved like "unguided missiles, I wish to emphatically state that we will push them out". "The present composition of the judiciary," he said, "reflects that the country is in a semi-colonial state, half free, half enslaved."[3]

The war veterans' leadership backed the Minister. Dr Chenjerai "Hitler" Hunzvi (then a member of Parliament) vowed to oust the entire Supreme Court bench and four non-black High Court judges, and is reported to have said in Parliament:

> "We are not afraid of the High Court ... this country belongs to us and we will take it whether they like it or not. The judges must resign. Their days are now numbered as I am talking to you ... I am telling you what the comrades want, not what the law says."

Another war veterans' leader noted: "The judiciary must go home or else we will chase them and close the courts indefinitely until President Mugabe appoints replacements." This particular threat was followed by one to remove judges by force if they did not resign within a fortnight. "We are the custodians of the people's revolution", he said, and we cannot allow these colonial and racist judges to continue to serve white colonial interests in Zimbabwe under the so-called rule of law."[4] These statements have not been repudiated or condemned by any government official, nor has any action been taken to prosecute those who made them.

In November 2000, "war veterans" and ZANU (PF) supporters physically invaded the Supreme Court during a case, some carrying arms. They beat up a guard and prevented the court from sitting. Police responded only much later. The Minister of Justice did not condemn this invasion and none of the invaders has been prosecuted.

The then Chief Justice, Mr Justice Gubbay, and Mr Justice Sandura met the acting president, ostensibly to discuss the threats to the judiciary by the "war veterans", but were reportedly faced with an attack on the judiciary itself which was later repeated by the President.

The Chief Justice was then induced to retire early, first from March and then from July 2001, but taking leave meanwhile. This occurred five days after the Supreme Court had struck down as unconstitutional regulations made by the President which attempted to nullify the opposition MDC's petitions against results in the 2000 parliamentary elections.

The Minister of Justice personally visited the remaining members of the Supreme Court Bench in an attempt to get them to resign, but was not successful.

The United Nations Special Rapporteur on the Independence of the Judiciary issued a series of statements condemning the harassment and intimidation of judges in Zimbabwe and the threats to the independence of the judiciary. He said that they constituted "a direct assault on the rule of law" and pointed out the rule of law is pivotal for democracy and sustainable development in any country. The deterioration in the rule of law and the undermining of judicial independence was a matter of grave concern to the international community, he said.[5] The International Bar Association also roundly condemned the undermining of the independence of the judiciary in Zimbabwe and criticised the failure by the government to honour an undertaking given to the IBA concerning the judiciary's independence.[6]

Mr Justice Godfrey Chidyausiku was sworn in as Acting Chief Justice in mid-March 2001. A former deputy Minister of Justice, he is widely seen as a supporter of the ruling ZANU (PF) party and an outspoken proponent of the government's policy of land seizure.[7] An anonymous petition, attributed by *The Standard* newspaper to 200 lawyers, was made to the Judicial Service Commission protesting his appointment, but in August 2001 he was appointed substantively to the highest judicial post in the land. He had previously been appointed as Judge President of the Supreme Court over the heads of more senior judges, and his appointment as Chief Justice also superseded senior judges, particularly those in the Supreme Court.

Although in the past he has made statements in favour of an independent judiciary[8], he is generally regarded as lacking Mr Gubbay's independence of mind and concern for individual human rights.

Since the replacement of Mr Gubbay as Chief Justice, one of the four remaining members of the Supreme Court bench has retired, one has resigned and one has died. Even before they left, three extra judges — Cheda, Ziyambi and Malaba JJA — were appointed over the heads of more senior judges.[9] The Minister of Justice said that the three new judges were needed to cope with a flood of appeals that was expected to arise from land acquisition cases being heard in the Administrative Court. There was never much likelihood of such a flood arising, given the nature of the Land Acquisition Act, and nearly a year later the flood has not materialised. There was a suspicion that, like the Chief Justice, the three new judges were appointed because

they were likely to support the government in politically sensitive cases. Their record since their appointment has given some substance to this suspicion.

Several High Court judges[10] resigned from the Bench amid speculation that they had been intimidated into leaving or had resigned in protest. All had been criticised by government spokespersons for judgments they had given in politically sensitive cases. They have been replaced by judges who are believed to be sympathetic to the government. Some have shown themselves to be so[11], but some have displayed commendable independence on several occasions.

Also in the High Court Mr Justice Chidyausiku was replaced as Judge President by Mr Justice Garwe, who like his predecessor was not the most senior judge eligible for the post.

Arrest of former judge Mr Blackie

No serving judges have been physically assaulted by agents of the government or supporters of the ruling party, as has been the case with magistrates, but a recently-retired judge, Mr Fergus Blackie, was arrested at his home at 4 a.m. on Friday 13 September 2002, on charges arising from a judgment he had delivered in an appeal before his retirement. The allegation, it seems, is that the judge set aside a white woman's conviction for theft and quashed the prison sentence imposed on her by a magistrate, but issued the judgment without the knowledge or consent of the judge who heard the appeal with him.

Mrs White, the woman whose appeal Mr Blackie had allowed, was also arrested.

Following Mr Blackie's arrest, the police are alleged to have refused to let him contact his relatives or his lawyers, and to have refused to inform his lawyers where he was being detained. He was held at Matapi Police station in Mbare and, it is alleged, deprived of medication for high blood pressure and left without food for 30 hours. He was made to share a cell with seven other people, in conditions described by journalists and opposition political figures who have been detained there as "filthy beyond belief".

On the evening after his arrest, Mr Blackie's lawyers brought a *habeas corpus* application in the High Court. The judge ordered the police to produce Mr Blackie in court, which they did the next morning. He was brought to court in handcuffs and heavily guarded, on the back of an open police Land Rover. According to his lawyers, he was "in very bad shape" through the combined effects of hunger and lack of medication. His lawyers applied for his immediate release but the judge (Mr Justice Hlatshwayo) dismissed the application, holding that the arrest was proper under the circumstances.

On Monday 16 September Mr Blackie was taken to the magistrates court where he was charged with contravening the Prevention of Corruption Act [*Chapter 9:16*] or, alternatively, defeating the course of justice. He was released on bail.

The propriety of the pre-dawn arrest of Mr Blackie was certainly questionable. It is an extremely serious matter to arrest a judge or magistrate, even a retired one, on account of a decision he made in the course of his judicial duties, and if it is done at all it should be done only in the clearest cases of criminal conduct.

The allegations against Mr Blackie were reported at length in the *Herald* of 13 September 2002, the day of his arrest. The report contained apparently verbatim extracts from letters and reports on the subject written by the Judge President, by the judge who sat in the appeal with Mr Blackie, by the law officer who appeared for the State in the appeal, and by the Chief Justice. It was most improper of the newspaper to have published these documents, since their publication could prejudice Mr Blackie's defence to the charges against him.

The *Herald* compounded the impropriety by reporting on 18 September that at Mrs White's bail hearing the State had alleged that Mr Blackie and Mrs White had had a sexual relationship which, according to the prosecutor, had influenced Mr Blackie to "unilaterally give out a judgment in her favour". Although there was apparently a bald allegation to that effect in the police charge sheet against Mrs White, a lawyer who was present at the hearing denied that any such allegation was made in court. The allegation was not raised at Mr Blackie's bail hearing, and he was given no opportunity to reply to it. Both he and Mrs White have categorically denied it.

Attacks on magistrates

Magistrates and prosecutors are part of the public service and thus particularly vulnerable to pressure, especially in smaller towns where they are more exposed to disaffected litigants and people who expect them to make "politically correct judgments", as one lawyer put it. Despite pressures, however, a number of magistrates and prosecutors have shown outstanding courage.

In August 2001 a large crowd of allegedly ZANU (PF) supporters, demonstrated for three days against a Karoi magistrate after he had granted bail to 106 farm-workers who were charged with public violence for attempting to throw "war veterans" off their farms. [12]

Also in August 2001, crowds of militants disrupted proceedings at which commercial farmers were being remanded on charges of public violence. This incident is dealt with more fully below in part 5 of Section B of this report, which describes the Chinhoyi farmers' case.

In 2001 over 200 "war veterans" disrupted proceedings at Harare Magistrate's Court in protest against the further remand in custody of colleagues on kidnapping and extortion charges.

In September 2001 after a Bindura magistrate sentenced 17 ZANU (PF) supporters to three years' imprisonment each for public violence ahead of a by-election in June, it was reported that other party supporters held "an all-night vigil" outside his home and intimidated his wife. [13]

In November 2001 ZANU (PF) militants assaulted a senior magistrate in Gokwe after he convicted a ruling party supporter on a robbery charge and sent him to jail for eight months. The magistrate, Douglas Chikwekwe, subsequently fled from his workplace and home. Police officials confirmed the incident, but said investigations were still in progress. They said they had not arrested anyone. The ZANU (PF) supporters were apparently unhappy with Mr Chikwekwe's decision to convict one of their colleagues for robbery. They called the conviction and sentence a "miscarriage of justice". The militants descended on Mr Chikwekwe's home over the weekend, breaking his

windows and destroying his furniture. Mr Chikwekwe escaped the attack with minor bruises, but fled the area.[14]

In January 2002 more than 150 ZANU (PF) supporters besieged the Bindura Magistrates Court and forced it to close. They demanded the removal of three magistrates whom they accused of sympathising with and supporting the opposition MDC and whites in the area. They said the magistrates should go to Harare and be employed by Morgan Tsvangirai, and if they refused to go they would be driven away. The riot squad eventually moved in and quelled the disturbance. [15]

In February 2002 a magistrate, Godfrey Macheyo, sentenced war veteran leader Joseph Chinotimba to an effective term of imprisonment of two months for illegally possessing a firearm without a licence. A crowd of about 200 ZANU (PF) youths who were packed into the courtroom threatened to deal with the magistrate soon after he had pronounced sentence. Riot police were on stand by to deal with any violence that broke out. [16]

In August 2002 Walter Chikwanha, a Chipinge magistrate, was dragged from his courtroom by a group of war veterans and assaulted at the government complex after he dismissed an application by the State to remand in custody five opposition MDC officials. Sources said the magistrate sustained broken ribs and a fractured collar-bone. The attack allegedly took place in full view of the police, who apparently did not try to stop the assault.[17] The magistrate was then paraded round town and made to chant ZANU (PF) slogans. Several other court officials were also assaulted and one had to be hospitalised. The magistrate had previously granted bail to the five MDC officials after they had spent several days in custody on charges of malicious injury to property arising out of the burning of three tractors belonging to the District Development Fund. The day after their release on bail the five had been re-arrested by the police and held for a few days before being brought back to court. The magistrate released them on bail on the same conditions as he had imposed previously. The identity of the assailants was presumably known to the police, yet at the time of the compilation of this report no arrests had been made.

According to a newspaper report[18], magistrates and prosecutors in Manicaland abandoned work[19] in protest against the attack upon the Chipinge magistrate. The

report quoted a prosecutor as saying: "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?"

In its editorial column a local newspaper had this to say about the attack upon the Chipinge magistrate: [20]

"**Final nail in the coffin of the rule of law**

When it was first reported in the Press that a gang of suspected war veterans had, last Friday, dragged out of the courtroom the sole Chipinge magistrate, Walter Chikwanha, and took him to a government building where they severely assaulted him, every peace-loving, law-abiding Zimbabwean was genuinely dismayed. It was the ultimate proof, if indeed any more proof was needed, that the rule of law had completely broken down in Zimbabwe.

Many felt anger and revulsion at the state of anarchy and lawlessness this country has been allowed to descend into …

The attack on Chikwanha was, of course, not the first on a magistrate. Others in Bindura, Kadoma and Masvingo have in the past been threatened and demands have been made for them to be transferred or removed altogether because they had delivered judgments which ZANU (PF) supporters did not like.

…. even High Court judges have had a taste of the nastiness of the so-called war veterans when they think the courts 'have betrayed the party' … [The present Chief Justice experienced this when he was heading the commission of inquiry into the looting of the War Victims Compensation Fund. The war veterans] 'publicly derided him, danced on top of his desk and forced him to abandon [the hearing.]

All in all, the war veterans have for a long time now been sending a clear message that the courts were only free to convict and punish everyone else except ZANU (PF) activists.

The physical attack and subsequent abduction of the Chipinge magistrate, whose whereabouts are still unknown …, is the most serious message to that effect to date. It is not entirely alarmist to say that that attack represented the final nail in the coffin of the rule of law in Zimbabwe …

More than that, it heralded frightening prospects in that, henceforth, no one who does not support ZANU (PF) can expect a fair trial. All magistrates and judges will now be afraid to pass fair judgments as this could have dire consequences on their own personal safety. In short, it means the end of justice, law and order. The justice system as we used to know it and as obtains in all civilised countries has now been emasculated.

The decision to go on what was virtually a spontaneous strike by magistrates and other court officials in Manicaland – action which, needless to say, is unprecedented – signals the profundity of alarm sparked off by what has been done to Chikwanha among those members of the judiciary who refuse to compromise their professional ethics by allowing themselves to be turned into puppets of ZANU (PF) …"

On 21 August 2002 the Trustees of the Legal Resources Foundation issued this statement about the incident:

"The Trustees condemn, in the strongest possible terms, the brutal assault on and apparent abduction of a judicial officer who was carrying out his judicial duties and the attack on a legal practitioner who was lawfully representing his clients. These acts, reportedly perpetrated by 'war veterans' in Chipinge, support the widely-held perception that the rule of law has long since ceased to exist in Zimbabwe. This latest reported attack in Chipinge has sounded its death knell.

The silence from certain normally vociferous members of the Government, who are quick to condemn alleged illegalities on the part of anyone perceived as an opponent and to preach about the need to uphold the law, is extremely disturbing and creates the impression that the criminal actions that have taken place are being condoned and that the Government is prepared to see the rule of law being subverted.

The LRF calls upon the Government to immediately take firm and meaningful steps to restore the rule of law, by ensuring:

- that the perpetrators of the brutal attacks in Chipinge are brought to book.
- that, where necessary, judicial officers are given full and adequate security.
- that the Courts are able to carry out their duties fairly and impartially, as the law requires of them, and

- that the decisions of the Courts will be implemented fully and without equivocation."

The Law Society of Zimbabwe also issued a statement imploring the government to take urgent action to protect judicial officers and restore public confidence in the administration of justice in Chipinge.

The UN Special Rapporteur on the Independence of the Judiciary condemned the attack on the magistrate and legal practitioner[21]. He said:

> "The provision of adequate protection to judges and lawyers when their safety is threatened is a basic prerequisite for safeguarding the rule of law. This is simply fundamental, in order to guarantee the right to a fair trial by an independent and impartial tribunal and the protection of human rights. The apparent failure to do so in this case represents a serious threat to the independent judicial system in Zimbabwe. Unfortunately, this represents another example of the government of Zimbabwe's continuing disregard for the independence of the judiciary and contempt for the rule of law."[22]

Just over a week after the attack on the Chipinge magistrate, on 26 August 2002 Mr Godfrey Gwaka, the magistrate for Zaka district in Masvingo province, was stabbed at Zaka petrol station. It was suspected that this attack was related to recent judgments handed down by the magistrate. However, the police have said that this attack was not politically inspired.

In a statement issued on 2 September 2002 Amnesty International stated: "The attacks on the magistrates reflect on-going attempts on the part of government authorities and state sponsored 'militia' to undermine the judicial system and prevent court officials from executing their duties impartially and professionally."

Neither the President nor any of his Ministers have seen fit to censure these outrageous attacks on magistrates, and their silence has undoubtedly encouraged the perpetrators to believe they are immune from prosecution and further diminished public respect for the judiciary.

Attacks on lawyers

From all over the country lawyers who represent members of the opposition MDC party or commercial farmers, or anyone else regarded as an opponent of the government, have reported being subjected to threats and intimidation. In a number of instances they have been physically assaulted when dealing with such cases. The persons responsible for the intimidation and violence against them have been war veterans, ruling party officials or youths, and sometimes even members of the police force. Lawyers practising in smaller centres are particularly vulnerable. Because of fear amongst the local lawyers, lawyers often have to be brought in from other centres such as Harare. These outside lawyers are also subjected to intimidation.

Some of the instances where lawyers have been assaulted are the following:

On 7 April 2001 Mr Tawanda Hondora, a lawyer and the chairman of the Zimbabwe Lawyers for Human Rights was attacked by members of ZANU (PF) in full view of, and with the active participation of, members of the Zimbabwe Republic Police. Mr Hondora had gone to a rural area in the company of two other lawyers to investigate allegations that persons from the area who came forward to testify in the court case challenging the election result in the district had been assaulted by local police officers. When they got to the area, the lawyers observed a group of about 30 ZANU (PF) supporters assaulting one of the election challenge witnesses, a Mr Chivanga. Uniformed police officers stood by and watched. The group of assailants saw the lawyers and chased them. They caught Mr Hondora and kicked and slapped him, hit him with fists, whipped him and hit him on the head with a stone. The mob then forced Mr Hondora to chant ZANU (PF) slogans and to toyi-toyi to the police station. At the police station Mr Hondora and Mr Chivanga were extensively searched, interrogated about their relationship to the MDC and further assaulted. A constable in the presence of Assistant Inspector Majora assaulted them. Two male and two female constables later took over the beating. When the other two lawyers arrived at the police station to rescue their colleague, Assistant Inspector Majora detained them as well. He ordered all police details to be armed and distributed live ammunition. Assistant Inspector Majora then proceeded to lecture the lawyers about the evils of the MDC, stating that as educated people they ought to be wiser and not allow themselves

to be used by white people. He threatened to call Dr Chenjerai Hunzvi, war veterans and the army to assault the lawyers further.

As stated elsewhere in this report, lawyers representing commercial farmers wrongly accused of public violence in the Chinhoyi area in August 2001 were subjected to threats by war veterans, and there was a suggestion that thugs had been hired to deal with them.

On 3 June 2002 the President and Secretary of the Law Society of Zimbabwe were arrested on palpably false charges, based on two documents which appear to be crude forgeries. They were held in custody for a few days in very poor conditions of detention. The Law Society has been outspoken in defence of the independence of the judiciary and the rule of law in Zimbabwe and the arrest of its top officers was widely seen as an attempt to intimidate the Society. [23]

On 28 April 2002 two Mutare lawyers who had gone to represent some MDC supporters arrested for allegedly petrol-bombing the house of Joseph Mwale, a CIO officer, were accused of being "terrorists" and anti-ZANU (PF). The lawyers said Mwale and the officer in charge of the station drove them out of the police station. One of the lawyers said: "It was a nightmare. They labelled us terrorists and threatened to physically harm us if we pursued the case. I will never go back there. I will never return to that police station on any case involving Mwale. He is bad news." [24]

As stated earlier, on 16 August 2002 war veterans in Chipinge assaulted a magistrate who had refused to remand in custody some MDC members. Soon afterwards they then proceeded to the premises of the law firm Matutu, Kwirira and Associates demanding to see the accused's lawyer, Langton Mhungu. Mr Mhungu said he fled when the ZANU (PF) supporters descended on the law firm. Contacted on his cellphone, Mr Mhungu said he was working towards evacuating his family. "The situation here is tense," he said. "They came singing liberation war songs, demanding my blood. Fortunately my colleagues locked me up in a room and they failed to find me. When they left, I fled from the office and as we speak, I am still hiding in the bush." [25] Mr Mhungu also said that the windscreen of his car was smashed during the attack. He said he had fled Chipinge and sought refuge in Masvingo. He said: "I have

evacuated my family and will only go back after the police have made an undertaking to normalise the situation in Chipinge."

It was reported in August 2002 that Mr Jeremy Callow, the Harare legal practitioner who has acted for a number of commercial farmers who have challenged the seizure of their farms received a death threat from an anonymous caller. When he appeared in court to represent more farmers he told a High Court judge that he had been warned that if he went to Karoi again he would be killed. "Someone called me at about 06:25 am on Monday and told me that if they see me going to Karoi, they will kill me," he said. He said he was worried about the threat in the light of the attack (detailed above) on court officials in Chipinge. Callow said he travelled to Karoi frequently to represent his clients in court. He said he had written a report on this incident which he would give to the police and the Law Society of Zimbabwe.[26]

Topic 2

2. FLOUTING OF COURT ORDERS AND CONTEMPT FOR THE COURTS

> "We will respect judges where the judgments are true judgments. We do not expect that judges will use subjectivity in interpreting the law. We expect judges to be objective. We may not understand them in some cases but when a judge sits alone in his house or with his wife and says 'this one is guilty of contempt' that judgment should never be obeyed. I am not saying this because we would want to defy judges. In fact we have increased their salaries recently. But if they are not objective, don't blame us when we defy them."

(President Mugabe speaking at a reception to mark the opening of Parliament.[27])

Introduction

Coupled with the coercion of the judiciary, dealt with in the preceding Part, there has been a series of cases in which government officials and the police and have refused to comply with court orders, and in which government officials have displayed a contemptuous attitude towards the courts.

The cases reflect an increasing tendency by government officials to behave as if they were a law unto themselves. The ignoring of court orders and the contemptuous attitude towards the courts adopted by high-ranking public officers has led other officials to behave as if they were immune from the law. The failure on the part of the police to enforce court orders has severely undermined the rule of law and the whole administration of justice.[28]

The cases of Chavunduka and Choto

In January 1999, after the *Standard* newspaper published a story that there had been a failed military coup, Mark Chavunduka, the paper's editor, and one of the paper's reporters, Ray Choto, were arrested by the police. They were illegally handed over to the military[29] who detained them for several days at a secret detention centre and subjected them to vicious and prolonged torture. Mr Chavunduka was stripped naked. His head was plunged into water. He was then handcuffed and electric shock treatment applied all over his body. Mr Choto was stripped naked and electric shock treatment was applied to his genitals and other parts of his body. The intensity of the shocks was progressively increased. He was beaten on the soles of his feet. His head was forced into water. His hands were stamped upon. He was slapped on the ears for a long time and one of his eardrums was perforated. He was made to roll around on ground that seems to have had spikes in it. Both journalists were threatened with death. They were told that the law and courts would not protect them and that President Mugabe had authorised their killing.

Despite an international outcry, no government leaders condemned the assaults upon the journalists by military personnel. In fact, despite independent medical verification of the torture, the then Minister of Defence, Moven Mahachi, tried to play down the entire incident by ridiculously suggesting that the journalists had scratched themselves. He did, however, concede in the High Court that what had happened was wrong. President Mugabe later defended the military, saying that their actions were understandable as a response to the attempted coup story. When the matter came before the High Court, the Minister and the Permanent Secretary for Defence said that the military did not take orders from judges.

In the aftermath of this incident, members of the judiciary, led by the Supreme Court, sent an open letter to the President requesting him to reaffirm that the rule of law would be adhered to in Zimbabwe. The President refused to do so, and instead suggested in a televised address that the judges involved had committed "an outrageous and deliberate act of impudence" and should resign if they wished to enter politics.

Nearly a year after the incident a case was brought in the Supreme Court to try to force the police to investigate the journalists' allegations of torture and to bring to justice those responsible.[30] The Supreme Court found that for nine months no action whatsoever had been taken to address the charges laid by the applicant, and thereafter what was done was so minimal as to justify the inference that the investigation was not being regarded seriously. The Commissioner of Police had not done all that his duty required of him. The court found that this failure to investigate the case violated the victims' constitutional entitlement to protection of law, including their right to require the police to perform their public duty of law enforcement by investigating the alleged crimes, arresting the perpetrators (if the investigation so warranted) and bringing them to trial. The court accordingly ordered the Commissioner of Police "forthwith" to institute or continue a comprehensive and diligent investigation of the alleged offences.

More than two years later, nothing appears to have been done to comply with the court's order. Indeed, far from having the alleged offences investigated in accordance with the Supreme Court's order, the government seems to condone them. In June 2002 *The Herald* reported what the Speaker of Parliament (Mr Emmerson Mnangagwa, a former Minister of Justice) told a fact-finding mission sent by the African Commission for Human and People's Rights to assess the situation in Zimbabwe. Mr Mnangagwa is reported as having told the mission that what happened to *The Standard* journalists Chavunduka and Choto in 1999 would happen again. He said: "What happened to them when they falsely wrote that the army was planning a coup would happen to them again if they repeat that because nobody is above the law."[31] (The law under which the journalists had been prosecuted was in fact declared to be unconstitutional by the High Court.)

The deaths of Chiminya and Mabika

On 15 April 2000 a ZANU (PF) vehicle stopped a convoy of MDC vehicles outside Murambinda Growth point in Buhera. The persons in the MDC vehicles were involved in campaigning for Morgan Tsvangirai, the MDC president, in the run-up to the June 2000 parliamentary election.

Two men armed with AK-47 rifles and others bearing iron bars emerged from the ZANU (PF) car. It is alleged that Joseph Mwale, a Central Intelligence Organisation operative, and one Kainos Tom "Kitsiyatota" Zimunya started to attack an MDC truck with iron bars. The MDC youths at the back of the truck fled at the sight of the guns. Mr Tichaona Chiminya and Ms Talent Mabika were trapped in the vehicle. It is alleged that Mwale ordered petrol bombs to be fetched and these were then thrown into the car. Although Mr Chiminya and Ms Mabika managed to escape from the burning vehicle, Mr Chiminya had been badly burned and died a few metres away; Ms Mabika died later in Murambinda Hospital. A police vehicle was said to be parked less than 100 metres away from the scene, but the police acted only later. The police, so it is alleged, did not intervene and made no effort to stop the ZANU (PF) vehicle or to follow it when it left the scene.

Neither Mwale nor Zimunya has been arrested, despite the fact that a High Court judge recommended that the Attorney-General's office should pursue the matter after evidence was led in a election petition about the killings.[32] The judge, Mr Justice Devittie, commented that the killing of Mr Chiminya and Ms Mabika was "a wicked act." In July 2001 Mr Andrew Chigovera, the Attorney-General, ordered the police to investigate the murders.

In July 2002 a local newspaper carried this report:

> Wayne Bvudzijena, the police spokesperson, on Thursday refused to say why the police have not handed over to the Attorney General (AG)'s Office a docket on Joseph Mwale of the CIO and Tom Kainos 'Kitsiyatota' Zimunya, a war veteran, the alleged murderers of two MDC activists in the June 2000 parliamentary election campaign. Bvudzijena said: 'Even if I was not on leave, I was not going to give you a comment.'

