

ATTACKS ON JUSTICE—ZIMBABWE (REPUBLIC OF)

Highlights

Deteriorating political and economic conditions are compounded by the decline of the rule of law in Zimbabwe. Court orders are routinely ignored or defied by the ruling party, and a culture of official impunity has destabilised the legal system and perpetuated human rights abuses. The state-controlled media operates in conjunction with the government to silence critics, including judges and lawyers who uphold the rule of law and human rights. Judges have been attacked for carrying out their professional duties. Forced resignations and politically motivated appointments to the Bench have seriously compromised its independence. Lawyers who represent opponents of the ruling party or human rights defenders have been subjected to reprisals, including arbitrary arrest and detention and physical violence.

BACKGROUND

Following presidential elections in **March 2002**, which were marred by violence and widespread irregularities (<http://news.bbc.co.uk/2/hi/africa/3236053.stm>; <http://www.guardian.co.uk/international/story/0,3604,1165168,00.html>), the ruling party remains the **Zimbabwe African National Union-Patriotic Front (ZANU-PF)**, led by **Robert Mugabe**. Mugabe became Prime Minister (and therefore, head of government) on **18 April 1980**, and then Executive President on **13 December 1987**, making him both head of state and government. The legitimacy of the election was challenged in court in **April 2002** by Zimbabwe's main opposition party, the **Movement for Democratic Change (MDC)** (<http://news.bbc.co.uk/2/hi/africa/3237327.stm>). The petition was heard by the **High Court** in **November 2003** but judgment has not been delivered to date.

Concerns that the current environment in Zimbabwe made it impossible to hold free and fair elections had led the **MDC** to threaten a boycott of parliamentary elections scheduled for **31 March 2005** (<http://www.guardian.co.uk/zimbabwe/article/0,2763,1290874,00.htm>). The MDC took this drastic measure after the Government introduced the **Electoral Amendment Bill 2003** on **19 March 2004** which allowed electoral officers to demand proof of residence from voters and those seeking to register as voters, disadvantaging persons unable to produce such documentary evidence – in particular, poor urban workers and displaced farm workers. The Bill also made it a serious criminal offence to put up posters or paint political slogans without the consent of the owner of the premises. The MDC demanded that an independent electoral commission be established to coordinate and supervise the 2005 election to ensure it was fairly conducted. The **Electoral Amendment Bill** was eventually scrapped but a new *Electoral Act* was promulgated on **1 February 2005**, establishing an **Electoral Commission** to conduct elections. The MDC ultimately agreed to participate under protest in the parliamentary elections on this basis but the new Electoral Commission did not prove to be sufficiently independent to guarantee free and fair elections.

Despite Zimbabwe's domestic and international human rights obligations, the state has consistently legislated to suppress and violate fundamental democratic freedoms. Between **2002** and **2004**, the government had amassed an armoury of statutes. These include the **2002 Access to Information and Protection of Privacy Act (AIPPA)** reportedly used to muzzle the independent media and censor public information; and the *Non-Governmental Organisations and Churches Bill* of **20 July 2004** (the NGO Bill) that seeks to ban the registration of any foreign or domestic organisation whose sole or principal objective is issues of governance, including "the promotion and protection of human rights and political governance issues". This Bill is yet to be enacted, and is being reconsidered by Parliament. The *Public Order and Security Act* of **2002** has also been used by police to break up public gatherings convened without police permission, and has generally been employed to prevent anti-government political activity. While these laws impose seemingly innocent administrative obligations upon citizens and organisations, government agencies subvert these processes to monitor behaviour, to limit freedom of expression and association, and to arrest the independent media and other government critics, political opponents and human rights defenders.

The government has also subjected NGOs to illegal forms of harassment and intimidation. Authorities have searched some of their offices and seized files, and forced several to eliminate or substantially change the content of human rights programmes. Some have also been forced to cease activities for several months.