> Bharat Patel, the deputy Attorney General, yesterday said he had told the police he was still waiting for the docket more than two years after the incident happened. Patel said the director of public prosecutions in the AG's Office on Wednesday wrote to the senior staff officer responsible for crime at the Police General Headquarters asking him to send the docket to his office. Patel said: 'I have checked with the director of public prosecutions who advised me that he had written to the senior staff officer responsible for crime to hand over the docket to the AG's Office.' In May, Patel said the AG's Office had written to ask the police for the docket because they wanted to study it before taking action. But more than a month has passed without police action."[33]

In September 2002 the same local newspaper reported that the police spokesperson, Mr Bvudzijena had refused to say why the police refused to hand over the docket on Mwale and Zimunya to the Attorney-General's office. According to the report, the deputy Attorney-General said that four months after his office had asked for the docket, the police had yet to respond to the request. The report added that the docket was said to be at the Police General Headquarters after it had been delivered there by the police in Manicaland early in 2002. [34]

There have been reports that following the presidential elections Joseph Mwale was involved in violence against the MDC in the Chimanimani area, where he was based. For example, in April 2002 this report appeared in a local newspaper:

> **"CIO officer spearheads Chimanimani terror**
>
> Joseph Mwale, a Central Intelligence Officer accused of killing MDC activists Tichaona Chiminya and Talent Mabika in Buhera during the June 2000 parliamentary elections campaign, is reportedly spearheading retributions on MDC supporters in Chimanimani
>
> Joseph Mwale, a Central Intelligence Officer accused of killing MDC activists Tichaona Chiminya and Talent Mabika in Buhera during the June 2000 parliamentary elections campaign, is reportedly spearheading retributions on MDC supporters in Chimanimani. Roy Bennett, the MP for Chimanimani, said Mwale is being assisted by another CIO agent known as 'Cobra', Major General Matsatswa, Lieutenant-Colonel Bangidza and two others identified only as Mutisi and Masabaya, all serving members of the Zimbabwe National Army who went on leave three months before the presidential

elections. Last year, the High Court ordered that Mwale be arrested and charged for Chiminya's death but up to now nothing has been done."[35]

In August 2002 another local newspaper gave this report:

"CIO's Mwale allegedly leads assault on Bennett's workers

Joseph Mwale of the Central Intelligence Organisation (CIO), implicated in the murder of two MDC activists in 2000, on Sunday reportedly led a group of pro-ZANU (PF) vigilantes in assaulting security guards and workers at Charleswood Estate owned by Chimanimani MP, Roy Bennett.

It is understood police and soldiers assaulted several workers on the farm, accusing them of planning to attack war veterans and ruling ZANU (PF) supporters in the area. …

Six of the injured workers fled to Harare following the beatings. …

The government security officers allegedly ordered all farming operations at Bennett's farms to cease with immediate effect in accordance with Section 8 of the Land Acquisition Act.

The workers said Mwale, the police and the soldiers arrived at the farm at about 6am in two police vehicles from Chipinge Police Station.

[One of the workers said] "Mwale ordered all those workers without identification documents to sit on one side. The soldiers then declared that they had taken over the farm. They severely assaulted about 25 workers who had no identification documents. …"[36]

As with the torturers of Chavunduka and Choto, the killers of Chiminya and Mabika appear to have a *de facto* immunity from prosecution.

The farm invasion cases

When the farm invasions started in 2000 the Police Commissioner refused to intervene, saying that the police could not act in this matter because it was a political issue that could only be dealt with politically.[37]

The police ignored a number of court orders requiring them to take action. For example, on 17 March 2000 Garwe J granted an order declaring the farm invasions to be unlawful and ordering the Commissioner of Police to deploy sufficient manpower to evict all illegal settlers from commercial farms. The order was issued with the consent of all the parties to the proceedings, and the Commissioner was one of the parties. He did not comply with the order, however, but instead sought an amendment which would have absolved him from any duty to evict the settlers. The application for amendment was heard by Chinhengo J[38], who characterised the invasions as illegal and of a riotous nature. He said that the Commissioner of Police had a clear duty to enforce the consent order and to afford commercial farmers the protection of the law enshrined in the Constitution. The rule of law meant that everyone must be subject to a shared set of rules that are applied universally and which deal on an even-handed basis with people and which treat like cases alike. Whilst the laws remained in existence, however, the courts had the duty to enforce those laws and those affected by official inaction were entitled to bring actions based on the law to protect their interests.

The Commissioner of Police did not appeal against the order of Chinhengo J, but did not comply with it either. Politicians urged further "demonstrations", and the police pleaded insufficiency of manpower and what might be termed "superior orders".[39]

The police were greatly fortified in their refusal to intervene in land invasion cases by repeated statements by President Mugabe that he would ignore court judgments ruling to be illegal any aspects of land seizures of white-owned farms. Addressing the ZANU (PF) Central Committee, he is reported[40] to have warned judges that they would not be allowed to "go against our quest for full sovereignty". According to the same report, he said: "The land question is a deep political question that no sane judge can hope to solve through laws of trespass or court orders." "Let it be known that the courts in independent Zimbabwe do belong to the people and will, whatever it will take, be placed at the service of those same people for whose convenience and protection they were set up in the first instance." And addressing a party congress, he said: Our party must continue to strike fear in the hearts of the white man, our real enemy." He also vowed that his government would continue to ignore court rulings declaring seizures of white-owned land illegal.[41]

Eviction of commercial farmers in defiance of court orders

Jean Simon is the owner of Erewhon Farm, a commercial farm in the Raffingora area. She obtained a High Court order in early July 2002 setting aside orders on her farm under secs 5 and 8 of the Land Acquisition Act. The government did not oppose her court action, and copies of the judgment were served on the Minister of Agriculture, the Police Commissioner, and the local Chinoyi police station.

However, Dr Ignatius Chombo, the Minister of Local Government, and ZANU (PF) Member of Parliament for the area, allegedly held a meeting on 14 July 2002 at nearby Katawa village. At this meeting the Minister is said to have warned Ms Simons and her workers to leave the farm, or face being beaten up by the Support Unit. He instructed his supporters to ignore the High Court order, and said that if Ms Simon and her workers continued to resist the eviction he would send in the Black Boots, the unofficial name for the Support Unit, to beat them up. He gave similar warnings to the owners and workers on Chinomwe Estate and Nyarugwe Farm.

Ms Simon has been harassed allegedly at the instigation of Dr Chombo on previous occasions. She was once abducted and escaped a second abduction attempt. She was also gaoled along with others for helping to monitor the presidential election, although charges were never brought to court. She has obtained a provisional order from the High Court calling on Dr Chombo and other government officials to stop harassing her.

Nevertheless Ms Simon's 340 staff and their families face eviction. Her workers have not been allocated land on the farm. According to the lists of farm beneficiaries published in the *Herald*, Erewhon has been allocated jointly to Mrs B Chanetsa, who is the Ombudsman and wife of the Mashonaland West governor Peter Chanetsa, and to another person.

All this, it should be noted, occurred despite the fact that the High Court set aside the acquisition orders made in respect of her farm. [42]

More recently, in August 2002 several[43] commercial farmers obtained orders from the High Court setting aside the acquisition of their farms under the Land Acquisition Act [*Chapter 20:10*] on the ground that mortgage-holders had not been notified of the

government's intention to acquire their farms, as required by the Act. The government did not contest these orders, whose effect was to restore to the farmers concerned the right to remain on their farms.

The orders did not, however, protect some of the farmers from eviction when they, along with many others in Mashonaland East and West provinces and elsewhere, were directed to leave their farms by noon on Sunday 8 September.[44] It was not clear who issued the directives, but they were served or delivered by teams of policemen.[45] The directives were certainly illegal in so far as they were directed against farmers who had obtained orders nullifying the government's acquisition of their farms. Ms Simon is one of the farmers who is being evicted.

In a further move to nullify the court orders, on 13 September 2002 the government published a Bill[46] to amend the Land Acquisition Act retrospectively, validating preliminary notices of acquisition that were served without notice to mortgage-holders.[47] The Bill will also obviate the need for the government to prove to the Administrative Court that land it has acquired for agricultural resettlement is suitable for that purpose; will increase the penalty that may be imposed on farmers who do not vacate their farms when ordered to do so; and will allow invalid acquisition orders to be reissued, thereby requiring the landowner to vacate the land on seven days' notice.

Prison officers refuse to obey court orders[48]

Nine MDC members had been arrested on two counts of murder. They were alleged to have kidnapped and murdered two ZANU (PF) activists, one of whom was Cain Nkala.[49] Seven of the suspects were granted bail by the High Court, and the State appeal against their release on bail was rejected by the Supreme Court. The two who remained in custody, Khetani Sibanda and Sazini Mpofu, were then granted bail by the High Court and once again, on 21 June 2002, the Supreme Court dismissed the appeal against the High Court order for their release. Chief Justice Chidyausiku held that the two should not be treated differently from their co-accused who were already out on bail. The Chief Justice immediately issued warrants of liberation in favour of the two, who had been in custody for six months.

For two weeks senior prison officers at Khami Prison in Bulawayo, where the two accused were being held, refused to comply with these court orders. Two MDC officials who went with the copies of the Supreme Court order said they were searched and had their identity particulars copied down at two roadblocks. One of them said:

> "We waited the whole day after handing over the court papers to the prison officials for the release of Khethani and Sazini. Later on we saw two police vehicles coming out of the prison with Sazini inside one of them."

The lawyer for the two, Mr Nicholas Mathonsi, said several attempts to have the accused freed had met with resistance, with the officer-in-charge of Khami Prison, Inspector Nyamukonda, refusing to co-operate. The lawyer said "Since last Friday, we have been going to Khami Prison to try to get the boys out as per court ruling but officials at Khami Prison have flatly refused to abide by Chidyausiku's command." The lawyer said that the action on the part of the prison officers was "clearly a defiance of the Chief Justice." He went on to say:

> "Where clear court orders are not being followed by very junior members of the government, such as prison officers, this shows a serious decay in the legal system."

Joyce Mabida, in charge of prisons in Matabeleland, and Inspector Michael Nyamukondiwa, the officer-in-charge at Khami Prison, were then charged with contempt of court in the High Court in Bulawayo.

The prison officers confirmed they had received the court orders and warrants of liberation, and admitted that they had defied the court orders. They said they had done so because they were awaiting instructions from their superiors and the Attorney-General's office.

Nyamukondiwa said defiantly:

> "As far as I'm concerned, even if my superiors were going to take 20 years to make the decision to release the suspects, I was going to keep them for that period regardless of the court orders."

However on 27 June 2002 the Attorney-General's office applied to the magistrates court in Bulawayo for the two accused to be indicted for trial in the High Court on 11 November 2002. The application was granted by a magistrate while the prison officials were appearing before the High Court on charges of contempt of court. The effect of indicting persons for trial is that any previous grant of bail falls away, and they are kept in custody until their trial unless a fresh application for bail is made and granted.

Inspector Nyamukondiwa was later convicted of contempt of court for defying the court order to release Sibanda and Mpofu. The sentence imposed was $10 000 or 60 days in prison, the whole of which was conditionally suspended for five years on condition that he did not commit a similar offence. Some other prison officers were given sentences of a wholly suspended fine.[50] The court found that they had purged their contempt by releasing the prisoners. These sentences were extremely light, given the blatant nature of the contempt and their point-blank refusal to obey the court order, which led to the continued detention of persons whom the courts had ruled should be released.

Contempt of court by police: Capital Radio

A serious instance of contempt of court on the part of a senior policeman occurred in October 2000.

A company called Capital Radio (Pvt) Ltd challenged the constitutionality of sections of the Broadcasting Act which gave a broadcasting monopoly to the government-controlled ZBC. The Supreme Court upheld the company's challenge, thereby creating a gap in the law which permitted organisations other than the ZBC to operate commercial broadcasting services within Zimbabwe. The company took advantage of this gap and, after identifying a suitable frequency, started to broadcast.

Despite the Supreme Court's ruling, the Minister of Information and Publicity, Professor[51] Jonathan Moyo, declared the company's radio station to be unlawful and threatened to "take appropriate action". To forestall any such action, the company applied urgently to the High Court for an order interdicting the Minister from interfering with or confiscating its equipment. The evening before the application was

heard, however, a group of policemen led by an Assistant Commissioner Liberman Ndlovu came to the company's premises armed with a search warrant authorising them to search for and seize the company's equipment. Late that evening the company obtained an order from the duty judge, Mr Justice Chatikobo, interdicting the police from seizing the equipment until after the company's urgent application had been heard the next day.

Despite having seen Mr Justice Chatikobo's order, Ndlovu proceeded to break down the door to the company's studio and have some of the company's broadcasting equipment seized. According to the company's legal practitioners, Ndlovu said he did not take his orders from the court but only from his superiors, and disregarded even the advice of the Attorney-General not to proceed with the search and seizure.

In later proceedings instituted against him for contempt of court, Ndlovu did not dispute the practitioners' assertions, but claimed that Mr Justice Chatikobo's order was "so blatantly absurd" that his defiance of it did not constitute contempt. He stated in an affidavit that he found the order confusing and had no opportunity to verify its genuineness.[52]

The court found him guilty of contempt but, curiously, did not impose any penalty upon him. Open defiance of a court order by a senior policeman has therefore gone unpunished.[53]

Alleged contempt of court by Secretary for Information

The police demanded to sit in on meetings of the general council of the Zimbabwe Congress of Trade Unions. They claimed that they had a lawful right to do this under the Public Order and Security Act. The ZCTU sought an order from the High Court to stop police from sitting in on and monitoring these meetings.

In April 2002 a High Court Judge, Mr Justice Chinhengo, ruled that the police were not entitled to be present at nor to monitor these meetings. He correctly held that the Public Order and Security Act did not apply because the union's gathering was not a "public meeting" as defined in the Act.

The day after this verdict was reported in the press George Charamba, the permanent secretary in the department of information in the President's office condemned the decision by Mr Justice Chinhengo in these terms[54]:

> "Government is disturbed by the decision by Justice Moses Chinhengo to bar police from ZCTU meetings. The decision is disturbing in so far as it smacks of an open invitation to the ZCTU to embark on lawless actions with impunity.
>
> [The ZCTU had been] planning an illegal post-election stay-away whose purpose had everything to do with the failed attempt to use violence to overturn the result of the presidential election and nothing whatsoever to do with the labour matters.
>
> Government will fully implement the public order and security act at all times and everywhere in the country without any exception as a matter of the rule of law. We expect more things to come. The government is saying loudly they will disregard the judgement. We don't believe it's only this judgement, but any other judgement they will treat with impunity."

These utterances led to a contempt of court charge being brought against Mr Charamba in the High Court. Judgment in this matter is still awaited.

Alleged contempt of court by Mr Chinamasa

The contemptuous statement

When the Minister of Justice, Mr Chinamasa, was the Attorney-General he spoke to the press strongly criticising the sentence imposed upon three Americans who were found guilty of being in possession of a large quantity of arms. He said that the judge, Mr Justice Adam, had imposed a completely inadequate sentence on the convicted persons. It was so inadequate that it induced "a sense of shock and outrage in the minds of all right-thinking people." By imposing an inadequate sentence, the judge had trivialised the seriousness of the offence. Mr Chinamasa then said:

> "The Attorney-General's office is bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentence constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests."

Mr Chinamasa went on to say that the imposition of the inadequate sentence came against the backdrop of repeated complaints made to him by his law officers of hostility and abuse directed at them and their submissions by the judge during proceedings. "All these developments", he said "erode the office's confidence in the administration of criminal justice."[55]

The first contempt proceedings and the appeal

These remarks led to a contempt of court charge being brought against Mr Chinamasa. At the instance of Mr Justice Adam the Registrar of the High Court issued a citation in which Mr Chinamasa was instructed to appear before the High Court on a specified date to show cause why an order for contempt of court should not be made against him. Mr Justice Blackie heard the case in October 1999. Counsel acting as *amicus curiae* prosecuted the case. Counsel for Mr Chinamasa argued that only the Attorney-General could prosecute the charge against his client since they were criminal in nature, and that the charge violated his client's constitutional right to freedom of expression. At counsel's request the judge referred the matter to the Supreme Court for a decision on these issues.

The Supreme Court considered the case later in the year. It rejected both the contentions put forward by Mr Chinamasa's counsel, though it expressed no opinion as to whether the contempt charge was justified in the circumstances.[56] The Supreme Court found that the limitation on the offence of contempt of court aimed at protecting the administration of justice and was a permissible derogation from the freedom of speech protection. It pointed out that the line between scandalising the court and fair and legitimate criticism is not always easy to draw. But although courts must be strong enough to withstand criticism, the court said, criticism that imputes improper or corrupt motives creates a substantial risk of impairing public confidence in the administration of justice. The court ordered the hearing of the matter to be resumed in the High Court before Mr Justice Blackie.

The resumed contempt proceedings and the reaction to them

Over eighteen months elapsed before the matter came before the High Court again. By that time Mr Chinamasa had become the Minister of Justice, Legal and

Parliamentary Affairs. The delay was mostly occasioned by a direction from the then Judge President that the contempt of court case should not be heard until the Supreme Court had decided an appeal against the judgment of Mr Justice Adam that had given rise to Mr Chinamasa's contemptuous remarks.[57] The case was finally set down in the High Court but when Mr Chinamasa failed to appear in court, the trial judge, Mr Justice Blackie issued a warrant for his arrest. This led to an outraged public response from Mr Chinamasa which was published in the *Herald* newspaper on 4 July 2002.

The *Herald* reported that Mr Chinamasa had "blasted" the issuing of the warrant of arrest and said that the judge's conduct constituted "gross abuse of judicial office" and should not be tolerated. According to the report, the Minister said he was appalled that a court would spend its precious time "investigating and harassing innocent people" without being bothered by the fact that the same court allowed "dangerous American terrorists to go scot-free". His reported statement continued:

> "It is disappointing that judges, whose responsibility is to uphold freedom of expression, become themselves dangerously sensitive to criticism levelled against them by citizens concerned about judicial irregularities.
>
> In fact the abuse is so grave that in my view it is tantamount to misconduct. Notwithstanding Justice Blackie's pending retirement on July 18, I am going to consult with the Chief Justice and recommend to him the setting up of a tribunal to investigate the conduct of Justice Blackie in this matter."

He noted that the powers of prosecution were vested in the Attorney-General in terms of s 76 of the Constitution. "It is unfortunate that in this case, the court has sought to arrogate to itself that power and such conduct should not be tolerated in a constitutional democracy such as ours."[58]

Mr Chinamasa said his criticism of the Mr Justice Adam's judgment was warranted, did not undermine the integrity of the court and did not therefore constitute contempt of court. "As a matter of fact," he said, "the record will show that my criticism was vindicated by the Supreme Court which was more severe in its criticism of Justice Adam's judgment." (The Supreme Court, it should be recorded, had dealt with the judgment on appeal and had described the sentence Mr Justice Adam imposed as "manifestly lenient", but its criticism was more temperately expressed than Mr

Chinamasa's). Mr Chinamasa said he was out of the country when Mr Justice Blackie issued the warrant following his failure to appear in court to answer a charge of contempt. Finally, Mr Chinamasa said he had asked the Attorney-General to challenge the validity of the warrant in court.

In its article on 4 July 2002 the *Herald* also quoted the Attorney-General as saying that this was a civil matter and not of a criminal nature and that a default judgment should have been issued instead of a warrant of arrest. He said he did not understand why a warrant of arrest could have been issued where there was no personal service, adding that Mr Chinamasa's lawyers were not served with the notice of the hearing.

The Minister then attempted to prevent the continuation of the contempt of court charge against himself by including in a General Laws Amendment Act a provision that would have narrowed down the capacity of the court to institute or continue contempt proceedings, other than proceedings taken as a result of contempt committed in the court-room. This provision, had it not been struck down by the Supreme Court, would have prevented the High Court from continuing the contempt proceedings in this case.[59]

The judgment and the reaction to it

In July 2002 the contempt case was resumed in the High Court before Mr Justice Blackie. Mr Chinamasa again failed to appear before the court. On 17 July 2002 Mr Justice Blackie gave his judgment in the matter. He found Mr Chinamasa guilty of two counts of contempt of court. The first charge related to Mr Chinamasa's attack on the sentence imposed by Mr Justice Adam in 1999. The second charge related to Mr Chinamasa's public remarks reacting to the issue of the warrant of arrest against him.

On the first charge Mr Chinamasa was sentenced to pay a fine of $50 000, or in default of payment to serve three months in prison and also to three months in prison wholly suspended. On the second count he was sentenced to an effective three months in prison.

In his judgment Mr Justice Blackie stated: "It is difficult to imagine a more deliberate and contemptuous response to the authority of the court than Mr Chinamasa's." He

said "He has deliberately scorned and avoided the process and directives of the court. His only response to the authority of the court has been abuse and threats."

Mr Justice Blackie also pointed out in his judgment that the police had ignored a warrant for Mr Chinamasa's arrest that was issued after he had not appeared for his hearing. He stated: "It is clear the police will not carry out the warrant." There should be a separate inquiry into the conduct on the part of the police, he said.

The Minister of State for Information and Publicity, Professor Jonathan Moyo, launched an intemperate verbal attack on Mr Justice Blackie in respect of the judgment. This is how the *Herald* reported Professor Moyo's statement on 18 July 2002:

> **"Judgment against minister sinister**
>
> The Minister of State for Information and Publicity, Professor Jonathan Moyo yesterday described Justice Blackie's judgment on the contempt of court case involving the Minister of Justice, Legal and Parliamentary Affairs, Cde Patrick Chinamasa, as "shocking, outrageous and sinister". Prof Moyo said: "We have just heard of it but have not read the judgment. But we understand that Justice Blackie made the judgment sitting alone with no representative of the minister. He made the judgment without hearing the accused. We think this is a patently outrageous and sinister judgment. It shows that the judge, who has a history of kangaroo courts as he did with the MDC's David Coltart in Nyamandlovu a few years ago, has taken the matter into a personal crusade and has done that in a manner that will erode public confidence in the justice system." …
>
> It has emerged that Cde Chinamasa had apparently not been informed that he was due to appear in court yesterday.
>
> Efforts were unsuccessful yesterday to get a comment from the Attorney General's office on whether they had been served with the notice for the minister to appear in court.
>
> If the Attorney General's office was served with the notice, it was not clear why they did not inform Cde Chinamasa and also why no one from that office was at the court. Prof Moyo said Justice Blackie was trying to create a crisis in the country and behaving like a Luddite. A Luddite was a member of English bands of artisans in the 1800s who rioted against mechanisation and destroyed machinery. "This judge is behaving like that. We are trying to bring about an efficient, effective and just judicial system in our country

and one person decides to set up a kangaroo court. The next day he sits there and the accused is not there. It is a kangaroo court. Any judgment made and does not respect the minimum standards of natural justice and the right to be heard is a kangaroo judgment.

"Who says that this was a criminal matter anyway? Why was the minister not notified?"

"How can a judge sit there alone and pretend to be dispensing justice? This is a very sad reminder that we have crude people in our midst." The minister said justice must be seen to be done and for that to happen, a judge should not be prosecutor and judge at the same time without giving the accused a chance to be heard. "This is a clear violation of our Constitution and we expect judges to be the first to uphold the Constitution. What makes this case stinks, and it stinks all the way to Heaven, is that this judgment is made today by a judge who is retiring tomorrow (Justice Blackie leaves the bench today). Is it settling of personal scores? How can justice be done in this manner? We expect judges to do better. You cannot abuse your position 24 hours before your departure. That is cowardly … And this is being done by a judge who distinguished himself during Rhodesia."

Prof Moyo said there was reason to believe that Justice Blackie, as was said by Cde Chinamasa a few weeks ago, was engaging in misconduct.

Three weeks ago, Justice Blackie issued a warrant for Cde Chinamasa's arrest when the minister was out of the country on Government business. Yesterday's judgement was made when the minister is out of the country.

"Who is he trying to embarrass? Is it the administration of justice, the courts, the minister, the Government or Zimbabwe? There is no doubt that fair minded and law abiding citizens will see this judgement for what it is: outrageous, sinister, highly personalised crusade made by someone who should be packing his bags."

It was also surprising that the notice was not on the High Court motion roll yesterday and that the judgement was delivered by Justice Smith and not Justice Blackie.

Some High Court officials also failed to get Cde Chinamasa's court file before the judgement was read and could not get a copy of the judgement after it was read.

> Prof Moyo said Zimbabweans should never again allow a situation where racists would be appointed to the bench and where the judiciary would be used to settle personal scores.
>
> "Rhodesian racists are very crude, uncouth and uncivilised and the manner in which this judgement has been done serves to remind us how crude they are. I would say the only consolation in this matter is that since this judge is leaving tomorrow, we can say 'thank God' because it is good riddance to bad rubbish."

This statement constituted an even worse contempt than the statements by Mr Chinamasa.

In the same article *The Herald* also quoted the Permanent Secretary of Justice, Legal and Parliamentary Affairs, Mr Mangota as having said:

> "… the whole thing was irregularly done and a counsel had been instructed to deal with the matter and have it corrected. The sentence imposed on the minister therefore has no force or effect."

The Minister then lodged an appeal against the judgment against him. The basis of the appeal was that proper notice had not been given to the Minister or his lawyers of the proceedings. On 24 July 2002 a High Court judge suspended the three-month prison sentence imposed on Mr Chinamasa and also suspended the warrant of arrest against the Minister. The judge gave the lawyers representing the High Court on the contempt charges ten days to file opposing papers and to show cause why this ruling should not be upheld.[60] For some reason no opposing papers were filed within the specified period and on 21 August 2002 a High Court judge, Mr Justice Hungwe, set aside the sentence imposed upon Mr Chinamasa for contempt of court and ordered a fresh hearing in the matter. He also cancelled the warrant for arrest issued in June by Mr Justice Blackie when Mr Chinamasa failed to appear in court to answer the charge of contempt of court. However, the judge granted leave to the Registrar of the High Court, in consultation with Mr Chinamasa or his legal practitioners, to set down the contempt of court matter for hearing on the merits.[61] At the date of writing this report, Mr Justice Hungwe's judgment has not been published. When it is, it will be interesting to see how he justifies setting aside a final judgment of another High Court judge.

Comment

As stated above, in his reaction to the judgment against him, Mr Chinamasa said that he would consult with the Chief Justice and recommend the setting up of a disciplinary enquiry to investigate Judge Blackie's conduct. Mr Chinamasa seems to be unaware of the provisions of the Constitution in this regard. In terms of s 87 in the Constitution it is the Chief Justice who is entitled to initiate investigations into the conduct of a judge of the High Court. The Minister should not normally try to influence the Chief Justice in the exercise of his power under that section, and certainly should never do so in a matter in which he himself has a personal interest.

Mr Chinamasa asserted that only the Attorney-General had the power to prosecute criminal cases and, by implication, contended that only the Attorney-General could prosecute cases of contempt of court. This is not correct. Both the High Court and the Supreme Court in the judgments cited above found that the court had power to bring prosecutions in respect of contempt of court.

It will be remembered that the Attorney-General was quoted as saying that the case against Mr Chinamasa was a civil rather than a criminal matter and that a default judgment should have been issued instead of a warrant of arrest. With respect, he was incorrect (and inconsistent[62]) in suggesting this. The proceedings were clearly criminal, and a default judgment cannot be issued in a case of contempt of court.

As for the comment by the Secretary for Justice that the proceedings should be set aside as irregular, Mr Mangota must surely have known that the only body that can set aside a wrong judgment by the High Court is a higher court, namely the Supreme Court.

The Meldrum case

Andrew Meldrum is an American journalist who is employed by *The Guardian* newspaper in England. He has worked in Zimbabwe for the last twenty-two years and had permanent resident status.

He wrote a story for *The Guardian* based on a report in a Zimbabwean newspaper, *The Daily News*, on the alleged beheading of a woman in Magunje by ZANU (PF)

supporters. This story turned out to be false and both *The Daily News* and *The Guardian* later apologised for publishing the story.

Mr Meldrum was charged with contravening s 80(1)(b) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*], namely of abusing journalistic privilege by publishing a falsehood. On 15 July 2002 the regional magistrate trying the case acquitted him of this charge. The magistrate found that this offence required proof of intention and that Mr Meldrum lacked the required intention as he had acted reasonably in the circumstances. Mr Meldrum had not originated the story and had clearly stated that it was a *Daily News* story. He had tried to verify the story by checking with the police. The police did not dispute his claim that they refused to talk to him.

A few minutes after the court acquitted him, immigration officers served Mr Meldrum with an order to leave the country within 24 hours. The deportation order had been signed by the Minister of Home Affairs on 3 July 2002, which meant that the Minister had decided in advance of the verdict that Mr Meldrum would be deported even if he was acquitted. This move to deport Mr Meldrum was heavily criticised by the international community, which condemned it as a vindictive punitive measure imposed even though he had been found innocent of the charge by a court of law.

The lawyers acting for Mr Meldrum brought an urgent application in the High Court challenging the validity and constitutionality of the deportation order. On 17 July 2002 a High Court judge, Mr Justice Matika, suspended the deportation order and referred the matter to the Supreme Court.

Earlier during the course of the trial on 26 June 2002, *The Herald* newspaper published a story in which it stated that the State intended to institute an investigation into the conduct of the prosecutor who had prosecuted in the Meldrum case. The prosecutor had indicated during the course of the trial that if Mr Meldrum was convicted, the State would not seek his imprisonment as he had not created the story but had simply derived it from another newspaper. *The Herald* implied that the prosecutor had acted irregularly in making this statement to the court. In this, *The Herald* was entirely incorrect. There was nothing wrong in the prosecutor giving an

intimation to the court about what sentence the State would seek in the event of a conviction.

Refusal by police to execute warrant[63]

Rusape police refused to execute a warrant for the arrest of a Mr Mhiripiri, which was issued by a provincial magistrate. Mr Mhiripiri is a ZANU (PF) district co-ordinating committee chairman. The warrant was issued after Mr Mhiripiri, who was on remand on a charge of committing acts of violence, failed to appear in court. The police claimed not to have received the warrant but court officials insisted that the police were given the papers. The charge was that Mr Mhiripiri had perpetrated acts of political violence in the Headlands resettlement areas. He was alleged to have gone to a farm with youths and assaulted legally resettled farmers, accusing them of being MDC supporters.

Topic 3

3. THE POLITICISATION OF THE POLICE

The Commissioner's partisanship

In January 2001 the Commissioner of Police cast off the cloak of political neutrality and announced: "I support ZANU (PF) because it is the ruling party." He said he would resign if another political party came to power.[64] In making this statement Mr Chihuri committed an offence in terms of the Police Act [*Chapter 11:10*].[65]

On 9 January 2002 the service chiefs, including the Commissioner of Police, held a press conference. In essence, what they announced was that if the people elected President Mugabe's chief political opponent, Morgan Tsvangirai, in the forthcoming Presidential election they would not recognise him as President. This was tantamount to a treasonable utterance, but no charges were brought against them. The Commissioner has recently reiterated his support for what the service chiefs said: "... I stand by and absolutely support the statement made by the service chiefs prior to the 2002 presidential election."[66]

The partisanship of the Commissioner of Police was further illustrated in August 2002. A state-controlled newspaper[67] carried a report in which it stated that the Commissioner had lashed out at the country's courts. The report said that the Commissioner had complained about the way in which the courts were handling cases in which MDC members had been accused of murder. He said that he was appalled by the way in which the courts had dealt with the bail applications by suspects in the murders of Cain Nkala and Limukani Luphahla.[68] By handing these cases leniently, the courts had created the impression among MDC members that they could commit such crimes and get away with them. "The judicial system should view this seriously and rectify the problem," he said. He said that the violence of the MDC was increasing by the day and this violence had now reached alarming levels. This was a "worrying trend", he said, and added: "We don't know who they are going to kill next." In this statement the Commissioner failed to make any reference to the fact that the police had failed to investigate and bring to court the perpetrators of many crimes of violence, including crimes of murder, that had been committed against MDC members.[69]

A remark by the Commissioner in September 2002 may reveal more about his political views than he intended. Speaking of police officers who had questioned his competence, he is reported as having said:

> "If selling the country to Western imperialism and neo-colonialism is what they regard as competence I would rather be described as incompetent. Those stooges of Western imperialism and neo-colonialism who cherish their chains of servitude ..."

On 16 September 2002 the Commissioner was unanimously elected as chairman of the Southern African Regional Police Chiefs Co-operation Organisation.[70] At the same time as they elected him, members of the Organisation signed a code of conduct that would bind the police forces of southern Africa. This code contains the following provisions:[71]

> "In the performance of their duties, police officials shall respect and protect human dignity and maintain and uphold all human rights for all persons."

> "Police officials shall treat all persons fairly and equally and avoid any form of discrimination."

"No police official shall inflict, instigate, or tolerate any act or other cruel, inhuman or degrading treatment or punishment to any person."

"The police must ensure protection of health of persons in their custody and secure medical attention where needed."

"The police may use force but only when 'strictly necessary and to the extent required for the performance of their duties adhering to national legislation and practices.' "

"Police officials should respect and uphold the rule of law."

Police spokesman, Assistant Commissioner Wayne Bvudzijena, was quoted as saying that for Zimbabwe the code would be easy to enforce as the ZRP had already incorporated human rights training and practice in the force. "That is why we have pocket human rights manuals for all officers meant for easier reference."[72]

Building a political police force

Before the June 2000 General Election there were many instances when the police turned a blind eye to violence perpetrated against opposition MDC supporters and commercial farmers. The excuses used for non-intervention in cases involving commercial farmers were either that the land issue was a political matter which the police could not get involved in, or that the police did not have transport to attend the scene. Although some members of the force tried to carry out their duties professionally in a politically neutral manner, there were numerous cases in which the police failed to intervene or to investigate murder, rape, torture or the destruction of property by "war veterans". In one appalling incident, a commercial farmer was taken from a police station and killed by "war veterans".

After the General Election the police force became increasingly partisan in favour of the ruling party. Police and army personnel were reported to have attacked people in urban areas to punish them for voting for the MDC. Police officers seen reading independent newspapers were regarded as disloyal; those who tried to enforce the law on a non-partisan basis were transferred[73] or demoted; and some senior officers left in disgust over the political abuse of the police force.[74] One senior officer who took action to save a foreign businessman's enterprise from "war veterans" was told to

pack his bags and report to a police station. To justify his purge of senior officers, Commissioner Chihuri alleged that there were reactionary elements in the force, remnants of the Rhodesian Selous Scouts and the British South Africa Police.[75] In July 2001 he told a government-controlled newspaper that police officers thought to support opposition political parties would be sacked; an undisclosed number of officers have already been dismissed on these grounds.[76]

"War veterans" in the police force received rapid promotion and more were recruited into the force. In March 2001 it was reported that more than 300 war veterans were promoted, some of whom were said to be illiterate.[77] A number of these war veterans have been placed in effective charge of rural police stations. Selective enforcement of the law seems to have become frequent in political cases, with the police arresting persons connected with the MDC for offences such as inciting or committing public violence, but ignoring similar offences committed by ZANU (PF) supporters.[78] The police regularly carry out raids on MDC party offices and arrest MDC members on apparently flimsy charges.

There are undoubtedly many members of the police force who would like to be able to perform their duties on an apolitical, professional basis. But like magistrates and prosecutors, they may be subject to severe reprisals from war veterans and members of the youth militia if they take any action perceived to be antithetical to the interests of the ruling party.[79]

The police have used their extensive powers under the Public Order and Security Act as a weapon against the MDC and others who are critical of the ruling party. In the lead-up to the Presidential elections the MDC alleged that the police frequently arrested their polling agents and party officials on spurious charges in order to disrupt their election campaign. They made similar accusations in the lead-up to local council elections held at the end of September 2002.[80] The MDC also complained that many of their members who had been arrested were subjected to brutal beatings whilst in police custody.[81]

The police hardly ever interfere with rallies and protest marches by ZANU (PF) and war veterans. Indeed the police often provide police escorts for these and in some instances they have failed to intervene when the participants have engaged in acts of

violence.[82] It would seem that the organisers of such rallies and protests frequently do not even notify the police in advance of their intention to convene such rallies and protests, as required by the Public Order and Security Act. On the other hand, the police have frequently barred political rallies by the MDC and demonstrations by groups perceived to be critical of government such as the National Constitutional Assembly. Since the Presidential elections, the police have disallowed all demonstrations by civic groups. When protestors have tried to go ahead with peaceful marches despite police bans, there has been a massive police and army presence to thwart them, and increasingly strong measures have been used against protestors. Many protestors have been arrested and charged under the Public Order and Security Act. These protestors have often alleged they were beaten when they were in police custody.

In July 2002 Amnesty International issued a report entitled *Policing to Protect Human Rights*. This report accuses the government of transforming the Zimbabwe Republic Police into a partisan force which had become little more than a party militia. It alleges that the ZRP was perpetrating human rights abuses by using repressive methods; it was using excessive or unjustified force to suppress peaceful protest and was arbitrarily detaining government opponents. The report says:

> "In Zimbabwe, the undermining of professional and impartial policing has taken an extreme form in the past two years. Police have been directly involved in the torture, ill treatment and arbitrary arrest of members of the opposition Movement for Democratic Change (MDC). They have also been complicit in nationally widespread acts of violence, arson and rape committed by state-sponsored militia against supporters of the MDC."

In political matters, it seems, the police force has removed the protection of the law from those who display their opposition to ZANU (PF).

Topic 4

4. ATTACKS UPON BUSINESSES AND AID ORGANISATIONS

In April 2001 Joseph Chinotimba, a war veteran, was appointed the ZANU (PF) political commissar for Harare[83]. ZANU (PF) formed a five-member committee in

Harare Province to deal with labour disputes. Chris Pasipamire[84], another war veteran, chaired this committee. Members of the committee included Mr Chinotimba (the political commissar) and ZANU (PF) provincial chairman Amos Midzi This was done after a new executive of the Zimbabwe Congress of Trade Unions (ZCTU) had been elected, in which the key positions had gone to persons sympathetic to the MDC. Mr Chinotimba unilaterally proclaimed himself to be the head of the ZCTU, and the war veterans embarked upon a strategy aimed at undermining workers' support for the ZCTU and strengthening their support for ZANU (PF). The war veterans sought to exploit a situation that had been created by government itself, namely a dysfunctional system of settlement of workers grievances. As a result of under-funding and understaffing, the legally established dispute settlement process had a huge backlog of cases awaiting attention.

Under the guise of settling long-standing labour disputes on behalf of aggrieved workers, groups of thugs led by war veterans raided white-owned commercial businesses, including a department store, a private hospital, a private dental surgery, a safari company, restaurants and hotels. They also raided foreign development-aid and charitable organisations including a children's orphanage and an old-age home. The war veterans assaulted and intimidated managers and executive officers of these organisations and extorted millions of dollars from them. Some managers were taken to the ZANU (PF) provincial headquarters where they were assaulted or threatened. By May 2001 about 300 businesses had been invaded. These businesses included subsidiaries of South African, Danish and other foreign companies.

To begin with, the ruling party seems to have encouraged these actions. The government-controlled press applauded the intervention of the war veterans on behalf of the workers. In most instances the police refused to intervene to stop these unlawful actions and protect those affected.

The local business community strongly condemned this wave of lawlessness, as did foreign governments, especially after foreign nationals, foreign-owned companies and foreign aid organisations were affected. In one instance, the war veterans manhandled the Canadian High Commissioner to Zimbabwe, who was trying to prevent war

veterans from taking away a Canadian national who was the head of a Canadian-funded aid organisation in Zimbabwe.

Towards the end of April Dr Hunzvi threatened to attack foreign embassies and non-governmental organisations that were funding and supporting the MDC. A local newspaper quoted him as saying: "Our next target ... will be to deal once and for all with foreign embassies and non-governmental organisations that are funding the MDC. We will use whatever means we have to deal with these foreign nations who want to install a puppet regime in Zimbabwe." There was an outcry about these threats and later Dr Hunzvi unconvincingly denied he had made them. After the foreign embassies demanded a guarantee of their safety and security, the Secretary for Foreign Affairs said that the government of Zimbabwe would not guarantee the security of foreign embassies and donor agencies that flout their terms of registration by supporting opposition parties and interfering in internal politics. This refusal to offer protection to foreign embassies was later quietly reversed.

In protest a number of countries suspended aid to Zimbabwe or threatened to do so. It was only after the government saw that this campaign was attracting widespread international condemnation that it started to rein in the war veterans. It claimed that rogue elements within the war veterans and bogus war veterans had perpetrated illegal excesses instead of settling labour disputes. The Harare Province Labour Committee was dissolved.[85] Some persons were arrested and prosecuted for extortion but the important war veterans who had orchestrated the campaign, such as Dr Hunzvi and Mr Chinotimba, were not prosecuted, although Chris Pasipamire was charged with extortion. One higher-ranking war veteran, Mike Moyo, was arrested but was soon released. Mr Moyo publicly protested about his arrest, accusing the Minister of Home Affairs, whom he said had sanctioned the business invasions, of using double standards in that he had ordered the arrest of only the small fish whereas the higher-ups were left untouched. Mr Moyo said that Hunzvi and Chinotimba should have been arrested as they were the ones who had organised the campaign and had made personal fortunes by taking large amounts of the money extorted from commercial companies.[86]

Just before he left the bench Mr Justice Gillespie handed down a judgment[87] in which he alluded to the breakdown in law and order during these invasions of businesses. In the case before the court a number of accused had twice entered their former employer's premises as part of a large gang, uttering political slogans and demanding large (and increasing) amounts of money as severance pay.

Mr Justice Gillespie had this to say:

> "They [were] among those who have sought to take advantage of the increasing breakdown of the rule of law engineered by the Executive. Their mistake is that they were acting independently for their own benefit rather than under an approved scheme of intimidation."

As a result of this mistake, the judge said, the accused were arrested and convicted of extortion. The sentence imposed on them, however, was grossly inadequate.

The proceedings, he said, were a discreditable instance of selective prosecution. Selective prosecution, he went on, was a serious threat to the administration of justice and it breached the Constitution, since it denied everyone the equal protection of the law. There was good reason to believe that persons known to be government supporters and involved in acts of violence and intimidation were be ing left at liberty. That persons such as the accused should be prosecuted and the others not involved an unequal and partial application of the law.

The judge concluded that in view of the prevailing conditions it was difficult, if not impossible, for a judicial officer to sit as an independent and effective member of the Bench.

Topic 5

5. REPRESSIVE LEGISLATION

During the first three months of 2002 two pieces of legislation were enacted which drastically curtailed the fundamental human rights of Zimbabweans, particularly the rights of freedom of expression and freedom of assembly. The first, the Public Order and Security Act[88], came into operation towards the end of January and the second,

the Access to Information and Protection of Privacy Act[89], came into operation in mid-March.

The fears that these pieces of legislation would be used to clamp down upon political opposition and to stifle protest and criticism of the government have proved to be well-founded. [90]

A brief summary of these two pieces of legislation is given below:

Access to Information and Protection of Privacy Act

No one is allowed to carry on or operate a mass media service[91] without being registered under the Act, and no one may be registered unless he is a Zimbabwean citizen or, in the case of a company, unless it is controlled by Zimbabwean citizens.[92] Only citizens or residents of Zimbabwe may hold shares in a mass media service,[93] so foreign involvement in Zimbabwean news media is severely restricted. The registration of a mass media service may be cancelled by a government-appointed Media and Information Commission on very flimsy grounds: for example, if the mass media service does not put a publisher's imprint on its publications or if it does not afford an immediate right of reply to anyone about whom it has published information "that is not truthful or impinges on his rights or lawful interests".[94] Moreover, a mass media owner who does not afford a person a right of reply in such a case is guilty of an offence and can be imprisoned for up to two years[95] He is liable to the same penalty if he "publishes a false record of personal information" — whatever that means.[96] In addition to placing these restrictions on mass media owners, the Act gives the Media and Information Commission wide power to issue orders requiring mass media owners "to do, or not to do, such things as are specified in the order(s) for the purpose of rectifying or avoiding any contravention or threatened contravention of [the] Act." The fact that all the members of the Commission's governing board are appointed by the Minister of State for Information and Publicity, Professor Jonathan Moyo, does not inspire confidence in the Commission's independence and gives rise to real fears that it will exercise its wide powers with the aim of suppressing the independent press rather preserving freedom of expression in Zimbabwe.

So far, however, the government's repressive attentions have been directed at journalists rather than at media owners.

The rights of journalists are severely restricted under the Act. No journalist or foreign correspondent can practise his profession in Zimbabwe unless he is accredited with the Media and Information Commission, and journalists who are not Zimbabwean citizens or permanent residents can be accredited only for limited periods.[97] 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".[98] About thirteen journalists have so far been charged with "publishing falsehoods" since the Act came into operation. All of these journalists work for the private press. No journalist working for the government-controlled media has been charged with this offence. Several of the journalists who have been charged for committing this offence have challenged the constitutionality of this provision, arguing that it violates the fundamental right to freedom of expression.

In addition to all these controls, the Media and Information Commission has power to develop a code of conduct for journalists and to punish journalists who fail to comply with the code.

Professor Jonathan Moyo, the Minister who devised these myriad controls and plays a key part in their implementation, has openly expressed his hostility towards the private media in Zimbabwe. He has verbally attacked foreign correspondents and labelled some of them "terrorists".

Public Order and Security Act

This Act contains several provisions which inhibit freedom of expression, in particular free political debate.

A person can be sent to prison for up to five years for communicating to others a false statement intending to undermine public confidence in a law enforcement agency, the Prison Service or the Defence Forces or intending to affect adversely the defence or economic interests of Zimbabwe.[99] A person can be subjected to the same punishment

for communicating a false statement even if he did not intend those consequences, but realised that there was a risk or possibility that they would occur. And if those consequences do in fact occur as a result of a person's publishing a statement which he knows is false or does not have reasonable grounds for believing to be true, he can be punished even if he neither intended the consequences nor realised there was any risk or possibility of their occurring.[100] The "chilling" effect this provision of the Act will have on free speech is obvious. For example, a newspaper editor who publishes a report alleging that prison officers are inadequately trained must realise that his report is likely to undermine public confidence in the Prison Service, at least to some extent; and if his report turns out to be untrue he will be liable to prosecution.

A person can be sent to prison for up to one year for intentionally making a public statement that engenders feelings of hostility towards or causes hatred, contempt or ridicule of the President, whether in person or in respect of his office or if he makes any abusive, indecent, obscene or false statement about the President, whether in respect of his person or office.[101] This offence is inappropriate in a country which has an executive President who is subject to election and re-election. A candidate who is standing for election against a sitting President cannot engage in the ordinary cut and thrust of political debate, or criticise the President's conduct while in office, without fear of prosecution under the Act.

A person can be sent to prison for up to twenty years without the option of a fine if he organises or sets up a group or even suggests the setting up of a group that will apply pressure to or attempt to apply pressure to government by various activities. These include the use of physical force or violence. They also include boycotts, civil disobedience or active or passive resistance to any law, but before these latter activities fall foul of this provision they must be accompanied by the use of or threatened use of physical force or violence[102].

The police are given extensive powers to control public meetings, assemblies and demonstrations. The organiser of a public meeting or assembly must give four days' notice to the police. The failure to give such notice attracts a maximum sentence of six months' imprisonment.[103] The police can prohibit any meeting or procession if a senior police officer has reasonable cause to believe that the meeting or procession

will lead to public disorder.[104] The only right of appeal against this prohibition is to the Minister in charge of the police. The police may also ban public demonstrations in an area for up to a month if they believe that this is necessary to prevent public disorder.[105]

The police also have power 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, the person can be detained by the police until his or her identity is established.[106] There is a danger that the police could use this power to discourage people from attending political gatherings organised by opposition parties.

SECTION B – SPECIFIC CASES

Topic 1

1. THE LAND CASES

Introduction

Occupations of white-owned farms started to occur at the end of February 2000. The occupiers were led by war veterans and were assisted by various government agencies which provided transport and paid monthly stipends to the occupiers. Within a short space of time farms were occupied throughout the country. Once on the farms, the occupiers often perpetrated acts of violence or threatened violence against the commercial farmers and farm workers. The government of Zimbabwe portrayed these occupations as a manifestation by land-hungry people of their impatience with the slow pace of land redistribution and accelerated the process of acquisition of farms for re-settlement via the Land Acquisition Act. [107]

Commercial farmers, usually represented by the Commercial Farmers Union (CFU), brought a series of court cases seeking protection from illegal actions by the occupiers, or sought rulings that the government had failed to follow its own laws in attempting to acquire farms for resettlement. The survey that follows deals mainly with the contrasting Supreme Court cases.

The interdict case

This case is reported as *Commercial Farmers Union v Minister of Lands & Ors* 2000 (2) ZLR 469 (S). The CFU applied to the Supreme Court, sitting as a constitutional court, for a declaration that the government's land acquisition exercise was not being undertaken in accordance with a programme of land reform, as required by the Constitution, and sought an interdict preventing the government from taking further steps to acquire land for resettlement until a proper programme had been put in place.

In its judgment the court observed: "there is no dispute whatever that a programme of land reform is necessary and indeed essential for the future peace and prosperity of Zimbabwe".[108] In a matter of such importance, the court said, one would expect the programme to be in writing and in conformity with the law. Although the land issue was a political question, the political method of resolving it was "by enacting laws". Government had enacted the necessary laws but had then failed to comply with the laws it had enacted. In previous judgments the courts were doing no more than to insist that the government complied with the law.

The court found that government was "unwilling to carry out a sustainable programme of land reform in terms of its own law".[109] Land resettlement had not been carried out in accordance with a programme of land reform as required by s 16A of the Constitution or in accordance with other laws. The settling of people on farms "has been entirely haphazard and unlawful ... A network of organisations, operating with complete disregard for the law, has been allowed to take over from government. War veterans, villagers and unemployed townspeople have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the CIO and the Army."[110] "Farmers and farm workers on the occupied farms have been denied the protection of the law. … The Rule of Law in the commercial farming areas has been overthrown."[111] The court went on to say:

> "Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned."[112]

The court declared that the farm occupations amounted to unfair discrimination. It said that the expropriation of farms owned by whites, in order to right historical wrongs, might not have constituted unfair discrimination on the grounds of race provided it was done lawfully and with the payment of fair compensation. However, various government officials had announced that only ZANU (PF) supporters would be re-settled on the land. There was no doubt that it amounted to unfair political discrimination to target farmers who were believed to be supporters of an opposition party, and to award the spoils of expropriation primarily to ruling party supporters. "If ZANU (PF) party branches or cells or officials are involved in the selection of settlers

and the allocation of plots," the court said, "the exercise degenerates from being an historical righting of wrongs into pure discrimination."[113] The displacement of farm workers of foreign origin who were lawful permanent residents also amounted to unfair discrimination. The court declared that forcing farmers and farm workers to attend political rallies had violated their right to freedom of association and assembly.

The Supreme Court pointed out that it was the duty of the courts to insist on compliance with the laws and that there be a return to lawfulness. It ordered the respondents, namely the Minister involved in the resettlement programme, the Minister of Home Affairs, the Commissioner of Police and the President, to comply with previous High Court and Supreme Court orders that had been made with the consent of the parties.

It also interdicted the Minister concerned from taking further steps to acquire land, but suspended the interdict until 1 July 2001. This meant that until then the government could continue with its (illegal) exercise of land acquisition. The court said it had suspended the order to enable the Ministers to produce a workable programme of land reform, and to enable the Minister of Home Affairs and the Commissioner of Police to satisfy the court that "the rule of law has been restored in the commercial farming areas". The effect of this was that after the date the interdict became operative, the government (if it was concerned with the law) would have had two options: either it could have stopped acquiring any further farmland or it could have put a proper programme in place and restored the rule of law and then acquired further land in accordance with the programme. The CFU would have been entitled to return to court only if acquisitions were effected after that date in defiance of the interdict. In that event the CFU would have had to ask the court to rule that the government and the police were in contempt and to ask it to impose penalties for the contempt.

The class action case

A matter worth commenting on, though it is peripheral to the land cases, is an altercation in 2000 between the Supreme Court and Mr Justice Chidyausiku, who at that time was Judge President of the High Court. The Supreme Court, with the consent of the government officials involved in the case, had ordered the eviction of

farm occupiers from all commercial farms. Several of the occupiers facing eviction sought to bring a class action in the High Court to oppose their eviction. Mr Justice Chidyausiku granted a provisional order suspending the Supreme Court judgment and allowing the occupiers leave to bring their class action in the Supreme Court. The Supreme Court set aside this order on the ground that the Judge President had no power to suspend a Supreme Court decision, and in any event could not grant leave for a class action to be instituted in the Supreme Court.[114] This was entirely correct. Only the Supreme Court can set aside its own decisions. In a subsequent public attack on the Supreme Court's judgment, the Judge President complained that it breached the right of the occupiers to be given a hearing before a decision affecting them was taken. However they could not have been given a hearing because, when the Supreme Court made its original order with the consent of the government, the occupiers had not commenced their class action and there was no way they could have been heard. If they wished to re-open the matter, the correct procedure would have been for them to apply to the Supreme Court to set aside or suspend the carrying out of its order so that they could be allowed to present their arguments on why the order should not be carried out. It is apparent, furthermore, that the Judge President misunderstood the ruling by the Supreme Court in another respect . The Supreme Court ruled that the Judge President could not grant leave for a class action to be instituted *in the Supreme Court* as a class action can only be instituted in the High Court. In his attack upon the Supreme Court the Judge President complained that the Supreme Court had wrongly ruled that the High Court had no jurisdiction to grant leave to institute a class action. The point is that the High Court only has jurisdiction to grant leave to institute a class action *in the High Court*.[115]

The reconstituted Supreme Court changes its mind

Following the Supreme Court's decision in the interdict case there were significant changes in the Court's membership. First Chief Justice Gubbay was forced into retirement and replaced by the Judge President of the High Court, Mr Justice Chidyausiku. Later, three additional Supreme Court judges were appointed. All these new appointees were widely viewed as being far less independent than the previous members of the Bench and likely to lean heavily in favour of the Executive.

The case of *Minister of Lands, Resettlement and Rural Development v Paliouras & Anor*[116] was a presage of the changed attitude which the new Supreme Court bench would adopt on the land issue. The case, in which two separate appeals were heard together, arose out the compulsory acquisition of the respondents' farms by the State following the Supreme Court's decision in the interdict case. The Court consisted of the newly appointed Chidyausiku ACJ together with four of the judges from the Bench which decided the interdict case. One of the issues to be decided was whether a land reform programme was a prerequisite to the Minister's power to acquire land compulsorily under the Constitution and the Land Acquisition Act. Chidyausiku ACJ held that a land reform programme was relevant only to the issue of compensation for compulsorily acquired land in terms of s16A of the Constitution, and was not a prerequisite for the compulsory acquisition of land under s 16. His argument was that a land reform programme is mentioned only in s 16A, which deals with the issue of compensation for land acquired for resettlement, and not in s 16 which sets out the requirements for a law that provides for the compulsory acquisition of land. Ominously, he questioned whether a court could interdict a Minister from acquiring land for redistribution in accordance with the explicit provisions of an Act of Parliament. His view did not find favour with other members of the Court, who said it was impossible to separate the issues of acquisition and compensation in the way he had done: agricultural land was acquired under the Land Acquisition Act, which had to comply with both s 16 and s 16A of the Constitution, so one could not speak meaningfully of compulsorily acquiring such land in accordance with s 16 as opposed to s 16A. The majority of the Court therefore upheld the view expressed in the interdict case, that a programme of land reform was a prerequisite to the compulsory acquisition of agricultural land for resettlement purposes in terms of the Land Acquisition Act.