In **2002**, the **African Commission on Human and Peoples' Rights** released a report on its mission to Zimbabwe, highlighting the breakdown of the rule of law and identifying an increased number of cases of torture and repression. Further, at the 59th session of the **United Nations General Assembly** in **September 2004**, **President Mugabe** again refused to acknowledge the crisis situation for the rule of law and remained defiant about his country's record. The situation remains unchanged to date. The **International Commission of Jurists (ICJ)** has also observed the decline of the rule of law in Zimbabwe with grave concern, and has condemned the obstructive action taken by the government to prevent international and non-governmental organisations from ascertaining the true extent of the situation (<http://www.icj.org/recherche.php3?lang=en&country=25&topic=§ion=&keywords=&go=Search&page=2>).

JUDICIARY

Independence

The government's attempts to undermine the independence of the judiciary have been roundly condemned by the international community, and have prompted public statements and urgent appeals from the **United Nations High Commissioner on Human Rights** and the **United Nations Special Rapporteur on the Independence of Judges and Lawyers**. In his report to the United Nations Human Rights Commission dated **10 January 2003** (<http://daccessdds.un.org/doc/UNDOC/GEN/G03/101/53/PDF/G0310153.pdf?OpenElement>), the Special Rapporteur recommended that the Commission take appropriate action to address "concern about the deterioration (of) the independence of the judiciary and its impact upon the rule of law." The Special Rapporteur's request to

visit Zimbabwe and undertake further investigation has not been addressed by the government since **January 2003**, and remains outstanding.

In **May 2003**, during the African Commission's 33rd session, the **African NGOs Forum** requested that the **African Commission on Human Rights** recommend that the Zimbabwean government "take all necessary measures to ensure protection of lawyers, public prosecutors, magistrates, judges and to respect the independence of the judiciary."

A number of judges in Zimbabwe, despite political pressure, have ruled against the government when unlawful policies and actions are challenged. However, the government has systematically ignored these judicial decisions, and the police have refused to execute judicial directives, most notably in cases relating to land transfer and unlawful occupation. The support of the state to the judiciary is only given to outcomes deemed favourable to ruling interests.

A shortage of magistrates has led to a substantial backlog of cases, with more than **60,000** proceedings awaiting hearing in **May 2003**. A total of 59 magisterial posts remained vacant in **May 2003**, leaving the courts understaffed. A number of vacancies had arisen as a result of resignations, suggesting that political pressure may compound the difficulties in filling the available positions. Magistrates have also reportedly resigned as a result of poor salaries and working conditions.

The personal security of judges is compromised, and the authorities have publicly announced that they cannot guarantee their protection. Criticism of the judiciary by the government and state-owned press has resulted in politically motivated threats against judges and made them unwilling to accept controversial cases (see http://www.omct.org/pdf/observatory/zimbabwe_HRdef_0204_EN.pdf).

Executive Usurpation of Legislative and Judicial Powers

Presidential Powers (Temporary Measures) Act [Chapter 10:20]

President Mugabe regularly uses the *Presidential Powers (Temporary Measures) Act* to bypass the legislature, and unilaterally enact controversial and repressive legislation in non-emergency situations. The legislation often impinges on the exercise of judicial power. The Act allows the president to make regulations in circumstances where a situation has arisen, or is likely to arise, which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and the situation cannot be adequately dealt with by any other law and, because of the urgency involved, it is inexpedient to await the passage of appropriate legislation through Parliament.

This practice has been roundly condemned by legal commentators and constitutional experts, as it undermines the separation of powers by enabling the President to wield executive and legislative power simultaneously, and inhibits consultation and debate concerning proposed laws. These laws are frequently inconsistent with constitutional guarantees and international obligations. Parliament has failed to object to a number of presidential ordinances that have subsequently been declared unconstitutional by the Supreme Court, including the *Presidential Powers (Temporary Measures) (Cellular Telephone Services) Regulations 1996*.

Criminal Procedure and Evidence Act

The **2004** amendments to the *Criminal Procedure and Evidence Act* exemplify the usurpation of judicial power by **President Mugabe** through the *Presidential Powers (Temporary Measures) Act* (see above) and lack of judicial review. New provisions allowed for the detention without judicial review of an accused person for up to 30 days before being charged with an offence. These amendments were subsequently incorporated into the *Criminal Procedure and Evidence Act* through the enactment of the *Criminal Procedure and Evidence Amendment Act 2004* (No 14 of **2004**).