Some months after the period of suspension of the Supreme Court's interdict had expired, the government brought the matter back to the Supreme Court to determine whether it had put in place a constitutional programme of land reform and had restored the rule of law in the commercial farming area. By this time three additional Supreme Court judges had been appointed and, with one exception (Ebrahim JA) the Bench consisted solely of new appointees. All the judges who had sat in the interdict case, except Gubbay CJ, were still available, and there was no apparent reason for

excluding them from this second instalment of the case — except perhaps a desire to avoid giving them another opportunity to rule against the government on the sensitive land issue.

One week before this matter was due to be heard, the applicants sought an interim order allowing the Ministry of Lands to proceed with applications for confirmation orders in the Administrative Court but only in respect of notices of acquisition issued before the expiry of the period of suspension of the interdict. The majority of the court granted the order "pending determination of this matter and without in any way pre-judging any of the preliminary (*sic*) issues raised in the application, but recognising the importance of land reform." (Chidyausiku CJ explained later that the effect of the order was merely to extend the interdict pending judgment in the main case.) Ebrahim JA dissented from the judgment by the majority, finding that none of the well-established requirements for the granting of interim relief were present and, contrary to the Rules of court, there was no certificate of urgency and it was moved before the respondent was required to reply.

The granting of this interim order was unfortunate because it suggested that the Court had already decided to set aside the interdict. Moreover, the Court itself later cast doubt on the validity of the order by saying that it had no power to extend the period by which the government had to come up with a workable programme of land reform and satisfy the Court that the rule of law had been restored in the commercial farming areas — which is what, in effect, the interim order did.

Before the hearing of this case, the CFU applied for the recusal of Chief Justice Chidyausiku and for the court to be reconstituted. This seemed to be a reasonable application given the very strong views expressed by the Chief Justice previously in relation to the whole issue of land redistribution. The Chief Justice not only refused this application but also in his judgment roundly castigated counsel for making it.

Setting aside the interdict

The judgment in the main case was issued as *Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union*[117] S-111-2001. The majority judgment was given by Chief Justice Chidyausiku with the support of the newly-

appointed judges. Ebrahim JA, a member of the original Supreme Court Bench, vigorously dissented.

The majority set aside the Court's earlier judgment (i.e. the judgment in the interdict case) and endorsed the government's land acquisition policy. The reasons given by the majority for this *volte face* are legally questionable.

The majority judgment

The majority of the court decided that the government had complied with the Supreme Court order to put in place a proper programme of land reform that was lawful. This programme conformed to s 16A of the Constitution and the programme was being carried out in accordance with the law. Government had established resettlement models to be followed, as well as institutional, monitoring and evaluation mechanisms, and a budget giving an estimation of cost and how money for resettlement was to be raised.

The CFU contended that the plan was not being implemented, but the court refused to go into that question, holding that the plan's implementation was not a justiciable matter. The actual manner in which the programme of land reform was being implemented was a policy matter outside the purview of the court. The Chief Justice reiterated his view 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."

The majority did, however, find that the government had taken sufficient steps to restore the rule of law on commercial farms. "Rule of law" simply meant that all rights and powers must derive from a duly enacted or established law. The rule of law did not require a totally crime-free environment. What it required was that the government take adequate measures to enforce law and order. The test for restoration of the rule of law was not the number and gravity of criminal acts committed but the rather all the measures, including policing and prosecution, adopted by the government in the land acquisition exercise. The majority was satisfied that the government had taken adequate measures to enforce law and order on the farms. The rule of law had been re-established in commercial farming areas; this was achieved by

the Rural Land Occupiers (Protection from Eviction) Act[118], which legalised the illegal occupations of land that had taken place, and through the acquisition of occupied land by means of the Land Acquisition Act. On the facts, the police were taking adequate measures to prevent crime in the commercial farming areas.

The Rural Land Occupiers (Protection from Eviction) Act [*Chapter 20:26*] was constitutional, declared the majority. This Act did not violate the constitutional rights of owners of properties, because in terms of s 8(1) of the Land Acquisition Act the acquiring authority became the owner of the property as soon as an acquisition order was made under s 8(1); the original owner of the property only regained ownership if the Administrative Court refused to confirm the acquisition order. As the farmers were no longer owners of their farms but mere occupiers, they could not exercise the rights of owners and claim that their rights as owners had been violated. By protecting illegal occupiers from eviction from land that was being acquired, therefore, the Rural Land Occupiers (Protection from Eviction) Act could not be said to have deprived the farmer of any of his rights of ownership — he had none. Furthermore, s 16A of the Constitution now made the British Government responsible for paying compensation for compulsorily acquired land.

In its judgment in relation to the rule of law, the majority placed reliance upon provisions contained in the Presidential Powers (Temporary Measures) (Land Acquisition) (No 2) Regulations 2001 SI 338 of 2001. This statutory instrument, which was gazetted on 9 November 2001, was not in existence when counsel argued the matter. Counsel for the CFU was not afforded the opportunity to challenge the validity of or present other arguments in relation to these regulations. This seems to be a violation of a litigant's constitutional rights for a court to decide a matter without hearing argument on an issue upon which the case will turn.

The minority judgment

In his dissenting judgement, Mr Justice Ebrahim strongly disagreed with the majority and reached entirely different conclusions. Dismissing the application, he found that the government had failed, by 1 July 2001, to produce a workable programme of land reform and to satisfy the Supreme Court that it had restored the rule of law in commercial farming areas.

He found that the court could not reverse its earlier decision, since the applicants had raised no new points. He said that the many factors taken into account by the Supreme Court in reaching its previous decision did not appear to have altered. While the government might have prepared a programme of land reform that was capable of being implemented, the real question regarding legality was whether it was being implemented lawfully and in accordance with legally stipulated processes. The uncontroverted evidence put forward by the CFU showed that it was not. Haphazard squatting could not constitute a lawful programme of land reform. The detailed and uncontroverted evidence put forward by the CFU showed that the rule of law had not been restored; commercial farmers were still being prevented unlawfully from conducting their farming operations.

He ruled that Rural Land Occupiers (Protection from Eviction) Act was unconstitutional. It violated various constitutional rights. It had deprived landowners of their rights or interests in their land without compensation; it had allowed arbitrary entry into property and occupation of that property; and it had deprived landowners of their right to protection of the law and the right to freedom of association.

Mr Justice Ebrahim expressed the opinion that the majority decision seemed to have been predicated not upon issues of law but rather upon issues of political expediency. This view is supported by the fact that at one point in his judgment, Chief Justice Chidyausiku had this to say:

> "More importantly, 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."

Criticism of the Majority Judgment

In the interdict case the Supreme Court led by Mr Justice Gubbay concentrated upon the large body of evidence that showed that land resettlement was being carried out in a violent and chaotic manner. The majority of the Chidyausiku court, on the other hand, simply tracked through a series of laws passed by government, some of which had been passed after the matter had been argued, which provided a façade of legality for the land acquisition. It largely turned a blind eye to the large body of convincing

evidence about what was happening on the ground. This evidence established that land resettlement continued to be carried out in a chaotic fashion, that violence against commercial farmers and farm workers was continuing and that, generally, the police were doing very little to prevent this violence or to intervene when such violence occurred. The majority of the court ducked the issue of what was happening in practice by declaring that the manner of implementation of laws was a matter of policy that fell within the province of the executive and not of the courts. Nonetheless, contrary to the evidence, it blithely declared that the government had taken adequate steps to restore the rule of law on the farms.

The decision by the majority that the rule of law had been "restored" by legalising what had been done completely disregards the essence of the rule of law concept. Retrospective validation of unlawful acts cannot be regarded as compliance with the rule of law. In any event, the Rural Land Occupiers (Protection from Eviction) Act did not purport to legalise the occupations; it merely protected the occupiers from legal action. By implication the Act accepted that the occupations were unlawful and that the occupiers were otherwise subject to criminal and civil action. The majority also found that the commercial farmers' rights under various sections of the Constitution had not been violated because a farmer whose farm had been the subject of an order under s 8 of the Land Acquisition Act was no longer the owner but merely an occupier. Even if this finding is correct, it ignores completely the rights of those numerous commercial farmers whose farms were not the subject of a s 8 order and who remained the owners of their farms. There can be no question but that the rights of those farmers were being breached.

The Court also ignored the question of whether a s 8 order can be issued at all before the Administrative Court has, in terms of s 7 of the Land Acquisition Act, confirmed the acquisition. As s 8 of the Act is subject to s 7, an order under s 8 arguably cannot be issued until the Administrative Court has confirmed the acquisition.

More generally, the majority analysed the applicable legislation — the Rural Land Occupiers (Protection from Eviction) Act, the Land Acquisition Act and the Presidential Powers (Temporary Measures) (Land Acquisition) (No 2) Regulations, 2001 — without paying sufficient regard to its cumulative effect. Taken together, the

various pieces of legislation enabled the Minister of Lands, Agriculture and Rural Resettlement to acquire ownership of any farm he chose by administrative action, namely the issue of an order under the Land Acquisition Act. Having issued the order he could subdivide the farm and allocate the subdivisions to settlers, effectively evicting the former owner by preventing him from using the land. In the same way — by issuing an order under the Land Acquisition Act — the Minister could validate the unlawful seizure of a farm by settlers (against whose depredations the owner had no effective remedy) by acquiring the farm and parcelling it out to the settlers. The Minister did not have to apply to a court before doing any of this: all he needed to do, if the former owner raised any objection, was to apply to the Administrative Court for a confirming order within thirty days after issuing his order acquiring the farm. By the time the application could be heard, the settlers would be in place and the acquisition would be a *fait accompli.* Looked at broadly in this way, how could the legislation be said to comply with the rule of law which, in its original formulation by Dicey, stated that no one should be deprived of rights and freedoms through the arbitrary exercise of wide discretionary powers by the executive? And can a process of acquisition which for all practical purposes can be concluded irrevocably without recourse to the courts, be said to conform with s 16 of the Constitution? [119]

Concluding comments

It is obvious from this survey of the main judgments in relation to government's land resettlement exercise that various judges have approached this issue from completely different perspectives.

The High Court judges who gave judgments in the earlier High Court cases and the Supreme Court led by Mr Justice Gubbay were primarily concerned about the violence and general lawlessness associated with land invasions. Whilst the judges made it clear that they fully understood and accepted the pressing need for equitable land reform, these judges rightly maintained that their judicial duty was to ensure that land reform was not carried out in violation of the law. On the basis of a considerable amount of credible evidence — mostly undisputed — the Gubbay-led Supreme Court decided that land reform was being conducted on a violent and chaotic basis and in clear breach of various fundamental rights.

On the other hand, when he was still in the High Court Mr Justice Chidyausiku openly expressed his wholehearted support for land reform. He strongly castigated the Gubbay-led Supreme Court, accusing it of bias in favour of white commercial farmers and of deliberate obstruction of land resettlement by its judgments in these cases. This criticism foreshadowed the approach that he would adopt in the Supreme Court.

In the final interdict case, heard before a reconstituted Supreme Court, his views have prevailed. The majority decision has provided the legal legitimacy from the Zimbabwean courts that the government had been seeking for its land "programme". The decision has allowed the government to claim that the entire programme is lawful, constitutional and in accordance with the rule of law. This is certainly not true.

Topic 2

2. THE LEGAL STANDING CASES

The High Court judgment in the Stevenson case (*Stevenson v Minister of Local Government & Ors* [120])

Introduction

Section 80 of Urban Councils Act[121] allows the Minister to appoint commissioners to run the affairs of a council area where the elected councillors have been suspended or dismissed. The commissioners appointed by the Minister can hold office for a maximum period of six months, pending the election of new councillors.

The Minister had dismissed the Harare City Council and replaced the councillors with commissioners to run the affairs of the city. A period well in excess of the maximum period of six months had elapsed since the commissioners were appointed, but no elections of mayor or councillors had been called.

The applicant was resident in the Harare area and a ratepayer. She was also a Member of Parliament for a Harare constituency. She applied for an order obliging the holding of mayoral and council elections in Harare to elect councillors to replace the Commissioners appointed by the Minister.

In his notice of opposition one of the respondents, the Deputy Chairperson of the commission appointed by the Minister, raised an objection to the legal standing of the applicant. At the hearing two of the respondents agreed that the matter of legal standing should be put in issue after it had been raised by the judge.

At the hearing the judge questioned the exact capacity in which the applicant wished to be heard. He queried whether it was in her individual capacity as a resident and voter, as a Member of Parliament, as a representative of her political party or as a representative of the Harare residents. He observed that in the pleadings there were "contradictory or incomplete assertions" in relation to standing. This raised "a unique problem different from the usual ones of outright lack of standing." The result of the badly formulated pleadings was that:

> "although the applicant could have had standing on the basis of any of the grounds she avers, she, for some strange reason not apparent on the papers, fails to make the necessary averments that would entitle her to be heard in any of the capacities."

In regard to the various possible grounds upon which the applicant might have had legal standing the court found as follows:

Personal injury: If the basis of her claim to legal standing was a violation of a direct, personal interest, she had failed to allege this in her founding affidavit. This was fatal to this basis of the action and a litigant's case stands or falls on the basis of the founding affidavit and the facts alleged therein. In her affidavit she had not alleged any personal injury to herself entitling her to the relief sought.

Ratepayer: Although a ratepayer automatically has legal standing to challenge the legality of action taken by his or her local authority without having to prove injury, in the present application the challenge was not to the legality of action taken by the local authority. Instead it was a challenge to a policy decision taken by central government in the form of the decision by the Minister of Local Government to install and retain a non-elected local authority.

Rule in Patz v Greene: Where legislation is enacted in the special interest of a particular individual or class of person, that individual or a member of that class who

has been affected by the administrative action automatically has standing to bring an action without proof of injury.[122]

However, the Urban Councils Act was not enacted in the special interests of the voters in a particular local authority area but instead in the broader constitutional and public interest. The narrower interest of ratepayers is amply catered for under the special principle relating to ratepayers.

On behalf of supporters of her political party: The applicant claimed that as the Member of Parliament for one of the constituencies within the Harare local authority area she had a right to make the application. Her party had won all the parliamentary seats within Harare and would be likely to win most if not all of the Harare local council seats when the council elections were held. She therefore argued that she had the right to represent the interests of the majority of people in Harare who would be registered voters in council elections.

The applicant's political party was contesting the Harare Council elections and the party would have been able to bring the application in its own name. However, the applicant had not produced any proof that her political party had given her a mandate to bring this action on its behalf.

A Member of Parliament does not, by virtue of that office, have legal standing to bring an action on behalf of the people in her constituency and to represent their interests in such litigation.

She had not proved that she was legally entitled to bring a representative action on behalf of the Harare residents. She had not shown that the residents had given her a mandate to represent them. She had also not sought to bring a claim in terms of the Class Actions Act that would have required her to apply for leave from the High Court to institute a class action on behalf of the residents of Harare.

As she had sought to bring the application on behalf of the residents of Harare without first securing their consent, she had attempted "to bring faceless and voiceless parties into the proceedings and substituting her own views and prejudices for theirs, and, what is worse, without revealing her own personal interest in the matter."

The court remarked that the concern of the court in the present case was to ensure that potentially viable public causes were not frittered away in frivolous, furtive, unfocused or self-serving private litigation. The legal standing requirement seeks to ensure that the action is brought by the best-qualified person to bring that action, as "unqualified" litigants are more likely to bring weak or half-baked actions.

The judge pointed out that there was no shortage of potential "qualified" litigants who could have brought this action. They included

- any residents' association in Harare or even a neighbourhood committee;
- any political party intending to contest the local government election could have brought the action in its own name;
- an action could have been brought under the Class Actions Act.

In the result, the judge dismissed the application on the ground of the applicant's lack of standing.

Comments on judgment

It took considerable ingenuity on the part of the judge in this case to find that the applicant lacked legal standing in this case. It was quite remarkable that he was able to find that the litigant fell outside every single one of the many possible bases for legal standing he referred to in his judgment. The fact that the pleadings might have been badly drawn and were somewhat contradictory did not prevent the court from allowing the case to proceed if it was obvious that any one of the recognised grounds for standing still applied. When applicant's counsel was asked by the court at the hearing on what basis his client was suing, he responded that applicant was suing in her personal capacity. It should have been obvious that she had legal standing on this basis alone.

The very first statement in the applicant's affidavit clearly spelt out that she was a resident and registered voter in Harare. Yet the judge said it was not enough for her to state simply that she was a resident and registered voter. She was obliged to allege in her founding affidavit that she had a direct, personal interest and that she had suffered

personal injury to herself entitling her to the relief sought. The failure to do so was fatal to her case. Plain common sense surely points to the fact that as a resident and ratepayer in Harare she had a more than sufficient interest in ensuring that Council elections were held in accordance with the law. The Urban Councils Act provides that an elected council is to run the affairs of the city. The only exception is where the Minister temporarily replaces elected councillors with appointed commissioners. However, the maximum tenure of such an appointed Commission is six months, after which time new council elections have to be held. Surely any person who is entitled to vote in council elections is entitled to approach the court to complain that a commission is illegally continuing to run the affairs of the city long after an elected council should have been put in place.[123] This is so obvious that it should not be necessary to spell it out in the pleadings.

The judge went on to suggest that someone — not Mrs Stevenson — might institute a class action on behalf of Harare's residents to compel the Minister to call elections. This was a curious suggestion. If Mrs Stevenson, as a resident and ratepayer, lacked standing to bring the proceedings on her own behalf, it is difficult to see how anyone could bring a class action seeking the same relief on behalf of residents and ratepayers who, presumably, would themselves lack standing for the same reason as Mrs Stevenson did.

The judge correctly found that a ratepayer automatically has legal standing to challenge the legality of action taken by his or her local authority without having to prove injury. However, he then decided that this ground did not apply because the challenge was not to the legality of the action taken by the local authority but instead to the policy decision taken by central government, namely, the decision by the Ministry of Local Government to retain a non-elected local authority. Yet the commissioners themselves were respondents in this action and part of the applicant's complaint was that the commissioners continued to run the affairs illegally because their term of office had expired.

It should also have been clear that Mrs Stevenson was not engaging in "frivolous, unfocused or self-serving litigation" and had not "frittered away this important public cause by bringing a weak or half baked action." The legal point being raised was

important and, as the subsequent ruling by the Supreme Court clearly shows, the administrative authorities were acting illegally by failing to hold Council elections in accordance with the law.

By holding that Mrs Stevenson lacked legal standing, the court avoided a decision on the politically sensitive issue of whether or not elections should be held in Harare. This had very far-reaching consequences. If the court had ordered the holding of Council elections within 60 days of giving its judgment, and if that decision had been upheld by the Supreme Court, (as it would have been), the government would surely have been obliged to hold the Harare council elections during 2001 and would not have been able to cause so much confusion by finally holding these elections simultaneously with the Presidential elections in 2002.

The Supreme Court decision in the Stevenson case (*Stevenson v Minister of Local Government and National Housing & Ors*[124])

Mrs Stevenson appealed against the High Court's ruling that she had no legal standing to bring the application.

The majority of the court (Sandura JA and Ebrahim JA) found that the High Court decision was wrong and that the applicant did have legal standing to bring the application.

Sandura JA started by noting that to have legal standing to bring legal proceedings a party must have a direct and substantial interest in the matter and that it must appear from the application that the applicant has such an interest. He further noted that in her founding affidavit the applicant averred as her very first point that she was a resident of Harare and a registered voter in Harare.

He then decided as follows:

> "Because the appellant specified other grounds in addition to the one set out above, the learned judge … declined to hear her application on the ground that she had badly formulated the issue of *locus standi*. I have no doubt in my mind that the learned judge erred in this regard. I say so because, in reply to a question put to him by the learned judge, counsel for the appellant … made it quite clear that the appellant had brought the

application in her personal capacity. It was, therefore, unnecessary for the learned judge to consider the issue of the appellant appearing in a representative capacity."

Sandura JA then had this to say about legal standing on the basis of the admitted facts that the appellant was resident and registered as a voter in Harare.

"As a resident of Harare and as a registered voter, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or by an elected mayor and an elected council.

In my view, the fact that the appellant made other allegations as to her interest in making the application, such as being a Member of Parliament, did not affect her basic interest which arose by virtue of her being a registered voter and a Harare resident.

It was, therefore, understandable that [counsel for the Minister] could not support the learned judge's view on the issue of the appellant's *locus standi* in this matter.

In the circumstances, the learned judge … should have dealt with the issues raised in the appellant's application."

Similarly in his concurring judgment, Ebrahim JA had this to say:

" … the appellant's *locus standi* to seek relief from the courts was patently apparent from the fact that [she resided and was a registered voter in Harare]. She was dissatisfied as a resident voter that a proper election of a body of persons, elected for the purpose of administering her interests, had not taken place. Clearly against this background common sense dictates that she was entitled to seek the assistance of the courts to rectify what she considered to be improper treatment of her, as a voter and resident in the area."

In her dissenting judgment Ziyambi JA simply quoted verbatim several pages of the High Court judgment dealing with the confused pleadings and, without giving any further reasons, simply agreed with the reasoning of the judge *a quo*. All that she said was

"I can find no fault with the reasoning of the learned judge. It is quite apparent that the appellant's *locus standi* was "so badly formulated" that the court was left with no choice but to decline to hear the rest of the application."

It should be noted that this dissenting judgment was given despite the concession by respondents' counsel that the reasoning of the judge *a quo* could not be supported.

The Tsvangirai case (*Tsvangirai v Registrar-General of Elections & Others* S-20-2002)

The election to elect the President of Zimbabwe was due to be held on 9 and 10 March 2002. The applicant, who was the leader of the MDC, the main opposition political party in Zimbabwe, was the principal challenger to President Mugabe in the presidential election.

On 5 March 2002 acting in terms of s 158 of the Electoral Act [*Chapter 2:01*] the President promulgated the Electoral Act (Modification) Notice, 2002, published in Statutory Instrument 41D of 2002 ("the Notice").

Section 158 of the Electoral Act empowers the President to make statutory instruments which "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 the elections." Such a statutory instrument may, amongst other things "suspend or amend any provision of the Electoral Act or any other law insofar as it applies to any election."

The Notice was issued three days before the presidential election commenced and dealt with vital and important issues relating to the manner in which the election was to be conducted. It altered the provisions of the Electoral Act in material respects and, consequently, the conditions under which the election was to be conducted.

The applicant was aggrieved by the provisions in the Notice because he believed that they gave President Mugabe an unfair advantage over him in the election. He brought an urgent application directly to the Supreme Court in terms of s 24(1) of the Constitution challenging the constitutionality of s 158 of the Electoral Act and the Notice. He alleged that s 158 and the Notice violated his and his supporters' right to the protection of law [s 18(1) of the Constitution] and to freedom of expression [s 20(1) of the Constitution].

In his founding affidavit the applicant alleged that the Registrar-General of Elections in his organisation of the forthcoming presidential election had repeatedly been heavily biased in favour of President Mugabe and against him. This had resulted in serious breaches of the Declaration of Rights in respect of himself and his supporters. The applicant alleged that the President not only had State personnel and machinery at his disposal to assist him in his campaign, but also had used his considerable powers under s 158 of the Electoral Act to gain an unfair advantage.

Section 24(1) of the Constitution provides that if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened *in relation to him* that person may apply to the Supreme Court for redress.

The application was filed in the Supreme Court on 7 March 2002 and was heard on the following day, which was the day before the commencement of polling in the election. Despite the urgency of the matter, the Supreme Court reserved judgment. It finally handed down its judgment more than a month after the election.

The judgment of the majority (Chidyausiku CJ with the concurrence of Cheda JA, Malaba JA and Ziyambi JA)

The majority of the Court decided that the applicant had failed to establish that he had legal standing to bring his application under s 24(1) of the Constitution.

A bald, unsubstantiated allegation of breaches of the Declaration of Rights does not satisfy the requirements of s24(1), the majority held. In his founding affidavit an applicant is obliged to aver facts, which, if proved, would establish that a fundamental right enshrined in the Declaration of Rights has been or is likely to be contravened in respect of himself as opposed to some other person.

As regards the applicant's contention that there had been a violation of the right to protection of law, the majority held that the applicant had not shown that his right to protection of the law had been infringed by the legislation he sought to impugn. He had alleged that the members of the electorate who might vote for him were denied the right to register as voters after 10 January 2001, while those who supported President Mugabe's party were allowed to register up to 3 March. If true, those

persons who were denied the right to register might possibly have been entitled to approach the Supreme Court for redress in terms of s 24(1), but the applicant was not entitled to bring an application on their behalf. Section 24(1) provides it is only when a person is unable to bring the application himself because he is being detained that someone else is entitled to bring an application on his behalf. See *United Parties v Minister of Justice & Ors* 1997 (2) ZLR 254 (S).

As regards freedom of expression, the applicant was required to allege that his own fundamental right to freedom of expression had been contravened by the legislation in question. None of the "jumbled and vague" allegations made in the applicant's affidavit satisfied the majority of the Court that the applicant's fundamental right to freedom of expression had been, or was likely to be, contravened.

The applicant took issue with s 4 of the Notice, which restricted postal voting to members of disciplined forces who were on duty and persons who were outside Zimbabwe on government service. To establish that this provision had violated the applicant's right to freedom of expression, he would have had to make an allegation such as that he had applied to the Registrar-General for a postal vote and was denied it because of s 4.

According to the majority, only two categories of persons would have had legal standing to bring the application: firstly, those who were alleging that they had been denied the right to register as voters when voter registration was extended; secondly, those who had applied for and been denied postal votes. As regards the second category, this was curiously expressed by the Chief Justice as follows:

> To establish that this provision had violated the applicant's right to freedom of expression, he would have had to make an allegation such as that he had applied to the Registrar-General for a postal vote and was denied such a vote because of [the new provisions].

Obviously the applicant himself would not have been eligible for a postal vote even under the unamended provisions.

In the event, the majority dismissed the application on the ground that the applicant lacked standing.

The minority judgment (per Sandura JA)

In his minority judgment, Sandura JA held that the applicant had legal standing to bring the application.

He pointed out that the applicant had contended that President Mugabe had used his immense powers under s 158 of the Electoral Act to make radical alterations to the electoral law passed by Parliament, thereby drastically changing the conditions under which the presidential election was to be held. This had allowed President Mugabe to gain an advantage over him in what was supposed to be a fair election.

The applicant's contention was that the election should be conducted in terms of the Electoral Law passed by Parliament (i.e. the Electoral Act), as required by s 28(4) of the Constitution, and not in terms of regulations promulgated by the incumbent President under s 158 of the Electoral Act. Section 28 of the Constitution provides that the President is to be elected by voters registered on the common roll and that the nomination of candidates for the presidential election "shall be as prescribed in the Electoral Law." Section 113 of the Constitution defines "Electoral Law" as "the Act of Parliament having effect for the purposes of s 58(4) which is for the time being in force." Section 58(4) provides that "An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purpose of filling casual vacancies." What all this meant, in Sandura JA's opinion, was that the legislation that comprised the Electoral Law must be an Act of Parliament. That Act of Parliament is the Electoral Act [*Chapter 2:01*].

Counsel for the applicant contended that, in terms of the Constitution, Parliament did not have the power to delegate to any person its constitutional function to make the Electoral Law. The power given by Parliament to the President to amend the Electoral Law by regulations in terms of s 158 of the Electoral Act was therefore unconstitutional. Sandura JA thought this submission appeared to have merit, but the issue was not to be determined at that stage because the sole question was whether the applicant had legal standing.

It was well established, Sandura JA said, that the right to the protection of the law enshrined in s 18(1) of the Constitution includes the right to due process of the law.

The entitlement of every person to the protection of the law embraces the right to require the legislature to pass laws that are consistent with the Constitution. In terms of s 32(1) of the Constitution the legislature consists of the President and Parliament,

Any person who is adversely affected by a law passed by the legislature that is inconsistent with the Declaration of Rights, has legal standing to challenge the constitutionality of that law by bringing an application directly to Supreme Court in terms of s 24(1) of the Constitution. In the present case the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by Parliament as required by s 28(4) of the Constitution. In the circumstances, he had the right to approach the Supreme Court directly in terms of s 24(1) of the Constitution and had legal standing to file the application.

Sandura JA noted that in the past the Supreme Court had taken a broad view of legal standing in applications of this nature in order to determine the real issues raised where the applicant had a real and substantial interest in the matter. He cited the cases of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250 A-E; and *Law Society of Zimbabwe & Ors v Minister of Finance* 1999 (2) ZLR 231 (S) at 233G-234G.

Since the applicant had legal standing, in Sandura JA's view, the Court should have determined the real issues raised in this application before the presidential election was held.

Comment upon the judgments

The judgment by the majority is unsupportable. The applicant was seeking to challenge the legality of a new electoral law, the Notice, passed just before the election by the incumbent president, which law, he alleged, placed him at a severe disadvantage in the election and was in violation of the Constitution. The applicant, as a candidate in the election, was directly affected by the Notice. Surely no one had a greater interest than the applicant in the matter and no one was as much affected by the Notice as the applicant. As the main opposition candidate in the Presidential election, he self-evidently had a direct and substantial interest to ensure that the

election was fairly conducted and that laws were not passed illegally that would render it unfair.

The most obvious potential violation of the Declaration of Rights was the violation of his right to protection of the law. The applicant was arguing that only Parliament had the power under the Constitution to change electoral laws and that it had unlawfully delegated this power to the President. He was also arguing that the President had illegally abused these powers to change the electoral laws at the last minute deliberately in order to gain an unfair advantage over him in the presidential election. If these arguments were valid, then the President was acting illegally in violation of the applicant's clear constitutional right to protection of the law. Such violation would obviously prejudice him in the election. The applicant was therefore entitled to a ruling from the Supreme Court about the legality or otherwise of the purported last minute changes to the electoral laws made by the President before the election. The Supreme Court was duty bound to rule on the merits. As the law being challenged was passed just before the election and the matter could only be placed before the Supreme Court at the eleventh hour before the election was to be held, the Supreme Court should have treated the case as one of extreme urgency. It should have handed down its judgment as quickly as possible and, if necessary, have given its verdict with the full reasons to follow later. There is no doubt that the Supreme Court composed of the judges who were sitting when Mr Justice Gubbay was Chief Justice would have done so, and would have had no hesitation in finding that the applicant had legal standing, as Sandura JA indeed found.

Apart from the argument based on protection of law, it would have been relatively easy for a court that was not intent on avoiding a decision on the merits, to have found that the applicant had legal standing on the basis of s 20 of the Constitution, which protects freedom of expression. The right to freedom of expression includes the right to receive and impart information without interference. An election is one of the most important ways in which the electorate can express its will. Any distortion or manipulation of the electoral process violates this free expression of electoral will. A candidate in an election has a right to expect that voters will be able to express themselves in a free and fair election. Thus he must be able to protect this right by taking legal action to ensure that the election is conducted freely, fairly and lawfully.

As Sandura JA said in his dissenting judgment, where the applicant has a real and substantial interest in the matter the Supreme Court should follow its own precedents and adopt a broad approach to legal standing in order to determine the real issues raised. This was particularly the case here, as the election was on the verge of taking place and even if someone could have been found who satisfied the exacting requirements for legal standing set by the majority of the Supreme Court, it would have been too late to take the matter back to court before polling commenced. It was clearly of great importance that there should have been a ruling in this case before the elections took place.

Conclusions

These cases show how inimical to the interests of justice a narrow view of legal standing can be, when courts wish to avoid politically sensitive issues. The *Stevenson* judgment was corrected by the Supreme Court, though too late to avoid the ill-effects it caused — the delayed municipal elections were held in conjunction with the presidential elections, resulting in the effective disenfranchisement of many voters who were unable to cast their votes. The *Tsvangirai* judgment, on the other hand, remains uncorrected, and its harmful influence may continue in our law for many years to come.

Topic 3

3. THE HARARE CITY COUNCIL CASES

Introduction

As indicated in Section A of this report, Mrs Stevenson was resident in the Harare municipal area and a ratepayer. She was also a Member of Parliament for a Harare constituency. In 2000 she applied in the High Court for an order obliging the holding of mayoral and council elections in Harare to elect councillors to replace the Commissioners appointed by the Minister. The court rejected her application on the ground that she lacked legal standing.[125]

The High Court and Supreme Court order elections to be held

In November 2001 the Combined Harare Residents Association (CHRA) won a High Court order compelling the Registrar-General of Elections to hold council elections in Harare before the end of December 2001. [126] In granting the order, Hungwe J said: "In any democratic society, the need for regular free and fair elections has never been doubted." The Registrar-General noted an appeal[127] but, because it was clear that elections should be held urgently, the High Court specified that its order would be binding pending appeal.

The Registrar-General then made an urgent application to the Supreme Court to have the High Court's order stayed pending appeal. Sitting alone on the afternoon of Sunday 25 November 2001 and without the High Court record before him, the Chief Justice, Mr Godfrey Chidyausiku, granted the application and altered the High Court order so that it would not be binding pending appeal. According to the CHRA's lawyers, they had been given the Registrar-General's application fifteen minutes before the hearing. They complained that this brief hearing at short notice, without reference to any documents filed of record, was not a fair hearing. They further alleged that the government papers materially misstated the High Court Order, and that there was no urgent need for it to be heard on that day. They also requested the Chief Justice to recuse himself because of dealings in land which they alleged he had had with the commission that was then running the City of Harare (commission members were parties to the case). It is not appropriate to recite the allegations made against the Chief Justice; it is sufficient to say that they illustrate the need for a generally accepted code of conduct for judges and other judicial officers which would specify precisely what financial and business dealings they may not engage in. The Chief Justice refused to recuse himself, saying he knew about the dealings he had with the commission.

According to the lawyers, the Chief Justice then said he would grant the order the Registrar-General sought, without first hearing the lawyers on the merits. Despite their insistence on being heard, he refused to do so and brought the proceedings to a close.

In his judgment, which was produced the next day, he accused the CHRA's lawyers of "somewhat insolent and unco-operative conduct". [128]

The CHRA then filed a counter-application in the Supreme Court requesting, *inter alia*, that the Registrar-General's appeal be heard urgently, and an urgent hearing of the appeal was then allowed. On 7 December 2001, after full argument, the Supreme Court dismissed his appeal and ordered that the City Council elections be held on or before 11 February 2002. In his judgment the Chief Justice said the law was clear and this order was unavoidable.

The President intervenes

If the Registrar-General was going to comply with the Supreme Court's order, he would have had to start the election process no later than 14 January 2002. He failed to take any steps to comply with the Supreme Court's order, however, and so after 14 January he was in contempt of court.

On 9 January 2002 the Ministry of Information announced that the President had decided that the Harare council elections should be held in conjunction with the presidential election, on 9 and 10 March. This decision presumably encouraged the Registrar-General not to give effect to the Supreme Court's order, though the order remained binding on him. Finally, on 23 January the President issued a notice, purportedly in terms of s 158 of the Electoral Act [*Chapter 2:01*], which stated that notwithstanding any order of court to the contrary, the Harare elections were to be held on 9 and 10 March 2002, in conjunction with the presidential election.[129]

Challenge to the President's notice

On 28 January the CHRA sought a provisional order from the High Court compelling the Registrar-General to give formal notice of the election and declaring the Presidential notice to be *ultra vires* the Electoral Act. Chinhengo J held that the Association had made out a *prima facie* case: the Supreme Court's order was still extant, and it seemed clear that the Electoral Act did not allow the President to override a court order. He granted a provisional order directing the Registrar-General to publish notices for the nomination of candidates and the holding of elections in

Harare. His order modified the time limits set out in the Act in order to meet the election date of 11 February fixed by the Supreme Court.[130]

The Registrar-General then filed an appeal to the Supreme Court against Chinhengo J's provisional order, presumably in order to avoid complying with it.[131] The papers were laid before the Chief Justice in chambers, who noted that the order against which the Registrar-General sought to appeal was a provisional one, so the Registrar-General should have sought leave to appeal from the court *a quo*.[132] He ordered the Registrar-General to do so.

Finally, to avoid imprisonment for contempt, on Friday 1 February the Registrar-General published a notice that Harare's elections would be held on the 11 and 12 February, and that the nomination court for this would be held on Monday 4 February. At the same time he sought leave from the High Court to appeal against Chinhengo J's provisional order, though he did so only after 9 a.m. on 4 February, which was the deadline given him by the Chief Justice.

On 4 February the nomination court for the election was due to commence at 10 a.m., but the Registrar-General refused to receive any nominations at the court. This not only amounted to contempt of the High Court order, which he must have known had to be complied with pending appeal, but also contravened the Electoral Act which obliged him to receive nominations.

Later that day the Registrar-General sought leave from Chinhengo J to appeal against the provisional order. That evening the High Court refused to grant him leave, holding that the President's Statutory Instrument was clearly *ultra vires* and the Registrar-General therefore had no prospects of success on appeal.[133]

This ruling, paradoxically, enabled the Registrar-General to approach a Supreme Court judge for leave to appeal, thereby giving the Supreme Court jurisdiction to hear the case. The next morning the government filed its application for leave to appeal at the Supreme Court, while CHRA applied to the High Court to deal with the Registrar-General's contempt of its order regarding the nomination court and to compel him to process the nominations. The Supreme Court directed both parties to appear before it the next morning, Wednesday 6 February, when a full bench consisting of the Chief

Justice, three new Supreme Court judges, and one veteran judge heard argument on whether the Registrar-General should be granted leave to appeal and, in addition, on the merits of the appeal itself.

The Supreme Court's ruling

Late in the afternoon on 8 February 2002 the Supreme Court's judgment was delivered.[134] All the judges agreed that in view of the importance of the matter the Registrar-General should be given leave to appeal. On the merits of the appeal, however, the judges differed.

The Chief Justice and the three other new judges set aside Chinhengo J's time-table for the elections on the ground that it departed from the time-limits laid down in the Electoral Act. Despite the fact that counsel for the Registrar-General conceded that s 4 of the President's notice was *ultra vires*,[135] they declined to determine whether or not the notice was valid, on the ground that the issue of its validity was not properly before the court.[136] They held, however, that the notice had to be regarded as valid until it was declared *ultra vires* or unconstitutional by a final judgment of a court — and no such judgment had yet been given.

Ebrahim JA, on the other hand, considered that the key to determining the issue was for the Supreme Court to consider the validity of the President's notice. He agreed with Chinhengo J that the notice was *ultra vires* the Electoral Act. He also stated that, in view of the Registrar-General's inactivity, Chinhengo J had to alter the time-limits laid down in the Electoral Act in order to comply with the Supreme Court's earlier ruling that the election was to be held on 11 February.

The Supreme Court's decision, and the delay that would inevitably have been occasioned in bringing the issue back to the Court for final determination, meant that the Court's original deadline for the holding of the elections could no longer be enforced. The CHRA was therefore forced to accept the President's decision on the election dates, knowing that it was likely to cause serious problems for Harare voters.

Conclusion

The majority decision of the Supreme Court which closed this series of cases indicates once again a readiness on the part of the newly-appointed judges to use technical procedural grounds to avoid deciding the real issues in a case, where a decision would be politically sensitive. Had the majority judges squarely faced the issue in this case, namely whether or not the President's notice was valid, they would almost certainly have had to follow Chinhengo J and Ebrahim JA and declare it *ultra vires* — even counsel for the Registrar-General had conceded its invalidity. But such a declaration would have meant thwarting the President. It is hard to avoid the conclusion that that was a consideration which, at least in part, motivated the judges' decision.

Topic 4

4. THE NKALA AND LUPHAHLA MURDERS

The murders

Cain Nkala, a war veteran leader and senior ZANU (PF) official in Bulawayo. Limukani Luphahla was a ZANU (PF) official in the Lupane district of Matabeleland.

Luphahla and then Nkala were murdered in November 2001. Nkala was kidnapped during daylight hours from his home in Bulawayo. His wife was present when the kidnapping took place and can presumably identify the persons who took away her husband. However, Mrs Nkala has apparently not been allowed to speak to the press since then.[137]

Government reaction

In the aftermath of the death of Cain Nkala the state media employed inflammatory rhetoric against the MDC, constantly referring to the MDC as a terrorist organisation. The government-controlled *Herald* compared the MDC with the Nazis, saying that it had "taken over the mantle of violence that Hitler unleashed on his people, bludgeoning them into submission".[138]

High-ranking ZANU (PF) officials, such as the Minister of Home Affairs, uttered statements denouncing the murder, clearly attributing responsibility for the death to the MDC and describing the MDC as a terrorist party. Vice-President Msika said of the party: "If they are looking for a bloodbath, they will get it."[139] President Mugabe threatened to crush the MDC after blaming the party for the kidnapping and killing of Cain Nkala.

On 16 November 2001 a crowd of about 300 ZANU (PF) youths and war veterans, reportedly escorted by the police, went on the rampage in Bulawayo, attacking people in the streets and destroying copies of the *Daily News*. The MDC offices were set on fire and destroyed with petrol bombs. In turn MDC members set fire to a building belonging to a senior ZANU (PF) official and burnt two cars before the police restored order.

The arrests

Fourteen members of MDC were originally arrested in connection with the Cain Nkala killing. Amongst those arrested were Fletcher Dulini Ncube, a Bulawayo Member of Parliament and the national treasurer of the MDC, and Simon Spooner, who is the adviser to Bulawayo Member of Parliament, David Coltart. They were held in custody for several weeks. Several months later the charges were withdrawn against Simon Spooner.

Two members of the MDC later appeared in court on allegations of kidnapping and alleged that they were beaten by the police into confessing that they had carried out the murder. One of the MDC members accused of killing Nkala showed the court wounds on his arm where he alleged that Nkala bit him. However, it was later reported that a doctor had testified that the wound was not caused by a bite.

On the evening of 13 November 2001 the Zimbabwe Broadcasting Corporation screened television footage showing two MDC men under arrest leading the police to the place where Nkala's body was buried in a shallow grave. They were said to have confessed to having killed Nkala by strangling him with a shoelace and had then buried him in this grave. The viewers were told that the two men had "voluntarily"

agreed to tell the police where they had buried Nkala. In front of the cameras the police asked the accused persons about what they had done.

The case of Fletcher Dulini Ncube

Fletcher Dulini Ncube is aged 62. For some time he had suffered from a serious diabetic condition that required constant medical attention and adherence to a special diet. When he had been detained for several weeks after the Nkala killing, he was denied access to special medical treatment and had no special diet. As a result of this, his eyesight deteriorated badly. After his release as a result of a High Court order, he had to be hospitalised but he did not regain the full use of his eyes and one of his eyes deteriorated further. Eventually the doctors decided that there was no choice but to remove this eye surgically. After the operation his recovery needed to be carefully monitored by the doctors This operation took place in a private hospital. The next day, as he was recuperating in hospital from this operation, the police arrested him and detained him in police cells. They were acting on a warrant of arrest following Mr Justice Chiweshe's ruling (which is dealt with below). Mr Ncube's lawyers protested to the police, pointing out that his doctors had indicated that his detention in police cells might lead to infection which would affect his brain. Despite this, the police held him for the most of the day before eventually taking him back to hospital on 4 August 2002, where he was placed in leg irons under police guard. Eight officers were assigned to guard him. The leg irons were later removed, and on 16 August he was granted bail.

Bail applications

Seven of the suspects were eventually granted bail by the High Court and the State appeal against their release on bail was rejected by the Supreme Court. However, two of the accused, Khetani Sibanda and Sazini Mpofu, remained in custody. The High Court ordered the release on bail of the remaining two. On the 21 June 2002 the Supreme Court dismissed the State's appeal against the High Court order for their release and issued warrants of liberation in favour of the two men, who had been in custody for six months. For two weeks senior prison officers refused to comply with these court orders. The two prison officers confirmed they had received the court

orders and warrants of liberation, and openly admitted that they had defied them. They said they had done so because they were awaiting instructions from their superiors.[140]

On 27 June 2002 the Attorney-General's office applied to the magistrates court in Bulawayo for the indictment of the two accused so that they would remain in prison until 11 November 2002. The application was granted by a magistrate while the prison officials were appearing before the High Court on charges of contempt of court. The effect of indicting the two accused for trial is that any previous grant of bail falls away, and they will be kept in custody until their trial unless defence counsel succeeds in a fresh application for bail.

On 16 July 2002 Mr Justice Lawrence Kamocha granted a provisional order suspending the indictment for trial in High Court of Fletcher Dulini-Ncube, Sony Masara and Army Zulu pending the determination of the matter by the High Court.[141] The effect of this order was to bar the Attorney-General's office from indicting the three for trial on two counts of murder.

On the return date, counsel for the three men sought confirmation of the order; the State on the other hand submitted that confirming the order would usurp the Attorney-General's power, granted him by the Constitution, to institute criminal proceedings without direction or control from any other person or authority. Counsel for the accused argued that this submission was misconceived. In terms of the Constitution the Attorney-General could exercise his power to prosecute only where there was admissible evidence on the basis of which a court might find that there was a reasonable suspicion that the offence charged has been committed.[142] This rule, counsel said, applied not only to remand and bail applications but also to cases where the Attorney-General seeks to indict an accused for trial in the High Court. The Attorney-General, he said, was obliged to disclose fully to the court the evidence and grounds upon which his reasonable suspicion was based. The only evidence in the indictment papers alleged against the accused was that two co-accused had allegedly made confessions to the police implicating them in the murder. These confessions were probably not admissible even against the persons who made them, and were definitely not admissible against co-accused in bail applications. There was ample

legal authority, counsel argued, for the proposition that an extra-curial statement made by a conspirator, after his arrest and after the conspiracy has ended, is admissible only against the maker and not against a co-conspirator. Significantly, the State had dropped the charges against Spooner who was similarly implicated by the alleged confessions.

He submitted that:

> "… the State's persistence in appealing against the grant of bail, failing to obey orders for release on bail of both the High Court and Supreme Court and now seeking to indict the Applicants without any admissible evidence … constitutes a gross abuse of process clearly designed to harass Applicants. In the absence of a credible explanation for such conduct from the law officers it is difficult to avoid the conclusion of intervention for political reasons."

On 1 August 2002 Mr Justice Chiweshe discharged the provisional order. He accepted that an indictment could be challenged on the basis that there was no reasonable suspicion that the person indicted had committed the crime charged. Without referring to the information contained in the indictment, he found that there was a reasonable suspicion in the present case. He said:

> "The admissibility or otherwise of any facts or evidence that the state may seek to establish or adduce is not a factor for consideration at this stage. Applicants seek a ruling on the basis that whatever evidence the state may have in the form of confessions by co-accused in which applicants are implicated would ordinarily be inadmissible as against the applicants and therefore no reasonable suspicion could be held to exist that the applicants committed an offence. With respect that would amount to an unjustifiable extension of the test to be applied.
>
> In my view such issues stand for determination by the trial court. Suffice it to say that where an accused person implicates another in circumstances such as the present, that would be sufficient grounds for holding that a reasonable suspicion exists that an offence has been committed by such other. On that basis an arrest is justifiable. The accused person may be placed on remand on the same basis and indicted if needs be."

He concluded that the application had been made "solely for purposes of defeating the indictment."

With respect, the learned judge's ruling is not supportable. As indicated above, he did not refer to the indict papers but seemed to accept that the only evidence against the applicants was contained in confessions allegedly made by their co-accused. These confessions were inadmissible against the applicants, even if they were to be admitted in evidence against the persons who made them. There was therefore no admissible evidence against the applicants, and so no "reasonable and probable cause" for their prosecution. It might conceivably be argued that there was sufficient suspicion for a court to put them on remand immediately after their arrest, in the expectation that the police would be able to gather further evidence from information contained in the confessions; but as the learned judge noted, they had been on remand for close on nine months. If after that time the only evidence against them was inadmissible, what possible justification was there for indicting them for trial in the High Court?

Immediately after the ruling, the counsel from the Attorney-General's Office applied in the magistrate's court for warrants of arrest for the three.

A few days after the granting of the provisional order Mr Justice Kamocha was transferred to Harare. It was said that he had been asked by Judge President Garwe to write a report about his ruling in this case. There was speculation that the ruling party had been angered by Mr Justice Kamocha's order and that he was being transferred to Harare so that he could be placed under the supervision of the Judge President.[143]

Three other suspects, Augustine Khethani Sibanda, Remember Moyo and Sazini Mpofu had already been indicted for trial and are in remand prison awaiting trial.

The lawyers acting for Fletcher Dulini Ncube, Sony Masera and Army Zulu then made a fresh application to the High Court for the re-instatement of bail, which had been terminated by their indictment for trial in the High Court. The State continued to oppose bail. The defence lawyer submitted that the State case was weak at the time the three were granted bail, and that there was no new evidence when they were indicted that would justify their detention in custody. Consequently, there was no inducement for the three to abscond since there was no expectation of conviction. In his judgment handed down on 16 August 2002 Mr Justice Matika accepted the submissions by the defence lawyer. He said:

> "There is no new evidence which the State has unearthed which tends to implicate the applicants. There is no fear that they will either not stand trial or interfere with witnesses or commit any offence while on bail. There is no inducement for them to abscond. **I agree that there is no expectation of conviction.**"[144] (Emphasis added.)

In respect of the case of Fletcher Dulini Ncube, he took into account his deteriorating health and that he had lost an eye and is presently in hospital. This, he said, was a new factor that was not before the court when it considered his application for bail pending trial.

The judge therefore granted them bail on the same conditions as before.

Suspects breach bail conditions

On 23 August 2002 *The Herald* newspaper reported that Gilbert Moyo and Army Zulu had breached their bail conditions and absconded. This emerged in a case in which three alleged accomplices of Moyo and Zulu were applying for bail. Refusing bail to them, the judge found that the State's fears that the suspects might abscond were justified, as they were likely to be convicted and to be jailed for a long time. This was fortified by the fact that their alleged accomplices, Moyo and Zulu, had disappeared.

Police Commissioner lashes out at courts

It was reported at the end of August 2002 that the Police Commissioner had "lashed out" at the courts for the way in which they were handling cases in which MDC members were accused of murder. In particular, he said that he was "appalled" that the courts had handled with "kid gloves" the MDC suspects in the killings of Nkala and Luphahla. This was creating the impression among MDC members that they could commit such crimes and get away with them. The result was that the violence by MDC members was increasing day by day and it had now reached "alarming proportions".

Conclusion

This series of cases illustrates once again the malign effect of politics intruding into the administration of justice. The deaths of Nkala and Luphahla were almost certainly politically inspired, but the immediate reaction of the government was that the two had been killed by members of the opposition MDC, and the government-controlled news media trumpeted this view to the exclusion of all else. Police investigations seem to have been directed solely at proving the government's allegations correct, without regard to any other line of enquiry. The police seem to have ignored suggestions made in the independent press, that Cain Nkala may have been killed by members of his own war veterans' organisation.[145] If, after nine months, the only evidence the police have managed to obtain are a couple of confessions whose admissibility will probably be challenged, then their investigations have certainly not been very fruitful. If, as seems likely, the suspects who have been indicted are acquitted for lack of credible evidence, then the true murderers of Nkala and Luphahla will have escaped justice.

Topic 5

5. THE CHINHOYI FARMERS CASE

Introduction

On 6 August 2001 twenty-one whites, mainly commercial farmers, were arrested in the Chinhoyi area and charged with public violence. The incident that gave rise to charges is described succinctly and, as it turned out, accurately by a writer[146]:

> "The worst outbreak of violence occurred in August 2001 in the Chinhoyi farming district, sixty miles north-west of Harare. It started after a group of government ministers and MPs, including Ignatius Chombo, minister of local government, Philip Chiyangwa, businessman and recently-elected MP for Chinhoyi and Sabina Mugabe, Mugabe's sister, visited a Chinhoyi farm urging invaders there to take over neighbouring farms. The following day, a mob of about 50 war veterans and invaders laid siege to the homestead on Liston Shiels Farm. Responding to a distress call over the local radio network from the farmer, Anthony Barkley, a convoy of white farmers forced their way through the

mob. In the melee, five invaders and two farmers were seriously injured. The police eventually arrived and requested the white farmers to report to Chinhoyi police station to give statements. When they arrived at the police station they were arrested, charged with inciting 'public violence.' When the elderly father of one of the arrested men arrived at the police station to deliver a blanket to his son, he too was arrested. Five other whites who went to the police station to check on the welfare of their colleagues were also arrested and charged.

The incident was seized on by the government to claim that white farmers had deliberately provoked the violence. 'It's true the farmers have been attacking people,' the minister of home affairs, John Nkomo, said on state television. 'It's the farmers who have been unleashing this violence.'[147] On the streets of Chinhoyi, Zanu-PF supporters retaliated against whites at random, assaulting shoppers and stoning cars. At the magistrate's court a hostile crowd gathered, shouting abuse when 21 white farmers appeared for a bail hearing. They were held in prison for two weeks, their heads forcibly shaved, before bail was granted."

Pre-Trial Treatment

The accused persons were denied access to their lawyers on 6 August 2001, the date of their arrest, and when their lawyers arrived at the police station at about 10 am on 7 August they found the accused being paraded there for identification purposes. After some demur on the part of the police, the lawyers were allowed to watch the proceedings. As an identification parade, it was most irregular and disorganised, with a large and hostile crowd present and witnesses being called on to pick out accused throughout the day. Later the video record which the police took of the proceedings was alleged to have disappeared, and the photographs were never produced in court. One of the lawyers, Mr L. Chibwe, was threatened by a member of the crowd for representing the whites.[148] At least three people, including the wife of one of the accused, were assaulted by members of the crowd at the police station, in the presence of the police.

The next day the identification parade continued until mid-morning, when a directive was issued to pick up the accused person's firearms from their homes.[149] The accused were accordingly bundled into police vehicles to assist the police to recover their firearms.

Shortly before 4 pm the accused were taken to court. At first the police declined to allow the lawyers to accompany the accused to court, saying their safety couldn't be guaranteed, but eventually a landrover was found to escort them there. There was a large and hostile crowd outside the court building and in the courtroom itself. The police seemed incapable of maintaining proper order even in the courtroom: before the proceedings began one reporter was attacked but escaped by jumping over the magistrate's bench and running out through the magistrate's entrance, where he was hidden from the crowd by court officials. When the magistrate came in he seemed frightened (understandably in the circumstances) and he remanded the accused until the next day.