By empowering executive officers to determine the question of a subject's liberty, the amendments run contrary to section 79 of the *Constitution*, which provides that judicial power is vested in the courts and may only be exercised by judges. The constitutionality of the Act is being challenged on the grounds that it contravenes sections 13 and 18 of the Constitution by removing a person's right to have the question of his or her liberty determined by an independent court in a fair hearing within a reasonable time.

Security of tenure

Section 86 of the Constitution provides that judges have tenure of office until the age of 65 years or, subject to the acceptance by the president of a medical report as to the mental and physical fitness of the judge, the age of 70. Section 87 of the Constitution deals with the removal of a judge from office during his or her tenure.

In practice, however, this is not respected, and recent judicial appointments have been politically motivated. The government removed **Chief Justice Gubbay**, the only judge in office prior to Zimbabwe's independence on **18 April 1980**. Since **2000**, when the **Supreme Court** declared illegal the government's central policy of "land distribution" – seizing white-owned land and giving it to black farmers – the **Minister of Justice** and other government officials have used the racial discourse to exert pressure on both black and white judges. As a result, some have been forced to resign, undermining the integrity of the judicial institution. The **Minister of Justice** publicly stated in **2000** that the government will not rest until there was a complete overhaul of the judiciary to remove "Eurocentric" judges who were "colonial relics" and not "politically correct" (see http://www.zimbabwesituation.com/oct14_2004.html).

The **Chief Justice, Judge President of the High Court**, and majority of **Supreme Court** judges reportedly have very close ties with the ruling party. The appointment process is said to be utilised by the **Judicial Services Commission** to ensure judicial support for the executive's actions. The Judicial Services Commission consists of the Chief Justice, Attorney-General, Public Service Commission chairman, and two or three other legally qualified members appointed by the President.

Judges frequently face reprisals for unpopular decisions. In a number of recent cases (see Cases below), judges have been forced to resign, forcibly removed from office or suffered harassment for challenging the government's unconstitutional exercise of power. The government has systematically transferred and demoted judges for political purposes.

Corruption

Judicial corruption is a crime pursuant to the *Prevention of Corruption Act* (Chapter 9:16). Reports of corrupt activity have emerged during the period amongst the magistracy and prosecution service (see Cases below).

Independence has also been threatened by senior judges' acceptance of farms made available to them under the land resettlement scheme. According to an **April 2004** report prepared by **Stephen Irwin**, the **Chairman of the Bar of England and Wales** for the International Council of Advocates and Barristers, a significant number of the current members of the Supreme Court and High Court have benefited from "land leasing agreements", which were granted at the will of the government and which may be withdrawn at any time without compensation (http://www.kubatana.net/html/archive/legal/040420si.asp?sector=HR&range_start=181). These methods illustrate the government's desire to appoint judges who will legitimise the laws and procedures imposed by the ruling interests, and who will take steps to ensure that the government and its supporters receive undue favouritism in litigation.

Professional Secrecy and Immunity

Professional secrecy is not constitutionally protected but is legally protected by virtue of the decision in *Law Society of Zimbabwe v Minister of Transport and Communication and Anor* (S-59-03). However, the principle is not respected in practice, and judges are forced by the government to testify on confidential matters discussed in the course of carrying out their judicial functions. In a press release dated **19 February 2003**, the **UN Special Rapporteur on the Independence of Judges and Lawyers** deplored the government's practice of "pitting judge against judge" by compelling members of the judiciary to give evidence against one another, causing discord and separating members of the bench into "independents" and "compliant". In the press release, the Special Rapporteur noted that the government had adopted this divisive tactic in the cases brought against **Judge Blackie** in **2002** and **Justice Paradza** in **2003** (see Cases below).

Cases

In **August 2002**, a magistrate, Mr. **Chikwana**, was attacked violently in public by war veterans following an adverse decision, and received no assistance from police present at the Chipinge court. No charges were laid in response to a complaint filed by Judge Chikwana wherein he named his assailants as well as the police present during the assault. The judge was subsequently transferred to Mutare (see http://www.omct.org/pdf/observatory/zimbabwe_HRdef_0204_EN.pdf).