The next day the police seemed to have better control of the situation. There was still a crowd outside the courthouse but policemen restricted entry into the building and there were many plainclothes officers in attendance. Even so, lawyers representing the accused came in for abuse from the crowd, and after the hearing a prison officer warned the lawyers to remain in the court building until things were clear, since thugs had been hired to get them.

The magistrate refused bail but on appeal bail was granted by Makarau J on 20 August. The accused complied with the bail conditions on 21 August but could not be released until the next day, because of what seems to have been excessive scrupulousness on the part of the Registrar of the High Court in ensuring that the conditions had indeed been met.

Meanwhile the government-controlled news media published statements which can only have exacerbated an already explosive situation, and which clearly presupposed the accused persons were guilty. Thus the *Herald* stated:

> "Twenty-two white commercial farmers armed with logs, sticks and batons ganged up on Monday and brutally attacked defenceless resettled farmers at Liston Shield Farm in Chinhoyi". [150]

The newspaper went on to quote extensively an account given by one of the farm invaders, a Mr Darlington Chasara. Mr Chasara later gave evidence at the trial of the arrested farmers and, like the other State witnesses, was disbelieved. The *Herald* and other government-controlled newspapers further exacerbated the situation when

reporting the widespread looting of farms that took place in the area later in August. On 16 August, for example, the *Herald* published a story which accused white farmers of initiating the violence at the behest of Western imperial forces, primarily Britain, and concluded, without any evidence, that the British High Commission to Zimbabwe had been implicated in the looting as part of a plot to justify international intervention. The article also tried to underscore the theory that white farmers and their workers were working in cahoots as part of a wider campaign to tarnish the image of government, on the assumption that the workers would not loot their bosses' property since they had always "stuck by the side of their 'baas'…"

The treatment of the accused while they were in custody was degrading and illegal. One of the accused, who was 72 years old, collapsed during the bail hearing and was taken to Chinhoyi Hospital where he was detained. While there he was kept in leg-irons. All the accused had their heads shaved and were required to wear prison uniform, contrary to the provisions of the Prisons (General) Regulations, 1996. [151]

The Trial

The trial of the 24 accused began eight months later, on 23 April 2002. At the outset the prosecution withdrew charges against six of the accused, and withdrew charges against another one during the trial. At the close of the State case charges were withdrawn against a further seven. The prosecution led evidence from 22 invaders who were present when the alleged assaults took place. Their evidence reads very badly, as can be seen from this example from the first witness, a leader of the invaders:

> "Q – Do you know any of the accused persons sitting at the dock?
>
> A – Yes
>
> Q – Which?
>
> A – Hennie
>
> Q – Indicate him
>
> A – He is not present

…

Q – And do you know any of the other accused persons?

A – Tony from Bell.

…

Q – Can you please indicate Tony to the court.

A – He is not here but he fired a firearm."

His evidence did not improve as it went on. He and the other witnesses blithely departed from the statements they had made to the police, and their allegations of brutal assaults being perpetrated upon them were not borne out by the very few injuries they suffered. Some of the witnesses showed contempt towards the court, by laughing and refusing to answer questions. The first witness lounged in the witness-box pretending to be half asleep.

The trial lasted until 1 July 2002, with frequent adjournments caused by failure on the part of the police to bring witnesses to court. The result, however, was inevitable. At the close of the State case defence counsel applied for the remaining accused to be discharged and the magistrate proceeded to acquit them:

"I am constrained not to believe the State witnesses. All of them gave different versions; some denied common cause events. Some exaggerated the involvement of the accused. It is very difficult to see why the accused were not all charged with attempted murder. Why would the witnesses lie?

The answer is they were trying to influence this court.

In the South African Law of Evidence at page 601 para 3, it states that if a litigant gives completely false evidence, then it must be disregarded and an adverse inference must be drawn therefrom. In short the witnesses lied to the court.

Therefore I grant the application for discharge. All 10 of the remaining accused are not guilty and acquitted after I have declined to put them on their defence."

During the trial the magistrate and the prosecutor seem to have acted with commendable fairness and professionalism in difficult circumstances. The same

cannot, however, be said of the police. It is difficult to see how they could honestly have believed the version of events given to them by the farm invaders, particularly since they had had a report that a farmer was surrounded and found the road to Liston Shields farm blocked by the invaders.

Since the trial the magistrate has been posted to Guruve, far from his family.

Topic 6

6. JOURNALISTS CHARGED WITH PUBLISHING FALSEHOODS

In terms of s 80 of the Access to Information and Protection of Privacy Act[152], a journalist is guilty of a criminal offence if he or she falsifies or fabricates information (s 80(1)(a)) or if he or she publishes falsehoods (s 80(1)(b)). A person convicted of this offence is liable to a fine not exceeding $ 100 000 or to imprisonment for a period not exceeding two years.

Since the Act was passed in mid-March 2002, more than a dozen editors and journalists, all of them from the private media, have been charged under s 80. The salient details of some of these cases are as follows:

Story about Presidential election results

In April *The Daily News* published an article suggesting that President Mugabe had in fact lost the Presidential election and that the formally announced results were false.

The editor was charged with contravening s 80(1)(b) of the Act. After being questioned by the police, he was released. He was told that the police would call him back if they gathered enough evidence to prosecute him for the alleged offence.

Story about First Lady's brother

In April 2002 *The Zimbabwe Independent* published a story alleging that Mrs Grace Mugabe's brother had attempted to take over a local company.

The reporter who wrote the story and the editor of the paper were charged under the Act, but released after the police said that the State would proceed by way of summons if it wished to pursue the matter further. The paper's editor was picked up by the police on 17 April 2002 and questioned in connection with the same story. He was charged under s 80(1)(b) the Act. The police said that the State would proceed by way of summons if it wished to pursue this matter against him.

False story about political killing

In April 2002 *The Daily News* published a story alleging that a woman had been beheaded in front of her daughters and that this killing was politically motivated and had been perpetrated by ZANU (PF) supporters. This story turned out to be completely false, although the newspaper believed it to be true when it published it.

The two reporters who wrote the story and the editor of the paper have been charged under s 80(1)(b) the Act. They were released on bail. A columnist for the paper was later arrested because he had written an article in which he commented upon the beheading story. He was charged with the same offence but was released after police questioning. The police told him that the State would proceed by way of summons if it decided to pursue the matter against him.

Mr Meldrum, a foreign correspondent for the English paper, *The Guardian*, was prosecuted for having sent this story to his newspaper, which then published it. He was found not guilty of contravening s 80(1)(b) the Act. His case is dealt with in topic 2 of Section A of this report.

Story about militants forcing teachers to pay protection money

In May 2002 *The Daily News* published a story alleging that teachers in rural areas were being forced to pay protection fees to ZANU (PF) militants.

The reporter who wrote this story was arrested by the police in Mutare and questioned about the story. He was not charged. When they released him the police said they would get in touch with him when they needed to do so.

Stories about importation of anti-riot equipment and about prostitutes arrested by the police

In May 2002 *The Standard* newspaper published two stories. In the first it was alleged that the government had brought in state-of-the-art military equipment and anti-riot gear to crush anti-government demonstrations. In the second it was alleged that prostitutes in the Harare area were making arrangements with the police for their release in return for sex with the police.

The editor, the entertainment editor and a reporter were arrested in connection with these stories. They were charged with contravening s 80(1)(b) of the Act. They were held overnight in custody and then taken to court and were remanded out of custody on bail.

Story about changes at Zimpapers and ZBC

In May 2002 *The Standard* newspaper published a story about impending changes at Zimpapers and at the Zimbabwe Broadcasting Corporation. The following day the Minister of Information said this story was false and accused the paper of lying deliberately.

The editor of the paper and a reporter were arrested in connection with the story. They were charged with contravening s 80(1)(b) of the Act. After being questioned by the police they were released.

Story criticising the handling of journalists by police

In May 2002 *The Standard* newspaper published a story about the way in which the police dealt with journalists. The article alleged that the police enjoyed harassing journalists from the private media, took orders from above in relation to such cases and followed directives that they did not even understand. The journalist also narrated his experience in the police cells when he had been previously arrested.

The paper's editor and a journalist were arrested in connection with this story. They were charged with contravening s 80(1)(b) of the Act. After being questioned by the police they were released.

Story about the widow of Joshua Nkomo

In July 2002 *The Daily News* published a story alleging that the family of the late Vice-President, Joshua Nkomo, had not been invited to a state-organised function in Mutare in memory of Dr Nkomo, and that his widow had to be flown to the function in a military helicopter at the last minute. The Department of Information accused the paper of lying in this story.

The Bulawayo reporter of the paper was questioned by the police. In his warned and cautioned statement he said he stood by this story, which he had got from Dr Nkomo's daughter. When they released him the police said they would proceed by way of summons if the reporter was going to be taken to court.

Other charges brought against journalists

In May 2002 *The Zimbabwe Independent* published a picture of a semi-naked Amazonian man in traditional attire. The paper's editor has been charged with contravening the Censorship and Entertainments Control Act by publishing this photograph.

In May 2002, alongside its story about prostitutes being released by the police in return for sexual favours, *The Standard* newspaper published a colour photograph of a prostitute skimpily clad in a G-string. The police questioned the editor and the entertainments editor about this photograph and said that they were going to be charged with contravening s 13(1)(a) of the Censorship and Entertainments Control Act.

In September 2002 the *Daily Mirror* published a story in which it alleged that the Commissioner of Police, Mr Chihuri, was incompetent to continue to head the police force because of ill health. A few days later the journalist who wrote the story was arrested. He was charged with violating the Police Act, the allegation being that he

had been employed by the newspaper while still a member of the police force. It was alleged that he had not obtained the necessary permission to leave the force. He was convicted by a police board and sentenced to three months in prison.

Topic 7

7. THE ELECTORAL CASES

The election petitions arising out of the June 2000 elections

Introduction

In the Parliamentary elections held in June 2000, the opposition Movement for Democratic Change secured 57 out of the 120 contested seats. Alleging widespread violence and intimidation of voters, the party filed 37 election petitions in which it challenged the results in constituencies where it had lost to the ruling ZANU (PF). Most of the petitions alleged that the results were affected by general violence and intimidation committed by ZANU (PF) supporters with the active or at least covert support of the successful candidates.

It was vital for ZANU (PF) to succeed in defending or quashing the petitions, because the opposition MDC had already won so many seats in Parliament that if it succeeded in only 18 of the petitions, and won any resultant by-elections, it would have secured an absolute majority in Parliament. The ruling party's survival, therefore, depended on the outcome of the election petitions.

Delays

All the petitions were presented within the 30 days after the results of the election were announced, as required by s 133(2) of the Electoral Act[153]. Thereafter it was the duty of the Registrar of the High Court and the parties to ensure that the petitions were dealt with as quickly as possible.[154] This did not happen, however. It appears that the petition files were not immediately allocated to judges for hearing, as they

should have been. As a result of this delay, hearings were due to begin only in January 2001, nearly six months after the elections.

Then to forestall the hearings, on 8 December 2000 the President issued a notice under s 158 of the Electoral Act[155] purporting to nullify the petitions by, in effect, validating the results of the disputed elections. The notice disingenuously declared that the elections had been free and fair and that the petitions were frivolous and vexatious. The MDC challenged the notice in the Supreme Court and, not surprisingly, succeeded in having it set aside as unconstitutional.[156] The Supreme Court's judgment was given on 30 January 2001, so even though the President was not able to quash the petitions altogether, he did manage to delay them further.

The delays did not stop there, however. When the petitions were finally allocated for hearing, they were allocated to only four judges. This virtually ensured that they could not be heard and determined promptly. Once allocated, some of the petitions were dealt with relatively promptly,[157] but some have been seriously delayed. For example, the Mberengwa West election petition was heard in July 2001, over a year after the election, and the court's order dismissing the petition was given only on 6 March 2002. The judgment itself was not available (presumably because it was not written) until 9 April 2002. Some petitions have not been completed even now, more than two years after they were filed.

And there have been further delays following the hearings and judgments, in preparing the inevitable appeals. For the purposes of an appeal to the Supreme Court, the record of proceedings in the High Court must be transcribed, and transcription is a notorious cause of delay in all appeals, not just those involving elections. With regard to the petitions, however, there is a suspicion that the delays are deliberate. Transcription of only one record has been commenced, so it is believed, and that record is for an appeal by a leading ZANU (PF) member who was declared not to have been duly elected.[158]

Hearings and judgments

Without a careful study of the records — which is impossible, since they have not been transcribed — it is difficult to assess the correctness of the judgments given in

those election petitions that have been decided. What one can say, however, is that they show a considerable divergence of approach by the different judges who have heard them, particularly as between the judges who were appointed before the election and those who were appointed afterwards.

As an example of this, one can contrast the approach of Devittie J in the Mutoko South Election Petition (2001 (1) ZLR 308) and that of Hlatshwayo J in the Mberengwa West petition (HH-43-2002). In both cases there were allegations of widespread violence and intimidation which affected the results. In both there was evidence that much of the violence centred round the land issue. And in both there were allegations that the successful ZANU (PF) candidates had instigated, or at least connived at, the violence and intimidation. In the first case there was evidence that before her nomination the successful candidate had attended a meeting at which abducted opposition supporters had been paraded, and that she had contributed money to buy food for the abductors. Devittie J held that when she did so she was aware that the abductors had embarked upon a course of conduct whose specific aim or effect was to boost her prospects of success in the pending election; she therefore recognised and accepted their agency and was answerable in law for what they did. Accordingly, he declared that she had not been properly elected.

By contrast, in the Mberengwa West Election Petition Hlatshwayo J found that the successful ZANU (PF) candidate was not responsible for proven incidents of intimidation committed by a war veteran who was named as part of his campaign team.[159] The judge subjected the evidence to minute scrutiny and, having decided that the war veteran was a man "genuinely passionate about the resolution of the land issue in the country", came to the conclusion that the incidents "were linked more to land occupations than to the election campaign itself." In his view, the land issue was not connected with the election, even though it was one of the main planks in the ruling party's platform. He justified this separation of the issues with the dubious statement that:

> "If in Britain there has been a race riot towards an election in one or more of the constituencies ... it cannot and has never been suggested that such riots could form a basis for voiding the election in the affected areas even though the race issue may have constituted a key platform for the contesting parties."

Because in his view the violence and intimidation arose from the land issue rather than the election itself, the judge held that the petitioner had not shown there was any general intimidation which permeated the whole constituency; all the petitioner had managed to show were "isolated cases of real or imagined intimidation of his supporters and unfortunate or even tragic incidents involving some of his supporters, but linked more to land occupations than to the election itself." On that ground he dismissed the petition.

With respect, the judge erred. The issue, as he pointed out, was whether there was common-law intimidation, described by Bramwell B in the *North Durham Election Petition* (1874) 31 LT 383, as: "intimidation ... of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency." Whether the intimidation was specifically and explicitly directed towards getting voters to vote in a particular way or to refrain from voting, is beside the point: if the intimidation had that effect, it would be enough to avoid the election.[160] Having found that the intimidation was directed towards opponents of land reform, the judge disregarded passages in the evidence which showed that ZANU (PF) supporters or land activists regarded MDC supporters as opponents of that reform. That linkage between opponents of land reform and the MDC may well have made people afraid to vote for the MDC lest they be subjected to violence as opponents of land reform. If so, then the intimidation would have been enough to avoid the election.

It may be noted that the judge's distinction between the land issue on the one side and the election on the other was devised by him *mero motu*; it was not part of the respondent's case that the violence arose from the land issue rather than the election. The judge's near-obsession with the land issue, which is discernible in at least one other judgment delivered by him[161], appears from his opening description of the Mberengwa West constituency, which he says is divided starkly between "rich ... commercial farming land" and "crowded, tired and overgrazed communal lands" with five Christian mission stations that appear to "sanctify this land imbalance". However justified this description may be, it did not derive from the evidence led at the hearing of the petition.

Although, as pointed out earlier, it may be unfair to criticise a judge's assessment of evidence without having seen the record, the judgment of Hlatshwayo J suggests that he subjected the evidence given by petitioners' witnesses to unduly narrow scrutiny, and that he was unduly hasty in dismissing it. For example, evidence was given that two MDC supporters were abducted, taken to an occupied ranch and assaulted so severely that one of them subsequently died. The judge considered that their "horrendous experience" arose from an earlier shooting incident between supporters of the two parties and dismissed it on the ground that it "does not seem to have had anything to do with compelling anybody to vote or refrain from voting". On much the same ground he dismissed a "horrific incident" in which MDC supporters were taken from their car to an occupied farm where they were brutally assaulted: "all the court could make of this incident was that [it and another incident] were horrific criminal acts engendered or exacerbated by political polarisation and the misguided carrying of dangerous weapons." And one of the grounds which the judge gave for disbelieving a witness who alleged he was assaulted was that the witness had given a "flimsy" reason for his failure to report the matter to the police, namely that a junior officer had chased him away from the police station. With respect, it does not sound a flimsy reason.

In some other election petitions judges have taken what appears to be an unduly narrow view of the law. For example, in the Mwenezi and Mt Darwin South Election Petitions[162], Makarau J held that the offence of undue influence as described in s 105 of the Electoral Act is narrowly cast in that the influence must be directed at a particular person and not at the electorate at large; hence it does not cover the setting up of illegal road-blocks and other acts that are unacceptable in a democratic society. On this reading of the law, general violence cannot amount to undue influence for the purposes of s 105 of the Act. The learned judge did not, it seems, consider whether the evidence led before her showed that there had been common-law intimidation as described in the *North Durham Election Petition* (*supra*). In the Chinhoyi election petition, *Matamisa v Chiyangwa & Anor*[163], Garwe J held that proof beyond a reasonable doubt is required to show that a candidate or his agent has been guilty of a corrupt practice under Part XX of the Electoral Act. In previous cases it has been said that electoral offences must be proved by "clear evidence", but proof beyond a

reasonable doubt is perhaps going too far. Though election petitions may have penal consequences, they remain civil, not criminal, cases.

Conclusion

The general picture is one of a government trying by all means to prevent the proper hearing and decision of election petitions that threaten its continued existence. At every stage there have been delays and obstacles placed in the way of the petitioners. More than two years have passed since the 2000 general election and few of the contested petitions have been brought to finality. It is unlikely that all of them will have been completed by 2005, when the current Parliament must be dissolved.

It hardly needs to be pointed out that this seriously offends against democratic principle. While the election petitions remain unresolved, persons who may or may not have been duly elected are able to sit, speak and vote in Parliament. And most of them can expect to continue doing so for the lifetime of this Parliament. If election petitions can be delayed so long, there is little incentive for unscrupulous candidates to abide by the rules laid down in the Electoral Act. So long as they are reasonably discreet and act through intermediaries, they can intimidate their opponents and bribe their supporters in the confident expectation that (provided they belong to the ruling party after the election) they will be able to block any attempt to unseat them until it is too late.

The Presidential election petition

This topic has not covered the election petition filed by Mr Tsvangirai in which he disputes the result of the Presidential election in March 2002. That petition has not yet been heard, but results of the preliminary skirmishes have not been encouraging. The MDC has been denied access to an electronic version of the electoral roll used in the election, on the ground that the Electoral Act does not require such a roll to be provided. And the petitioner has been ordered to provide security for costs in the sum of $2 million, more than the respondent requested.

Attempt to fast- track changes to electoral laws

On 8 January 2002, a General Laws Amendment Bill, which would have made far-reaching changes to electoral laws, went through the normal parliamentary processes and was defeated on its third reading. The next day, the Minister of Justice, Legal and Parliamentary Affairs, who was responsible for steering the Bill through Parliament, gave notice that he would move that the House rescind its decision and that standing order 127 should be suspended. Under this standing order, the same bill may not be offered twice in the same session. On 10 January, the two motions were passed. A new third reading took place, and the Bill was approved by a majority of the members. The Bill was promulgated on 4 February.

A Member of Parliament challenged the validity of this legislation in the Supreme Court.[164] The majority of the court[165] decided that the legislation was invalid, because it had not been properly passed by Parliament. Standing orders prohibited the course that had been followed, and standing orders cannot be suspended at the convenience of a party. Ebrahim JA quoted Erskine May's *Parliamentary Practice*:

> "The power of rescission has only been exercised in the case of a resolution resulting from a substantive motion, and even then sparingly. … Proposing a negatived question a second time for the decision of the House, would be … contrary to the established practice of Parliament.
>
> The reason why motions for open rescission are so rare … is that parliamentary government requires the majority to abide by a decision regularly come to, however unexpected, and that it is unfair to resort to methods, whether direct or indirect, to reverse such a decision."

The learned judge said:

> "The reasoning of the learned editors is clear. Once Parliament has taken a vote, that vote cannot be rescinded simply by changing allegiances or changing numbers in the House in order to reverse the decision."

Erskine May, said the judge, was the "bible" on practice in the British Parliament and, by virtue of s 3 of the Privileges, Immunities and Powers of Parliament Act[166] which applied British parliamentary practice to Zimbabwe, was equally authoritative in this

country. In British practice a negatived Bill should not be reintroduced in the same session of Parliament, and therefore it could not be reintroduced in our Parliament.

The Minister of Justice had argued that the Supreme Court was precluded from enquiring into the internal proceedings of Parliament, but the majority of the court rejected this argument: Zimbabwe was not a parliamentary democracy like Britain, it said, but a constitutional democracy and our Parliament was bound by the law as much as any other person or institution. Standing orders constituted legislation which must be obeyed.

In his dissenting judgment, Mr Justice Malaba found that the record of Parliament's proceedings (the Order Paper) in fact showed that the Bill was in fact read for a third time on 8 January and therefore had been validly passed by Parliament.

In fact the Order Paper for 8 January does not show that the Bill was read the third time before the Minister moved his third reading motion and was defeated in the division. The record shows that the Minister, wanting to complete work on the Bill that day, sought the leave of the House for the third reading to be taken immediately, instead of on a subsequent sitting day as is the general rule laid down in standing orders. The non-verbatim record summarises an exchange something like this, in accordance with a time-honoured formula: the Bill (after adoption of amendments) being now ripe for Third Reading, the Speaker looks at the Minister and asks "What day for Third Reading?" to which the Minister replies "With leave, forthwith" (if he isn't in a hurry, he says "Tomorrow" or "Next Tuesday" or something of the sort); the Speaker then asks the House if there are any objections, probably saying only "Any objections?" and, in the absence of objection, the Minister proceeds to move the third reading. It may be that it was unnecessary for the Minister to seek the leave of the House in this case, given that the relevant standing order was one of those suspended by an earlier vote; but that did not convert the exchange into the third reading.

Topic 8

8. THE ARREST OF THE PRESIDENT AND SECRETARY OF THE LAW SOCIETY

Background to the arrests

On 17 April 2002[167] the Minister of State for Information and Publicity, Professor Jonathan Moyo, made a statement attacking the Law Society of Zimbabwe and its President, Mr Sternford Moyo. He accused it 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 Mr Moyo 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.

Professor Moyo said

> "Media reports attributed to the ever-partisan president of the Law Society allegedly calling for constitutional reforms to 'prevent the packing of the Supreme Court with pro-Government judges' are, if true, clear proof that the Law Society, under Sternford Moyo, has become an anti-Government, anti-black and pro-British sponsored opposition to African nationalism in Zimbabwe. The import of the LSZ [i.e. Law Society of Zimbabwe] position is that the bench should be 'packed with anti-Government' judges who are presumably white and steeped in Rhodesian jurisprudence like the departed Anthony Gubbay and his fellow travelling racist judges who laboured in vain to hijack the court for partisan interests on behalf of the British and unrepentant white commercial farmers in the MDC."

Professor Moyo went on to say that the Law Society President's "Uncle Tom-like statement" was unfortunate in so far as it constituted self-evident contempt of the present bench of the Supreme Court. "The 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."

He said that the Society's enabling statute should be reviewed urgently by Parliament to ensure that British and other imperialist donors do not compromise it.

The arrests

On the morning of Monday 3 June 2002 about ten policemen, most of them in riot squad gear, searched the Law Society office and arrested Mr Wilbert Mapombere, the society's secretary.

Shortly after 2.00 pm plainclothes policemen from the Law and Order Section arrived at the law firm where Mr Moyo practises. Detective Inspector Dohwa announced that Mr Moyo was under arrest for an alleged contravention of the Public Order and Security Act. He produced a search warrant. Mr Moyo indicated to DI Dohwa that the search warrant was invalid because it was vague and non-specific. He also pointed out that the searching of his client files would be a violation of attorney and client privilege. The police nonetheless insisted on searching his office. They did not find anything of interest to them. They then took Mr Moyo to his residential home and carried out a search of these premises. They took away only one document, which was a paper that Mr Moyo had recently presented at a SADC Lawyers Association conference in Zambia.

Mr Moyo was then taken to Harare Central Police Station. He was able to speak briefly to the lawyers who had come represent him. He could not tell them much as he had not yet been told about the particulars of the charge. The police then questioned him and showed him two letters, which formed the basis of the allegations against them. The first was on Law Society letterhead paper. It purported to be from Mr Mapombere (in that it bore a signature purporting to be his) and was addressed to the British High Commission, though not to any specific person there. It reads as follows:

"RE: RULE OF LAW AND POINT OF ACTION

Further to our communications, we suggest that from now onwards our communications should be in writing and by hand post straight to the receiver.

> We are grateful for the support you have given us in order to restore the rule of law in Zimbabwe. At the moment as a Law Society we are embarking on a vigorous campaign to conscientise the populace to rebel against the unlawful and illegitimate rule of Mugabe. We have consulted with the MDC and urged them to abort the useless talks so that a proper confrontation will be viable.
>
> Our secretary will be living for UK soon please assist with his documents. Find attached our letter to MDC and to Deventer Sails."

The second letter was unsigned but purported to be written by Mr Moyo to the Secretary-General of the MDC.

Mr Moyo and Mr Mapombere gave warned and cautioned statements denying the charges and disputing the authenticity of the letters attributed to them.

Just before midnight on 3 June, the police officers released Mr Moyo and Mr Mapombere from custody. About one and a half-hours later, Detective Inspector Dohwa came to Mr Moyo's house and advised him that he had been instructed to re-detain him. Mr Moyo phoned the Attorney-General, Mr. Andrew Chigovera. He told Mr Chigovera that the investigating officers had decided that there was no reasonable cause for detaining him yet a senior officer had then unlawfully instructed that he and Mr Mapombere be re-detained. Mr Chigovera said he would speak to the Commissioner of Police. Mr Chigovera phoned back to Mr Moyo and advised him that the Commissioner had told him (Mr Chigovera) that he was not in a position to assist as he had not been able to obtain an explanation from the senior officer who had instructed that Mr Moyo be re-detained.

Mr Moyo was taken to Highlands Police Station and was locked in a small cell together with eight or nine other inmates. The conditions in the cell were appalling.

The next morning (4 June) Mr Moyo was taken to Harare Central Police Station where he spent most of the day seated in the offices. The only thing the police did was to take Mr Moyo's fingerprints. At about 3.30 p.m. Mr Moyo and Mr Mapombere were taken to Chivero National Park about 50 km west of Harare together with the entire staff of the Law Society of Zimbabwe. When they reached a remote part of the national park, they were separated and questioned. They were then driven back to

Harare. On the way in the police stated that they were now free and could arrange their transport home. However, before they reached the city centre, the police received an instruction to keep Mr Moyo and Mr Mapombere in detention. Mr Moyo was then held overnight at Borrowdale Police Station and Mr Mapombere at Avondale Police Station. The next morning (6 June) Mr Moyo and Mr Mapombere were taken to the High Court.

The court application

Meanwhile, on 3 June 2002 the lawyers representing Mr Moyo and Mr Mapombere had applied to the High Court for an order that:

- the police forthwith produce the two men before the court;
- the two men be allowed unhindered access to the two by their lawyers;
- the two men be immediately released from detention on the grounds that their detention was unlawful; and
- the police search warrant be declared to be unlawful.

The Judge President, Mr Justice Garwe, heard this application. The prosecutor told the court that he had received no instructions in relation to this matter from the police. The prosecutor advised the judge of the enormous difficulties which both he and the Director of Public Prosecutions had experienced in trying to obtain instructions from the police regarding the reasons for the detention of the two men.

The judge adjourned the proceedings on several occasions to allow the prosecutor to obtain instructions. When the hearing resumed after the adjournments the prosecutor informed the court that he and the Attorney-General's office continued to be unable to contact the Police Commissioner; he and his deputies and senior police officers all had their cell phones switched off and were unavailable. It seemed that the senior police officers who had ordered their re-detention were unwilling to provide reasons for their detention.

The investigating officers, who were present at the hearing, were not in a position to explain the two men's detention. These officers, it will be remembered, had decided on two separate occasions that they ought to be released.

The lawyers for Mr Moyo and Mr Mapombere pressed that the three police officers in attendance (the investigating officer, the arresting officer, and the officer-in-charge) be incarcerated at the High Court cells until such time as the detained men had been produced. The lawyers did this because, they argued, the judge had been misled that the prisoners were being detained at Harare Central Police Station. The judge turned down the application for the incarceration of the police officers, but at around 9.48 pm that evening he issued a *habeas corpus* writ ordering that Mr Moyo and Mr Mapombere be immediately given access to their lawyers and that the police produce them before the High Court the following morning at 9.00 a.m.

The following day the two men were brought before the High Court, but well after the specified time of 9.00 am. The police had also complied with the order that they be allowed access to their lawyers. The lawyers for the applicants informed the judge that while the hearing was in progress the previous day the police had taken the two men to the National Park at Lake Chivero. The lawyers also pointed out the very tenuous nature of the allegations against the two.

The police had still given no instructions to the prosecutor. There was no opposing affidavit to the application for the release of the men. Technically, therefore, the State was in default. Despite this default, the court found that the police had held a reasonable suspicion that Mr Moyo and Mr Mapombere had committed an offence. The reasonable suspicion had been formed on the basis of the two letters allegedly written by them. These letters required full investigation and the court could not make a ruling that they were forgeries. The court did not address the issue of whether there were any valid grounds for their continued detention such as that there was a prospect of the men absconding or interfering with witnesses. The court found that although the preamble to the warned and cautioned statements they had signed referred to a non-existent section in the Public Order and Security Act, the allegations could fit another section in the Act, which the court identified.

Mr Justice Garwe did, however, deplore the actions by the police for failing to co-operate with the Attorney-General's office. He said the police conduct was unacceptable and that the Attorney-General's officer and the Commissioner of Police should carry out an inquiry into this matter. On the issue of the search warrant, Mr Justice Garwe said both parties should file their heads of argument, if they so wished, for him to determine its legality.

The investigating officers who were present at the High Court hearing had apparently expected the court to release Mr Moyo and Mr Mapombere. As they did not see any basis for the continued detention of the two men, they decided to release them immediately after the High Court hearing. They had not applied for a warrant for further detention. Their stated basis for releasing them was the expiration of the maximum period of time for which the men could be held, namely forty-eight hours. The police officers arranged for the men to meet them at the Magistrate's Court the following day so that they could be formally placed on remand. The police officers expressed doubts that they would proceed further with the case against them.

Unlawfulness of detention

There are very strong arguments that the detention of the two men was unlawful.

Arrest without warrant and detentions are only lawful if the arresting officer has a reasonable suspicion that the person arrested has committed a particular offence. The law says that all arrests without warrant are *prima facie* illegal and the onus rests on the arresting authority to justify the arrest by establishing, on a balance of probabilities, that the arrest was lawfully justifiable. To justify his arrest the arresting officer must prove that at the time of the arrest he genuinely held a suspicion that the person arrested had committed a specific criminal offence and that, objectively, the suspicion was based on reasonable grounds. All this is trite law. In this case it is very debatable whether the arresting officers could have formed a *reasonable* suspicion that the two men had committed an offence under the Public Order and Security Act. At the time of the arrest the police do not seem to have had any particular section of the Public Order and Security Act in mind, and in their preamble to the warned and cautioned statements they referred to a non-existent section of the Act. It was not the

function of the judge to correct this deficiency by finding a section that could possibly apply. It was the function of the police to identify the particular offence under the Act that would apply and to arrest on the basis of a reasonable suspicion that the two men had committed that offence.

The allegations and evidence of the allegations was entirely specious. The main basis of the charge against the President of the Law Society was that he had organised a meeting on 4March 2002 to plan "peaceful" "mass action" in support of the MDC and at this meeting it was agreed that the MDC would cease reconciliation talks with ZANU (PF). This was a patently false allegation. On 4 March 2002 the Presidential elections had not yet been held. The reconciliation talks between MDC and ZANU (PF) only commenced some time after the election and mass action was mooted only after the election. In any event the planning of "peaceful" mass action is not a criminal offence. Planning mass action can only constitute an offence in terms of s 5 of the Public Order and Security Act if the mass action is "accompanied by physical force or violence or the threat thereof." This section does not criminalise the organising of peaceful mass action. Indeed it could not criminalise peaceful mass action as this would violate the fundamental right to demonstrate peacefully protected by the freedom of expression and association clauses in the Constitution. (ss 20 and 21 of the Constitution.)

The two men emphatically denied that they had written the two letters that formed the basis of the charge and *prima facie* the letters were of highly questionable authenticity. There were numerous indications that they were crude forgeries and that their contents were completely false, yet the judge stated that it was "not possible to say with certainty that the letters are fraudulent or otherwise. It is only possible if there is a full inquiry into the matter." The point was surely not whether it could be said *with certainty* that the letters were fraudulent; the point is whether the police could have formed a reasonable suspicion of the commission of a criminal offence, given the improbability of the allegations against the unlikelihood of their having authored the letters. Furthermore, if — as suggested above — the conduct of which the two men were suspected did not amount to a criminal offence, the police cannot be said to have had a reasonable suspicion that they had committed an offence: compare *R v Nkomo & Ors* 1963 R & N 572; 1963 (4) SA 166 (SR).

Even if it could be said that there was a reasonable suspicion of the commission of a specific offence, the question still arises as to whether it was necessary to arrest and later to continue to detain the men. The case of *Muzondo v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) lays down that the police have a discretion whether or not to arrest and must exercise this discretion reasonably. Considerations to be taken into account are factors such as whether the suspect may abscond, whether he may interfere with police investigations and whether he may commit further crimes. In the light of these considerations, the lawfulness of the continued detention of Mr Moyo and Mr Mapombere was highly questionable. On two separate occasions the investigating officers decided that there was no reason to continue to detain them and that they should be released. The policemen must, therefore have believed that the two men would not abscond and would not interfere with investigations. On the first occasion they were actually released but then re-detained on the instructions of a senior officer. On the second occasion the investigating officers were about to release them when they were ordered by a senior officer to continue to detain them. Despite strenuous efforts to do so, the prosecutor was unable to obtain instructions from senior police officers, all of whom had seemingly made themselves deliberately uncontactable by switching off their cell phones.

These actions on the part of senior officers suggest that they had no proper basis for giving the instruction that the two prisoners should continue to be detained. If they had some valid basis for issuing the instruction, they would surely have informed the prosecutor about it and would have been willing to come to court to testify about it. Their failure to advance any reasons for their instructions leads to a suspicion that they were acting on the basis of "orders" given by politicians to keep the two men in custody.

An additional factor was that the two men had been unlawfully denied access to their lawyers. After a brief initial meeting with their lawyers when they were first arrested, the two men were denied access to their lawyers until the High Court ordered that such access be allowed.

The response of *The Herald* to the case

The Herald was quick to use this case for propaganda purposes. On 5 June 2002 it published an article entitled "British meddling". The first two paragraphs of this article read:

> "Investigations into the alleged plot by Law Society of Zimbabwe president Mr Sternford Moyo and secretary Mr Wilbert Mapombere to topple the Government point to a heavy involvement of the British High Commission in Harare, sources said yesterday.
>
> Following the arrest of Mr Moyo and Mr Mapombere on Monday over allegations of subverting a constitutional Government, the sources said that there was a flurry of activity in the British High Commission yesterday with meetings between MDC lawyers and senior members, and high commission officials. … "Investigators are looking at a huge paper trail pointing to heavy involvement by the British High Commission," the sources said.

On 14 June 2002 it published this article:

> "**Law Society Working To Further British Interests**
>
> When Professor Jonathan Moyo castigated the Law Society for its defence of white judges, dilution of Zimbabwe's sovereignty and conjured notions of judicial independence, he was being prophetic. The Law Society, true to form, has now shown that instead of focusing on the defence of the marginalised citizens, its brief now appears to be concentrating on holding meetings with High Commissioners of diplomatic missions to map out strategies against the sovereignty and hard-won independence of the country. At no time did we hear the Law Society criticise judicial decisions that went against blacks. Instead, we have a litany of statements questioning why blacks are being elevated to the bench.
>
> After 22 years of independence, a black man still believes that only white people should hold sway in the judiciary and that only they can pass judgment with impartiality. Is this an inferiority complex on their part?
>
> Professor Moyo was once quoted saying 'Media reports attributed to the ever partisan president of the Law Society of Zimbabwe, Mr Sternford Moyo, allegedly calling for the constitutional reforms to prevent the packing of the Supreme Court with pro-Government judges' is dear proof that the LSZ under Moyo has become an anti-Government, anti-

black and British-sponsored organisation. 'The LSZ's position is that the bench should be packed with anti-Government judges who are presumably white and steeped in Rhodesian jurisprudence like the departed Anthony Gubbay and his fellow judges.'

Those words should have rung a warning bell and served as a harbinger of the ominous revelation of the lawyers' agenda, that of working to further white and British interests.

Allegations that two members of the Law Society wrote to the British High Commission are disturbing, to say the least, in that patriotism does not exist in their dictionary. If the allegations are finally proven true, then heaven forbid, Zimbabwe can easily be dragged back to the colonial days.

In October 2001, Mr Sternford Moyo came in defence of white judges who were being attacked for failing to come to grips and ignoring the new political dispensation. That statement was betrayal at its worst by a black lawyer who graduated in 1978 and should, therefore, have been aware of the racism prevalent at the bench at that time. Instead, Mr Moyo in his defence of the white judges, said: 'Allegations of racial bias in the discharge of judicial functions, and the racial disharmony among judges have been made without a scintilla of evidence to support them. The Law Society has not seen any evidence of racial bias or disharmony within the High Court bench.'

When Mr Anthony Gubbay became Chief Justice all we heard were congratulatory messages but when Chief Justice Godfrey Chidyausiku was appointed, dissenting voices were heard. When it is a white man, then Government made the right choice but not when a black man gets the job. A new generation that should uphold its integrity and honour should not be seen to be cowering to the white man's whims. The liberation war then was a wasted effort if we continue to believe in whites and not ourselves.

Call the members of the LSZ elitist and you will not be far off the mark because they are now busy aligning themselves with foreigners in demonising the country of their birth. What is it that some of the lawyers think the British will do to change Government in this country? If the people's will has been respected through the plebiscite, then who are the British to think they can simply wave a magic wand and 'hey presto', we have a new government. Miracles happened in the past. We face reality and we should not be beguiled by the sinister machinations of the imperialist powers to think that paying homage to the colonial master will elevate us in any way. No wonder some lawyers walked out of the LSZ annual meeting in Harare in February last year in protest. That

was not the forum most lawyers thought they would be part and parcel of. It was instead one madhouse that planned to usurp their legal and constitutional rights to free debate without fear or favour.

When Chinhoyi Member of Parliament Mr Phillip Chiyangwa moved a motion to review the laws governing the law society, he created a stir in the legal fraternity. He rocked the LSZ because they upheld opposition views only.

Now we have lawyers agitating for mass action, trading the courtroom for the streets and teargas. So be it, if they can brave the tear smoke in place of the robe and genteel language of the courtroom. When lawyers marched in August 2000 for what they termed a 'restoration of the rule of law', it became evident and categorically clear that theirs was not a march for rule of law.

Instead, it was a march to press home that land should not be designated. Why refer to rule of law on land when that land was stolen from the blacks in the first place. When Chief Rekayi Tangwena and his people were displaced, which black lawyer went ahead to try and defend him? I wonder who, amongst the lawyers who marched back then, could have taken Cde Tangwena seriously. Most would have regarded him as a crackpot who wanted to fight against white supremacy. Few of them like the late Herbert Chitepo have a lion's heart."

Subsequently the British High Commission emphatically denied that it had plotted with the Law Society to oust the Government of Zimbabwe. It said it had no record of the letter allegedly sent by the Law Society to the High Commission.[168] The MDC also issued a statement denying that the Law Society had been in contact with it in connection with the talks between MDC and ZANU (PF).

Conclusion

In the light of the propaganda campaign waged by the government against the President of the Law Society, his arrest and detention, together with that of the Society's Secretary, was seen by many as a crude attempt at harassment and intimidation of Mr Moyo and his Secretary. As indicated above, there is considerable substance in this view.

Topic 9

9. THE JONGWE BAIL CASE

The case

Mr Learnmore Jongwe is a member of Parliament and was the official spokesman for the MDC political party. He is also a qualified lawyer. He is alleged to have murdered his wife. He has raised the defence of "extreme cumulative provocation."

He was refused bail by the High Court, the judge finding that he might abscond in view of the overwhelming evidence that he stabbed his wife to death. He appealed to the Supreme Court against the refusal. Dismissing the appeal, Chief Justice Chidyausiku said the evidence against Mr Jongwe "is very cogent, if not overwhelming", adding that Mr Jongwe admitted inflicting the wounds found on his wife. The post-mortem report clearly established that the attack was savage and brutal, he said. "For the above reasons, I am satisfied that the evidence against Jongwe is overwhelming and the prospects of conviction for an offence for the murder is a virtual certainty. Should the trial court reject his version of events, Jongwe will have problems establishing extenuating circumstances and the death penalty could be imposed." He said "the temptation for Jongwe to abscond if granted bail is irresistible."

In giving this judgment he made the following statements:

> "It is pertinent to observe at this point that the State version of events leading to the killing of the deceased is plausible and has a ring of truth, while Jongwe's version as set out in his statement recorded by the police is riddled with improbabilities."

The judge said then said that according to the affidavit of the police officer investigating the case, Rutendo had met the alleged lover only once previously.

> "The two hardly knew each other. The deceased was a professional woman. She was married with a seven-month-old baby. The question is: is it likely that a professional woman would desire to be laid on a desk by a man she hardly knew? The door to the

> office was unlocked and that is why, in Jongwe's version, he was able to enter [M's] office and see his wife being intimate with the paramour."

He said the incident was alleged to have happened during working hours when the risk of the parties being caught was "extremely high", making it highly unlikely. He said Mr Jongwe's reaction undermined his own story. Given the brutal manner in which Mr Jongwe killed Rutendo, it was difficult to believe that he would simply walk away from a man he had found ravishing his wife, the judge said. The Chief Justice said if the State version was correct, then the conclusion was that Mr Jongwe killed his wife because she had started divorce proceedings against him.

> "If he could not have her then no one else was going to have her, would be the most logical motive. Such a finding would leave Jongwe with very little prospects of success in establishing a defence to a charge of murder and the existence of extenuating circumstances in order to avoid the imposition of a death sentence."[169]

Comment

When dealing with a bail application the court is quite entitled to examine the strength of the case against the accused. There were obviously strong grounds for refusing bail. What is more questionable is whether the Supreme Court should have made the sort of detailed findings that it did when dealing with an appeal against the refusal to grant bail. Such detailed findings are surely only appropriate after all the evidence has been heard when the matter is tried. There is a danger that such detailed findings could prejudice the trial itself and any appeal to the Supreme Court.

Topic 10

10. THE LOVEMORE CASE

The Amani Trust is an organisation that assists victims of torture. It has been in operation since 1993. Dr Lovemore is the medical director of Amani (Mashonaland Branch.) In August 2002 Dr Lovemore spoke to the media about cases of rape allegedly committed by militants to punish the victims for affiliation to the MDC or as reprisals for their parents involvement in the MDC.

These interviews led to action being taken by the police. On the morning of 29 August 2002 plain clothed policemen searched the offices of the Amani Trust in Harare. Their search warrant specified that they would search Dr Lovemore's office to look for subversive materials. However, in addition to taking materials from her office they also took various papers from other offices. This was done despite objections from Dr Lovemore's lawyers. Dr Lovemore was arrested and taken to the Law and Order Section of the Central Police Station. Her lawyers accompanied her. At Law and Order, the officers insisted in questioning Dr Lovemore in the absence of her lawyer. The lawyer insisted that she was lawfully entitled to be present when this questioning took place, but she had to leave the room when the police threatened to remove her physically. A warned and cautioned statement was recorded from Dr Lovemore on a charge of contravening s 15(1)(c) of the Public Order and Security Act (i.e. making a false statement realising there is a real risk or possibility of undermining public confidence in a law-enforcement agency).

Later her lawyer made an urgent application to the High Court for her release. The lawyer was not permitted to enter the High Court building and argue the matter before a judge. She was told that it was after normal court hours and that the Central Intelligence Officer assigned to do this had not given clearance for her to enter the building. She therefore had to communicate her case to the Registrar of the High Court through the metal bars, and the Registrar in turn communicated it to the judge. The judge refused the order, stating that the police were entitled to hold a person for up to forty-eight hours for the purposes of investigation. This is entirely incorrect. There is a string of cases in which it has been decided that the police may not arrest for the purposes of investigation. They may arrest only if they have a reasonable suspicion that a criminal offence has been committed. Dr Lovemore's lawyers were maintaining that there was no such reasonable suspicion that the crime specified had been committed.

After this ruling the police proceeded to take Dr Lovemore away in a police vehicle. As they were about to do so one of her lawyers tried to find out from the police to which police station she was being taken. The police refused to tell the lawyer and threatened to assault her if she persisted in her attempts to ascertain where her client was being taken. Her lawyer then attempted to bring a second application before the

same judge, asking the court to order the police to disclose where they intended to hold Dr Lovemore. The judge rejected this application, saying that this was not a new application but was the same application as before.

Dr Lovemore was taken to the Warren Park Police Station. She was placed in a cell without being booked in. The lawyers made frantic efforts to trace where their client was without success. Dr Lovemore, who had not had any food that day, says she was given no food during the time that she was held. She was only given one small container of water on request.

She was held in a holding cell. She was the only person in that cell. It was pitch black when she was placed in the cell. The cell, she reported later, was filthy, crawling with lice and full of mosquitoes.

The next morning her lawyers had to seek assistance from the Attorney-General's office in tracing her whereabouts. In this way they found out that Dr Lovemore was being taken from the Warren Park police station to the Law and Order Section of the Central Police station. Her lawyer was present when a further warned and cautioned statement was taken from her.

The police and Dr Lovemore's lawyer then proceeded to the Attorney-General's office. After lengthy deliberation the prosecutor assigned to deal with the matter decided that Dr Lovemore should be released without taking her to court to be placed on remand. The prosecutor indicated that the police would still be entitled to bring a charge against Dr Lovemore should they find further evidence which would support such a charge.

It seems clear that in this case there were deliberate and persistent efforts by the police to deny a suspect in a politically sensitive case her constitutional right to legal representation.

Topic 11

11. THE FARM WORKERS' REFUGE CASE

The Zimbabwe Community Development Trust is a Christian humanitarian organisation that was formed to look after farm workers who have been displaced from the farms where they used to work as a result of the seizure of commercial farms by government for resettlement. According to a press release by the Trust[170] the following events have taken place:

Originally the Trust had 270 people in three tented camps around Harare. The Trust had encouraged these persons to approach the Social Welfare Department for assistance and to request the Ministry of Agriculture to allocate some land to them under the land resettlement scheme. However, the police raided the camps, rounded up the inhabitants and took them back to the farms from which they had been displaced. Their conditions there were very bad and war veterans allegedly harassed them and beat up some of them. Some of them drifted back into town. The Trust made an application to the High Court requesting that the Trust be allowed to assist displaced farm workers without interference. This matter was heard by Mr Justice Garwe.

Since then the Trust had been looking after around 150 farm workers and their families at a tented camp on church-owned land at Ruwa. This site was not large enough for farming operations, so the Trust decided to find some farmland on which to place the workers so that they could grow crops and earn some money for themselves. The Trust says that it therefore rented a farm at Mazowe for this purpose. This farm was owned by a white farmer, but government had taken no steps to acquire the farm under the Land Acquisition Act. The plan was to establish a camp for the refugees half way up a hill on the farm and for the workers housed there to farm the land below the hill. The camp was to be called the "Restoration of Hope Camp". The dignity of the workers was to be restored by encouraging productive work and self-reliance. The workers, many of whom had been traumatised, would be given care and counselling and would be told about the message in the Scriptures. Mr Gumeze, a

church elder with missionary experience in Mozambique was to be placed in charge of the camp.

The Trust had sent an advance party of 17 farm workers to dig pit latrines at the camp site. They were given tents for shelter and picks and shovels to dig the latrines. During the week starting 26 August 2002, the police raided the camp, arrested the workers and took them to Bindura. They appeared before a magistrate on a charge of undergoing military training in contravention of the Public Order and Security Act and they were remanded until 17 September 2002. The charge sheet alleged that the accused persons were young men from all around the country and that they were undergoing military training at the campsite. It alleges that they were digging trenches and not pit latrines.

On 3 September 2002 Mr Gumeze was also arrested and was initially charged with training terrorists in contravention of the Public Order and Security Act. That charge was later changed to organising an illegal gathering. He was released on bail the next day.

The Trust maintains that it is a Christian humanitarian institution that believes in non-violence and does not sponsor or encourage violent or illegal activities.

CONCLUSION

This survey of some of the significant developments that have affected the legal system of Zimbabwe shows a system that is in deep distress. A strong professional system that tried to protect rights of all and generally upheld the rule of law has been transformed into a system designed to advance the political goals of the ruling elite. The professionalism and independence of all the branches of the legal system have been severely compromised.

To repair the substantial damage that has been done, the legal system must be rebuilt on the firm foundation of the rule of law. The police must once again become an apolitical, non-partisan law enforcement agency. Political interference in the courts must cease and the independence of the judiciary should be restored.

APPENDIX 1: PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

In 1985 the United Nations Congress on the Prevention of Crime and Treatment of Offenders agreed upon a set of Basic Principles on the Independence of the Judiciary. Some of these principles are as follows:

- The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

- There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

- The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

- Judges … shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

APPENDIX 2: STATEMENTS ISSUED FOLLOWING ARREST AND DETENTION OF RETIRED JUDGE BLACKIE

A number of individuals and organisations made press statements expressing concern about Mr Blackie's arrest:

South African Chief Justice

The South African Chief Justice, Mr Justice Chaskalson said:

> "The events surrounding the arrest and detention in Zimbabwe of the retired judge, Mr Justice Blackie, have given rise to adverse comment by legal institutions in and outside of South Africa. The allegations made against him — which are apparently denied — did not warrant his arrest at his home in the early hours of the morning, and his subsequent detention for a number of days before being released on bail. Whether this was the intention or not, the perception created by this high handed and disproportionate action is that its purpose was not only to humiliate the former judge, but also to intimidate others.
>
> The independence of the judiciary is a core value of any democratic society. The way that the matter has been dealt with by the Zimbabwe police, threatens that independence, and is deplorable."

U.N. Special Rapporteur on Independence of the Judiciary

The United Nations Special Rapporteur on the Independence of the Judiciary, Mr Cumaraswamy said: "There is reasonable cause to believe that this latest arrest, detention and charges against Justice Blackie is an act of vendetta by the government. When judges can be arrested, detained and charged on trumped-up facts for exercising their judicial function then there is no hope for the rule of law in such countries."

Lawyers Committee for Human Rights

In a open letter to the Minister of Justice, Legal and Parliamentary Affairs the Lawyers Committee for Human Rights said:

"The arrest and detention of Justice Blackie were unnecessary measures in the investigation of the allegations against him. It appears, rather, that the date and time of his arrest were deliberately chosen to cause the greatest possible distress to Justice Blackie and to ensure that he would be held over the weekend. Both the Zimbabwean Constitution and international human rights conventions to which Zimbabwe is party contain provisions prohibiting arbitrary detention and inhuman treatment, as well as protecting the right of all persons to be presumed innocent until proven guilty. We are concerned that law enforcement authorities have violated these provisions in their arrest and detention of Justice Blackie in the manner described.

We call upon you urgently to ensure that all law enforcement authorities in Zimbabwe perform their duties strictly in accordance with constitutional protections and international human rights law. Once again, we register with you our alarm at the serious erosion of the rule of law that has occurred in Zimbabwe in recent months, as demonstrated by the manner in which members of the judiciary and legal profession are threatened, harassed and attacked, judicial orders are ignored, and impunity prevails. We demand that you bring this situation to an end, so that the human rights of all Zimbabweans are fully respected."

Legal Resources Foundation

The Trustees of the Legal Resources Foundation issued the following statement on 16 September 2002:

"In an action chillingly reminiscent of the tactics of the apartheid régime, the Hon Mr Justice F C Blackie, a recently retired judge of the High Court, was arrested at his home at 4 a.m. on Friday 13 September by law enforcement agents. …

Despite an order being given by a High Court judge for him to be brought immediately before the High Court, the police at several stations refused to accept the order, claiming that they did not know his whereabouts. He was only brought before the court the following day. Even if there is evidence to support the allegations against him, the arrest of Mr Justice Blackie raises serious concerns.

In the first place, it was not necessary to arrest him at all on such a charge. It would have been quite sufficient to have issued a summons. The courts in this country have repeatedly stated that arrest should only be resorted to when it is necessary.

Secondly, the time and manner of his arrest, and the subsequent attempts to conceal his whereabouts and to prevent him from being brought to court, are regrettably typical of the way in which perceived opponents of the government are treated. On more than one occasion people have been arrested and so treated and later released without any charge being brought.

In more general terms, it seems to be increasingly common for people to be arrested on a Friday so that the police can detain them for the weekend before bringing them to court. This appears to be no coincidence, but deliberate policy. It is wholly indefensible.

We wish to place on record our increasingly deep concern at the sinister manner in which law enforcement agents regularly flout their obligations to the people of Zimbabwe, whose constitutional rights are being eroded as a result."

Zimbabwe Lawyers for Human Rights

The Zimbabwe Lawyers for Human Rights issued the following statement:

"The detention of former Justice Blackie smacks of outright retribution by the government for his judgment against the Minister of Justice, Legal and Parliamentary Affairs, Patrick Chinamasa, in which the minister was sentenced to a three-month term of imprisonment and a fine for two instances of contempt of court. The judgment was subsequently nullified in a procedurally questionable manner by the High Court in Harare. Although the police were obliged to imprison Mr Chinamasa by order of court, he was not arrested, yet former Justice Blackie was arrested and detained on an unsubstantiated and seemingly unreasonable suspicion of having committed an offence.