In **September 2002**, **Justice Fergus Blackie**, a recently retired judge of the High Court, was arrested on charges of corruption after convicting the **Minister of Justice** of contempt of court. He was held in custody over a weekend, deprived of food and medication, and denied access to his lawyer for 24 hours. His arrest and subsequent court appearance on a *habeas corpus* application was widely covered by the state electronic and print media. Justice Blackie was not questioned by police while in custody and the matter was dropped in **July 2003**. The **International Commission of Jurists** (ICJ) had sent an urgent appeal deploring the government's conduct (http://www.icj.org/news.php3?id_article=2701&lang=en) and welcomed the decision

to withdraw charges (http://www.icj.org/news.php3?id_article=2959&lang=en). Justice Blackie has since retired from the Bench.

In **February 2003**, **Judge Benjamin Paradza** was arrested at his chambers in Harare and detained on charges of corruption. It is believed that this was prompted by a series of his rulings that were unfavourable to the government. On **16 September 2003**, the Supreme Court considered issues surrounding Judge Paradza's arrest, detention and remand, and found that the state had not followed constitutional procedures for investigating allegations of judicial misconduct. The **ICJ** monitored the trial, having already expressed alarm at the arrest in a letter dated **20 February 2003** to President Mugabe (http://www.icj.org/news.php3?id_article=2754&lang=en).

Judge Paradza was not permitted to actively return to the Bench, and was subsequently suspended in **February 2004** for alleged misconduct based on the same charges that had been considered in the context of his unlawful arrest. Pursuant to Section 87 of the Constitution, a three-member tribunal comprised of judges from Zambia, Tanzania and Malawi was established in **late 2004** to hear the allegations. The hearing has been adjourned pending the determination of a **Supreme Court** challenge brought by Judge Paradza and heard in **February 2005**, concerning the panel's composition. His counsel argued that the tribunal was not properly constituted as its members were nominated by judicial authorities in their own countries and not by President Mugabe as required by the Constitution (<http://www.suntimes.co.za/zones/sundaytimesNEW/basket17st/basket17st1108723780.aspx>). The Court has reserved judgment on this application to have the tribunal disbanded and no decision has been issued to date.

In **August 2003**, Harare **Magistrate Maxwell Manyanhai** faced trial for soliciting a ZWD \$50,000 bribe from a defendant in return for a lenient sentence. Reports regarding the outcome of these proceedings are not available.

In **November 2003**, "The Herald" newspaper published a report casting serious aspersions on the professionalism and integrity of **Judge Majuru**, President of the Administrative Court in Harare. This coincided with proceedings before Judge Majuru between the independent "Daily News" newspaper and the state's **Media and Information Commission**. As a consequence of these reports and their allegations of bias, the judge was obliged to recuse himself and has since left Zimbabwe. He has revealed that he was placed under considerable direct and indirect pressure by the government concerning the "Daily News" case, including an offer of a farm if he upheld the government's decision to close down the publisher, and a demand from Justice Minister **Patrick Chinamasa** to delay the case for at least three months.

Magistrate Judith Tsamba was publicly criticised by "The Herald" newspaper in **March 2004** for granting bail to businessman and politician, **James Makamba**, who had been arrested without a warrant. The **ICJ** intervened (http://www.icj.org/news.php3?id_article=3301&lang=en) to urge the government to respect and uphold judicial rulings. No further information is available on this case.

A report published in **August 2003** by **The Observatory for the Protection of Human Rights Defenders**, a non-governmental organisation, details nine cases of state-supported harassment and intimidation of judges and lawyers in Zimbabwe (see

http://www.omct.org/pdf/observatory/zimbabwe_HRdef_0204_EN.pdf). In addition, a report by **Arnold Tsunga**, human rights lawyer and director of the non-governmental organisation **Zimbabwe Lawyers for Human Rights**, documents 20 examples of attacks on judges and lawyers in **2003**. The nature of these attacks include arbitrary arrest, physical violence and torture as well as denial of access to clients, and the government's refusal to abide by decisions that do not correspond with its political agenda.

In **March 2004**, **Legalbrief Africa** reported that seven judges – **Ebrahim, Blackie, Chatikobo, Gillespie, Devittie, Chinhengo and Mungwira** - have been compelled to resign for their own safety since **Chief Justice Anthony Gubbay** was forced to step down in **2001**. Furthermore, an additional four judges – **McNally, Smith, Adam and Sibanda** - have retired.