In the event that there was an irregularity in the manner in which a judgment was handed down by Justice Blackie, or a suspicion of his having attempted to defeat the course of justice, it is the constitutional duty of the police to fully investigate and obtain tangible evidence in this regard prior to arresting and detaining him. We are, and Zimbabweans must be, extremely concerned with the growing incidents in which individuals seemingly critical of the government are arrested, usually on a Thursday or Friday, and detained over the weekend without proof of commission of an offence, only to be released without charge after detention in deplorable conditions in various police holding cells around the country.

Justice Blackie's continued detention and the denial of food, warm clothing and essential medication (something which happens with frightening regularity to individuals

detained on suspicion of committing an offence) contravene the constitutionally-protected right of an accused person to be presumed innocent until proven guilty (section 18(3)(a)) and the right not to be subjected to inhuman and degrading conditions (section 15(1)).

We are alarmed, albeit not surprised, by reports from the former judge's legal practitioners that his whereabouts were not revealed to them and that a court order had to be sought for his safe production on Saturday morning. This calls to mind the recent removal of the President and Secretary of the Law Society of Zimbabwe[171], and of Dr Frances Lovemore, [172] from the confines of Harare Central police station to various other police stations and the denial of information as to their whereabouts in an effort to deny them lawful access to their lawyers as well as protection by the courts.

The police force continues to act outside the confines of the law without impunity. Constitutional safeguards are recklessly ignored. The government is not acting to protect its citizens. The courts are not demanding explanations for such unconstitutional behaviour. This provides proof positive that the rule of law has broken down irretrievably in Zimbabwe."

APPENDIX 3: FAILURE BY THE POLICE TO TAKE ACTION

There is a whole succession of cases in which the police have failed to investigate crimes committed against persons perceived to be hostile to the government. The following are some examples of the worst of these cases:

Murders

No one has been arrested or tried in connection with the case, described earlier, in which a CIO operative and another person are alleged to have brutally murdered two MDC party workers, Mr Chiminya and Ms Mabika, in April 2000 by petrol-bombing their vehicle. This attack was allegedly carried out in the presence of the police who did not intervene.

On 17 April 2000 militants took David Stevens, a commercial farmer and an active member of the MDC, away from a police station in Murehwa and shot and killed him

in cold blood. Despite the fact that the police can identify the people who removed Mr Stevens from the police station, no one has been arrested and charged with his murder.

On 19 April 2000 Martin Olds was attacked at his farm after dark by a group of about 100 militants who were armed with automatic weapons. The militants arrived at the farmhouse in a number of vehicles. The police had allowed the militants through a roadblock but had stopped farmers from going to the assistance of Mr Olds. After a protracted gun battle Mr Olds was wounded. He was then beaten to death with metal rods. The police did not go to the assistance of Mr Olds whilst the gun battle was going on. After the killing the militants were allowed again to go unimpeded through the police roadblock. The police know of the identity of at least some of the assailants, as they visited in hospital a number of militants who had been injured by Mr Olds during the gun battle. No one has been prosecuted for this murder.

Torture

Despite court rulings obliging the police to take action to conduct proper investigations into the alleged kidnapping and torture of two journalists in January 1999[173], apparently the police have done nothing in connection with this case.

Attacks on the press

On the evening of 22 April 2000 a bomb was thrown from a passing car outside the offices of the *Daily News.* No one has been prosecuted for this attack.

On 28 January 2001 at 1.45 a.m., the printing press of the *Daily News* was bombed in Southerton in Harare. An armed saboteur lured six security guards, the only employees at the works at the time, to the main gate and made them lie on the ground while accomplices broke in from another quarter and planted the explosives. The blast wrecked five of *The Daily News*'s six presses, blew the roof off the warehouse and damaged rolls of newsprint 20 yards away.

Five days earlier, the Minister for Information, Professor Jonathan Moyo, had said the independent daily would be silenced because it posed a risk to the nation. A few days

earlier Dr Chenjerai Hunzvi, the late veterans' leader, had declared that he would "ban" the paper. His promise was carried out by ruling party mobs who, watched by police, set up illegal roadblocks outside Harare and confiscated copies of *The Daily News* and other independent newspapers. In an earlier veterans' demonstration, *Daily News* journalists were assaulted and steel bolts fired from catapults smashed windows of its offices.

No one has been arrested or prosecuted in respect of this attack.

On 29 August 2002 the offices of a private radio station, the Voice of the People, was bombed by three men. The men were armed. They scaled the wall of the property at about 1.00 am. They held the security guard at gunpoint and then one of the men threw a bomb into the building. The building was set on fire by the explosion and the roof was blown off. The security guard reported the bombing to the police. Property worth millions of dollars was destroyed including computer equipment, files and office furniture. The police and government officials immediately started to speculate that this bombing may have been carried out by "enemies of the state" intent on embarrassing the government ahead of an important international conference in South Africa that was to be attended by President Mugabe. A few days after the bombing the police arrested the MDC Member of Parliament for an Harare constituency and another senior MDC member. The police told their lawyer that they had arrested his clients on the strength of a tip-off contained in a letter sent anonymously to the police. The men were released several days later after the Attorney-General's office decided that there was no evidence upon which a prosecution could be brought. The MDC officials' lawyer severely criticised the police for arresting his clients on the basis of an anonymous letter and alleged that his clients had been arrested simply because they were members of the MDC. An MDC spokesperson also criticised the police action, saying that the arrests on the basis of the anonymous letter showed "the transformation of the police into a ZANU (PF) militia …"[174]

APPENDIX 4: AMNESTIES AND PARDONS

There is a long history in Zimbabwe of granting amnesty to persons who have committed serious human rights abuses.

The Amnesty Ordinance (3) of 1979 and the Amnesty (General Pardon) Ordinance (12) of 1980 were passed as part of the Lancaster House Agreement that ended the war for liberation. Amnesty was granted for acts done by liberation fighters in furtherance of the liberation struggle and by Rhodesian security forces personnel in defence of Rhodesia. This amnesty prevented the prosecution of those covered by the amnesty for crimes such as murder, rape, assault and arson. These amnesties set a very bad precedent. No one was held accountable for serious human rights abuses perpetrated during the liberation war. There was not even catharsis through a process of truth and reconciliation.

After the Unity Accord between ZANU and ZAPU in December 1987, the government granted a general amnesty in respect of all human rights violations committed by the security forces and by "dissidents" between 1982 and the end of 1987. This amnesty was contained in Clemency Order (1) 18 April 1988. During this anti-dissident campaign the Fifth Brigade of the Zimbabwean National Army and various other security agencies reportedly perpetrated widespread human rights abuses resulting in the deaths of thousands of civilians and the torture and brutalisation of large numbers of civilians in Matabeleland and the Midlands.[175] Most of the beneficiaries of this amnesty were members of the security forces. Only 122 "dissidents" emerged from the bush after hostilities ended to be granted amnesty.

The 1995 elections were relatively peaceful. There was no significant political opposition to the ruling party, with just a number of small opposition parties. Nonetheless members of the ruling party carried out some beatings and burning of homes. A general amnesty was granted, placing beyond the law all those who committed crimes in connection with those elections. This was contained in Clemency Order (1) of 1995.

By the time that the 2000 General Elections were contested a strong opposition party had emerged that posed a major threat to the ruling party in the election. There was widespread violence in the period leading up to this election. The Clemency Order (1) of 2000 granted amnesty for all criminal acts committed in connection with this election, except murder, rape and fraud. As these acts had been committed predominately by members of the ruling party, it was members of the ruling party

who were the major beneficiaries of this amnesty. This amnesty created the impression that members of the ruling party were immune from the law when they behaved violently and this set the stage for the increasing lawlessness that followed.

The President has also exercised his constitutional power to grant individual pardons to benefit persons who have committed criminal acts on behalf of the ruling party. Some notable instances of this are these:

- In the 1980s during the Matabeleland crisis, five army officers were convicted and sentenced to death. Rejecting their appeals the Supreme Court, who described their actions as being the most callous they had ever seen, and confirmed death sentences for them. They were granted pardons.

- In 1985 a CIO officer in the middle of the night went to a cell, opened it, dragged out a prisoner whom he had been torturing during the day and shot him through the head in cold blood, accusing him of being a supporter of dissidents. Barely a week after his conviction he was also given a pardon.

- During the 1995 elections, a candidate in Gweru, Patrick Kombayi, was shot and nearly killed by ZANU (PF) activists and a CIO officer. The culprits were prosecuted and sentenced to terms of imprisonment. The day after the Supreme Court rejected their appeal, the President issued a specific pardon to the culprits and they went free.

In its report entitled *Zimbabwe The Toll of Impunity* June 2002, Amnesty International said:

> "Impunity has become the central problem in Zimbabwe where state and non-state actors commit widespread human rights violations without being brought to justice. Unless the cycle of impunity can be broken, human rights abuses will continue unchecked and victims and their families will not see justice."

[1] Quoted in the Zimbabwe *Independent* 12 January 2001.
[2] *Star* (S.A.) 12 January 2001.

[3] See *Herald* 19 January 2001; *Daily News* 6 February 2001; *Independent* 9 March 2001. It should be noted that all the judges except Mr Justice Gubbay were appointed to the Bench after Independence, either by or on the recommendation of Mr Mugabe himself. Even Mr Justice Gubbay was appointed as a judge of the Supreme Court, and later Chief Justice, after Independence.

[4] *Star* (S.A.), 4 December 2000.

[5] *Star* (S.A.) 25 January 2001.

[6] The IBA Report of Zimbabwe Mission 2000 at page 98 records that President Mugabe assured the IBA mission that he had no intention of "packing" the Supreme Court. The emptiness of the assurance became apparent very shortly afterwards.

[7] He has said on several occasions that land resettlement is a political, not a legal, issue, and while still a judge of the High Court attempted to vary a ruling of the Supreme Court on the issue.

[8] See the remarks attributed to him at the beginning of this Part.

[9] And, as indicated in an earlier note, in breach of specific assurances given to a delegation of the International Bar Association. See the I.B.A. Report of Zimbabwe Mission 2000 at page 98.

[10] Bartlett, Chatikobo, Gillespie and Devittie JJ and, more recently, Blackie J. Adam J is currently on leave pending retirement.

[11] See for example the judgments of Hlatshw ayo J in *Igudu Farm (Pvt) Ltd v Commissioner of Police & Ors* HH-143-2001, dealing with the land issue, and *Hove v Gumbo* HH-43-2002, an election petition.

[12] *Daily News* 28 August 2001; *Standard* 9 September 2001.

[13] *Standard* 9 September 2001.

[14] *Cape Times* 12 November 2001.

[15] *Daily News* 16 January 2002.

[16] *Herald* 21 February 2002

[17] *Daily News* 17 August 2002

[18] *Daily News* 20 August 2002

[19] After a one-day go slow at the Mutare courts in protect against the attack on the magistrate, the courts resumed operations the next day. *Herald* 21 August 2002.

[20] *Daily News* 21 August 2002.

[21] A legal practitioner representing the accused MDC officials was also attacked, as detailed in the next section.

[22] *Mail and Guardian* (SA) 31 August 2002.

[23] The full details of this episode are to be found in Section B of this report.

[24] *Daily News* 1 May 2002.

[25] *Daily News* 17 August 2002.

[26] *Financial Gazette* 29 August 2002; *Daily News* 29 August 2002.

[27] Taken from a report of the speech in *Herald* 27 July 2002.

[28] The rule of law, in its original formulation by Dicey, involved the principle of equality: nobody is above the law and everybody is subject to the jurisdiction of ordinary courts.

[29] It was illegal to do so because the Defence Act [*Chapter 11:02*] does not give the military authorities any jurisdiction over civilians.

[30] The judgment in the case is reported as *Chavunduka & Anor v Commissioner of Police & Anor* 2000 (1) ZLR 418 (S).

[31] *Zimbabwe Independent* 5 July 2002

[32] Buhera North Election Petition, reported in 2001 (1) ZLR at 295.

[33] Daily News 8 July 2002

[34] *Daily News* 5 September 2002.

[35] *Standard* 8 April 2002.

[36] *Daily News* 22 August 2002.

[37] *Herald* 29 February 2001. On 13 January 2001 the Commissioner of Police cast off any thin cloak of political neutrality he had worn previously. He publicly announced: "I support ZANU (PF) because it is the ruling party." See *Daily News* 16 January 2001.

[38] The judgment is reported as *Commissioner of Police v Commercial Farmers' Union* 2000 (1) ZLR 503 (H).

[39] As noted by the Supreme Court in *CFU v Min of Lands & Ors* 2000 (2) ZLR 469 (S) at 478D.

[40] *Business Day* (SA), 14 December 2000.

[41] *Houston Chronicle* (US) 15 December 2000.

[42] The details of this report are taken from a ZW News report on 16 July 2002 and a *Daily News* report on 17 July 2002.

[43] Reports of the number of farmers who obtained these orders vary, but it seems that at least 62 did so. *Daily News*, 6 September 2002.

[44] The *Star* (SA) 6 September 2002.

[45] *Daily News* 9 September 2002; *The Star* (SA) 6 September 2002.

[46] HB 10, 2002.

[47] In so far as the Bill will permit a preliminary notice to be served on a mortgage-holder immediately before a final acquisition order is served on the landowner, the Bill contravenes s16(1)(b) of the Constitution, which requires anyone with an interest or right in the land to be given "reasonable notice of the intention to acquire the property".

[48] The details of this case have been extracted from reports in *Daily News* on 27 and 28 June 2002 and *Financial Gazette* (Zim) on 27 June 2002.

[49] Details of this case are given in section B of this report.

[50] *Mpofu & Anor* v Madida & *Ors* HB-76-2002

[51] Some doubt has been expressed as to his right to call himself "Professor" since, so far as is known, he is no longer a member of the faculty of any university. He will be referred to by that title in this report, however, because in the absence of fraud he is entitled to call himself whatever he pleases.

[52] The proceedings are reported as *Capital Radio (Pvt) Ltd v Minister of Information & Ors (3): in re Ndlovu* 2000 (2) ZLR 289 (H). This account is based on that report.

[53] Mr Justice Chatikobo also came under verbal attack from Information Minister Jonathan Moyo when he ordered the police to stop the seizure of Capital Radio's equipment. Commenting on Chatikobo's interdict Moyo contemptuously spoke of "night lawyers going to see night judges in a night court to seek night justice." Although no proceedings were brought against Moyo for contempt of court for this

unwarranted attack, his remarks drew criticism from the Law Society of Zimbabwe which pointed out that judges were entitled to grant relief at any time they chose. Mr Justice Chatikobo resigned a few months later and took up a judicial post in Botswana.

[54] *Herald* 17 April 2002.

[55] *Herald* 15 September 1999.

[56] The Supreme Court's judgment is reported in 2000 (2) ZLR at 322. There is a hint at page 335B–D that perhaps the Chief Justice did not consider that Mr Chinamasa's remarks amounted to contempt of court.

[57] The Supreme Court did decide that Mr Justice Adam's sentence was manifestly lenient: see *S v Blanchard & Ors* S-78-2001.

[58] This contention, it should be noted, had already been rejected (at least impliedly) by the Supreme Court.

[59] Under this provision a court would only have been permitted to institute contempt proceedings

- where the alleged impairm ent occurred in the presence of the court or tribunal; or
- where the alleged impairment occurred in relation to a matter that was actually being heard or tried by the court or tribunal concerned at the time when the alleged impairment occurred, whether such impairment is alleged to have occurred in the presence of the court or tribunal or otherwise.

In all other cases of alleged contempt only the Attorney-General could bring contempt proceedings. See the General Laws Amendment Act 2002 which was gazetted on 4th February 2002. This Act was later set aside by the Supreme Court on the basis that it had not been properly passed by Parliament.

[60] *Financial* Gazette 25 July 2002.

[61] *Herald* 22 August 2002.

[62] In a letter to the then Judge President (now the Chief Justice) the Attorney-General protested at what he said was an "irregular" and "unlawful" attempt by the High Court to usurp his constitutional powers, stating that contempt of court proceedings were criminal, not civil.

[63] Taken from report in *Daily News* on 16 March 2002.

[64] *Daily News* 16 January 2001. In making this statement Chihuri had in fact committed an offence in terms of the Police Act [*Chapter 11.10*]. Under this Act (s 48 in the Schedule) it is an offence for police officers actively to participate in politics.

[65] In terms of para 48 of the Schedule to the Police Act, it is an offence for police officers actively to participate in politics.

[66] *Herald* 10 September 2002.

[67] *Herald* 31 August 2002.

[68] These murders, and the treatment of persons arrested in connection with them, are dealt with in section B of this report.

[69] For example, the murders of Chiminya and Mabika, dealt with earlier in part 2 of this section.

[70] *Herald* 17 September 2002. Mr Chihuri is also a deputy chairman of Interpol.

[71] These are taken from a *Herald* report dated 18 September 2002.

[72] *Herald* 18 September 2002.

[73] Senior officers Chimwanda and Ncube were quarantined in the "Commissioner's Pool" introduced by Chihuri to monitor senior officers about whom he is distrustful. Both decided to leave the force. Former Assistant Commissioner Simbi said: "I need not pretend that all is well…The ZRP is going through a very bad patch and some unprofessional fingers that are raised have taken advantage of this." *Independent* 11 May 2001.

[74] *Financial Gazette* 4 June 2001.

[75] *Sunday Mail* 7 June 2001.

[76] *Herald* 11 July 2001. Amnesty International researchers interviewed one former police officer on 30 November 2001 who described his experience: "I had twenty years of service, but I was fired because I was accused of supporting the MDC… I liked my job, I was loyal, I was proud to be a policeman to serve my nation, and now it hurts me to see the police officers are working for a political party, not the nation… The police are frightened of the war veterans, they have their own command structure, and if you arrest them, they will get them out of jail. If one is an ex-combatant, one can be promoted to take your position. Only ex-combatants are promoted. We're at the worst stage now, when everyone is doing what he wants."

[77] *Daily News* 20 March 2001. See also *Financial Gazette* 14 June 2002.

[78] See Appendix 3 for some specific example of the police ignoring serious crimes committed against opponents of government.

[79] One recent example of this is a Daily News report on 2 September 2002 describing how two recently graduated members of the youth brigade beat up a police officer at Harare Central Police Station after they had been arrested on charges of theft and violence.

[80] The MDC election director, Mr Nyathi, alleged that 70 of the MDC candidates for the election had been arrested on trumped up charges by the police. He also said that 20 MDC candidates had been assaulted and forty candidates had withdrawn in two districts out of fear for their safety. Associated Press report 3 September 2002.

[81] For instance, on 5 September 2002 the *Daily News* reported that Harare City Councillors and the MDC petitioned government, the Chief Justice and the Commissioner of Police about the alleged torture and inhuman treatment of a Councillor and MDC security officer who were in custody on allegations of murdering a ZANU (PF) activist. The previous week the two accused told a Harare magistrate they had been brutally tortured by the police and by suspected Central Intelligence Organisation (CIO) agents and soldiers, who were pressurising them to confess to the murder. The petitioners also registered their protest " against the inhuman and unconstitutional treatment of ... Fletcher Dhulini and countless other suspects while in police custody." They observed that "the entire nation is living in a state of fear of the very people who are charged with protecting us."

[82] For example, on 16 November 2001 a crowd of about 300 ZANU (PF) youths and war veterans, reportedly escorted by the police, went on the rampage in Bulawayo following the murders of Cain Nkala and Limukani Luphahla.

[83] *Standard* 15 April 2001.

[84] *Herald* 26 April 2001.

[85] *Herald* 21 May 2001.

[86] *Zimbabwe Independent* 24 May 2001.

[87] *S v Humbarume & Anor* HH-148-2001.

[88] [*Chapter 11:17*] promulgated on 22 January 2002.

[89] [*Chapter 10:27*]. This Act was promulgated on 15 March 2002.

[90] In its report entitled *Zimbabwe The Toll of Impunity* published in June 2002 Amnesty International called for the repeal of these Acts, which it says do not conform with international human rights standards relating to protection of human rights.

[91] The term 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.

[92] See secs 65 and 72 of the Act. Section 93 of the Act gave existing mass media owners three months within which to register (i.e. until 15 June 2002), but the Media and Information Commission has (illegally but sensibly) extended the deadline.

[93] Sec 65(2) of the Act. This implies that a mass media service may be a company rather than what the definition in sec 2 states it is, namely a service or medium. Really the Act is very badly drafted.

[94] See secs 71(1), 75 and 89 of the Act. So even if the information is true, a person must be given a right of reply if it impinges (i.e. touches) on his rights or interests.

[95] Section 64(2) of the Act.

[96] Ibid.

[97] Sections 79 and 83 of the Act.

[98] Section 80 of the Act.

[99] Section 15(1) of the Act.

[100] Section 15(2).

[101] Section 16.

[102] Section 5.

[103] Section 24. The Supreme Court found this provision to be constitutional in the case of *Biti & Anor v Minister of Home Affair & Anor* S-9-2002. This provision, it said, was 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 and 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.

[104] Section 26(1) of the Act.

[105] Section 27(1) of the Act.

[106] Section 32 of the Act.

[107] The present Chief Justice, Mr Justice Chidyausiku, clearly believes that these invasions were spontaneous rather than state orchestrated. In a speech to a conference of Chief Justices in South Africa in August 202 he said that the situation exploded over land because of resistance from the white farmers to land resettlement. “People started invading their lands and the whole situation really became ugly,” he said.

[108] At page 480G of the report.

[109] At pages 486H to 487A.

[110] At page 482G to H.

[111] At page 479E.

[112] At page 486G.

[113] At page 480C to D.

[114] *Commercial Farmers' Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S).

[115] That is still the law at the time of writing, though Government intends to amend the Class Action Act to allow class actions to be instituted in the Supreme Court. See clause 13 of the General Laws Amendment (No 2) Bill , 2002 (HB 5, 2002)

[116] S-55-2001

[117] S-111-2001.

[118] The effect of this piece of legislation was to protect from eviction all farm occupiers who had occupied farms in anticipation of re-settlement. It suspended the operation of court orders ordering the eviction of settlers and it precluded the courts from ordering the eviction of these occupiers. It also protected the settlers against criminal and civil liability for unlawful occupation of properties and damage caused on the properties.

[119] It has been reported (*The Herald*, 12 September 2002) that the government intends to amend the Land Acquisition Act further, to increase the fines for farmers who resist eviction and to validate retrospectively preliminary notices of acquisition which were issued without notification to bond-holders as required by the Act. If the *Herald*'s report is accurate, the proposed amendment will seriously prejudice bond-holders. The amendment will also allow eviction on seven days' notice, where a previous notice of acquisition has been set aside.

[120] 2001 (1) ZLR 321 (H).

[121] Chapter 29:15.

[122] This is a principle of English law, introduced into our law by the decision in *Patz v Greene & Co* 1907 TS 427.

[123] As was said by Hungwe J in a subsequent case (*Combined Harare Residents Association & Anor v Registrar-General & Ors* HH-210-2001) "in any democratic society, the need for regular free and fair elections has never been doubted."

[124] S-38-2002.

[125] *Stevenson v Minister of Local Government & Ors* 2001 (1) ZLR 321 (H).

[126] *Combined Harare Residents Assn & Anor v Registrar-General of Elections & Ors* HH-210-2001.

[127] He did so even though he had told the High Court that he had a voters' roll ready in place for the purpose of holding elections.

[128] See *Registrar-General of Elections & Ors v Harare Combined Residents' Assn & Ors* Civ App 341-2001, dated 25 November 2001.

[129] Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice, 2002 (SI 13A/2002).

[130] Case no. HC 24/2002.

[131] Whatever the Registrar-General's motives may have been, in fairness it must be pointed out that by then he was in an awkward position: the Supreme Court had ordered the election to be held by 11 February, while the President had directed that it be held on 9–10 March.

[132] *Registrar-General v Combined Harare Residents' Assn & Anor* S-4-2002.

[133] *Registrar-General v Combined Harare Residents Assn & Anor* HH-27-2002

[134] *Registrar-General of Elections v Combined Harare Residents Assn & Anor* S-7-2002.

[135] *Ibid* at page 18.

[136] Since the High Court's ruling was only a provisional one, the High Court had not finally determined the validity or otherwise of the notice. Until it did so, and there was an appeal from that final determination, it was not open to the Supreme Court to decide the issue.

[137] *The Standard* 8 September 2002.

[138] *Herald* 14 November 2001.

[139] *Guardian* (UK) 15 November 2001.

[140] This is dealt with above, in part 2 of Section A of this report.

[141] Unreported case HB-80-2002.

[142] Or, put another way, there must be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated: *S v Lubaxa* 2001 (4) SA 1251 (SCA) at 1257C–D.

[143] *Financial Gazette* 8 August 2002

[144] *Herald* 17 August 2002 and *Daily News* 17 August 2002

[145] *Standard* 18 November 2001.

[146] Martin Meredith in his book *Mugabe: Power and Plunder in Zimbabwe* at p 219.

[147] Interview on ZBC TV, 8 August 2001.

[148] The threat was uttered by a Mr Marasha, a nurse at the Chinhoyi hospital and a leader of the "war veterans".

[149] At their trial the magistrate made an order, unopposed by the prosecutor, for the police to return the firearms to the accused. To date the police have refused to comply with the order.

[150] The *Herald* 8 August 2001

[151] See sections 56 and 81 of the regulations.

[152] Chapter 10:27 (Act No. 5 of 2002). An outline of the Act's provisions is to be found in topic 5 of Section A of this report.

[153] [*Chapter 2:01*]

[154] In terms of s 31 of the Electoral (Applications, Appeals and Petitions) Rules, 1994 (SI 74A of 1995).

[155] The Electoral Act (Modification) (No. 3) Notice, 2000 (SI 318 of 2000).

[156] See *MDC & Anor* v *Chinamasa NO & Anor* 2001 (1) ZLR 69 (S).

[157] For example, Devittie J heard the Mutoko South election petition (2001(1) ZLR 308) in mid-March and gave 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.

[158] The petition is the Mutoko South election petition, and the unseated candidate Dr Olivia Muchena.

[159] The candidate insisted that the war veteran "was named in his campaign line-up only in his representative capacity as a war veterans chairman". It is not clear what difference that could make.

[160] Cf Devittie J in *Hurungwe East Election Petition* 2001 (1) ZLR 285 (H).

[161] *Igudu Farm (Pvt) Ltd v Commissioner of Police & Ors* HH-143/2001.

[162] HH-4-2002 and HH-8-2002 respectively.

[163] 2001 (1) ZLR 334.

[164] *Biti & Anor* v *Minister of Justice & Anor* S-10-2002

[165] The judgment was delivered by Ebrahim JA, with whom Cheda and Ziyambi JJA concurred.

[166] [*Chapter 2:08*]

[167] Reported in *The Herald* 18 April 2002.

[168] *The Daily News* 7 June 2002.

[169] This summary is taken from *The Daily News* 9 August 2002.

[170] Published in *Daily News* 6 September 2002.

[171] See Part 8 of section B of this report.

[172] See Part 10 of section B of this report.

[173] Messrs Chavunduka and Choto, whose case is dealt with in topic 2 of section A of this report.

[174] *Daily News* 5 September 2002.

[175] See *Breaking the Silence Building True Peace* 1997 (A report by the Catholic Commission for Justice and Peace in Zimbabwe and the Legal Resources Foundation of Zimbabwe)