LEGAL PROFESSION

Independence

The government obstructs lawyers in the discharge of their duties, particularly when they are acting for human rights defenders or political opponents, identifying them with the politics or acts of their clients (http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/hrd_zimbabwe.htm). In particular, lawyers are denied access to their clients by police and have even been physically evicted from police stations on some occasions.

Individual lawyers and the **Law Society of Zimbabwe**, a professional association of lawyers, have suffered reprisals when they spoke out against the deterioration of the rule of law. Lawyers avoid working in rural regions where they are likely to face intimidation and physical attacks by war veterans. Paralegals in these areas have suffered a number of attacks, leading to office closures and, in some instances, the end of the provision of legal services in remote areas. Human rights lawyers are regularly targeted by the government in their personal capacity, and arbitrary arrest and detention, as well as ill treatment and torture, are used to intimidate them and dissuade them from continuing their activities.

2002 Public Order and Security Act

The vague and subjective provisions of the *2002 Public Order and Security Act (POSA)*

(<http://www.kubatana.net/html/archive/legisl/020122posa.asp?sector=LEGISL>) have been used by the government to prohibit free speech, suppress dissent and criminalise legitimate expression. *POSA* has been used to arrest lawyers for the alleged possession of “subversive” documents. In addition to Sections 15, 17 and 19 which substantially curb freedom of expression, the Act creates offences such as criticising members of the police or defence forces (Section 12) and insulting the Office of the President (**Section 16**), punishable by imprisonment. Section 19 of the *POSA* effectively bans any form of assembly in the absence of explicit police permission and prohibits any act that “forcibly disturbs the peace, security or order of the public of any section of the public; or invades the rights of other people; [or intends] to cause such disturbance or invasion or realising there is a risk or possibility that such

disturbance or invasion may occur”. Sections 21, and 23 to 31 inclusive regulate the convening of public gatherings and restrict any conduct that is considered to create hostility against police forces.

Cases

In **June 2002**, the then President of the Law Society of Zimbabwe, lawyer **Sternford Moyo**, and the Executive Secretary, lawyer **Wilbert Mapombere**, were arrested and detained under the *Public Order and Security Act 2002* (see above) for alleged possession of “subversive documents” even though searches of their homes and offices failed to locate any such documents. This incident had followed the publication of a Law Society report in **June 2001** written by **Mr Sternford Moyo**, voicing alarm at the state of the judiciary and the forced resignation of Chief Justice Gubbay (see “Attacks on Justice 2002”). On **6 June 2002**, the **ICJ** (http://www.icj.org/news.php3?id_article=2633&lang=en) called upon its network to demand that the government cease its harassment of the Law Society and members of the profession. In a press release dated **June 2002**, the **UN Special Rapporteur on the Independence of Judges and Lawyers** (see <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BB3B6D78D2702996C1256BD0004F57AB?opendocument>) also demanded that the lawyers be released and all charges against them be unconditionally withdrawn in accordance with Zimbabwe’s international obligations. The lawyers were released after 48 hours in detention and the case was never taken to trial, with the Attorney-General citing a lack of evidence.

In **January 2003**, **Gabriel Shumba**, a human rights lawyer working for the local NGO **Zimbabwe Human Rights Forum**, and his client, **Job Sikala**, an **MDC** Member of Parliament, were arbitrarily arrested with other party members and detained for two days without access to legal representation. Mr Shumba was eventually informed that he would be charged under Section 5 of the *Public Order and Security Act* which deals with organising, planning or conspiring to overthrow the government by unconstitutional means. Mr Shumba and his client suffered torture by state agents during their imprisonment, but no investigation or punitive action was taken against the perpetrators. (see http://www.house.gov/international_relations/108/shu031004.htm). After a court hearing in **January 2003**, Mr Shumba was released on bail although his passport was confiscated. Once released, he went to work in Tanzania but after being threatened by the **High Commissioner of Zimbabwe in Tanzania**, he fled to South Africa. Reportedly, Mr Shumba is currently the director of the **Accountability Commission – Zimbabwe**, an organisation based in South Africa which is collecting evidence of gross human rights abuses against President Mugabe and his regime.

The **ICJ** wrote to **President Mugabe** in **April 2003** (http://www.icj.org/news.php3?id_article=2831&lang=en), expressing grave concern at the repressive treatment received by human rights defenders in Zimbabwe.

In **April 2003**, Ms **Gugulethu Moyo**, a lawyer for the independent **Associated Newspapers of Zimbabwe**, was violently beaten when she went to a police station to represent a staff photographer who had been arrested whilst covering a civil protest, and was prevented from assisting her client. The **ICJ** intervened and called for a full and impartial inquiry into the incident

(http://www.icj.org/news.php3?id_article=2782&lang=en). However, no action has been taken by the authorities.

In **October 2003**, the **Zimbabwe Lawyers for Human Rights**, a non-governmental organisation comprised of lawyers and law students (<http://www.hrforumzim.com/members/zlhr/zlhrtext.htm>), issued a public statement detailing the manhandling of lawyers **Beatrice Mtetwa** and **Arnold Tsunga** by the police and their eviction from the Harare Police Station. Ms Mtetwa and Mr Tsunga attended the station for five hours and were not allowed access to their detained clients.

A report published in **August 2003** by **The Observatory for the Protection of Human Rights Defenders**, a non-governmental organisation, details nine cases of state-supported harassment and intimidation suffered by judges and lawyers in Zimbabwe (see http://www.omct.org/pdf/observatory/zimbabwe_HRdef_0204_EN.pdf). In addition, a report by **Arnold Tsunga**, human rights lawyer and director of the non-governmental organisation **Zimbabwe Lawyers for Human Rights**, documents 20 examples of attacks on judges and lawyers in 2003. The nature of these attacks include arbitrary arrest, physical violence and torture as well as denial of access to clients, and the government's refusal to abide by decisions that do not correspond with its political agenda. The report is not an exhaustive account of all incidents involving the persecution of members of the legal fraternity in Zimbabwe.

PROSECUTORS

In the current political climate the office of **Attorney-General** may potentially be reduced to that of a mere "political functionary." During **2002**, the Office of the Attorney-General was criticised by the government for not prosecuting MDC supporters and officials vigorously enough and, in some instances, state departments engaged private lawyers to appear in court instead of using lawyers employed by the state prosecution services. As public servants, prosecutors are reportedly particularly vulnerable to pressure, especially in small towns where they frequently come in contact with disaffected litigants and agitators seeking "politically correct" decisions (<http://www.lrf.co.zw/>).

Cases

By **early 2003**, two senior prosecutors, **Thabani Mpfu** and **Kennedy Mupomba**, had left the Attorney-General's office as a consequence of intimidation by government agencies. It was reported in "The Herald" newspaper that Mr Mpfu had been under investigation for not acting strongly enough against "enemies of the state". He has since disappeared. It is reported that **between 2002 and 2004**, a number of independent-minded prosecutors have resigned from the prosecution service because of intimidation, not only by government agencies but also by support groups belonging to both of the major political parties in Zimbabwe.

The **Minister of Justice, Legal and Parliamentary Affairs** stated in **April 2003** in Parliament that the government "(e)mloys people on merit and professional standing, not political affiliation ...If (the government) comes across any person in the Public

Service who, instead of pushing the policy of government of the day, pushes other policies, we will descend on that person.” Police and prosecutors alike are, therefore, under considerable pressure to support the ZANU-PF’s interests in the conduct of their duties, to the extent that proceedings against the party’s supporters do not go ahead, and case dockets are lost.

In **April 2003**, public prosecutor **Levison Chikafu** was confronted and threatened by war veterans over a decision to grant bail to a group of **Movement for Democratic Change** supporters. Despite this, there are a number of courageous prosecutors who attempt to protect the integrity of the legal system under trying conditions. In this sense, following the **August 2002** attack on judge **Walter Chikwanha** in Chipinge (see <http://web.amnesty.org/report2003/Zwe-summary-eng>), prosecutors in Manicaland along with magistrates immediately abandoned work to protest against this breakdown of the rule of law.

ACCESS TO JUSTICE

The *2002 Public Order and Security Act (POSA)* has been employed by state security forces to arbitrarily arrest and detain human rights defenders with impunity. In **2003** alone, the **Zimbabwe Lawyers for Human Rights** reported 314 cases of this nature. The Act creates offences like criticising members of the police or defence forces (Section 12) and insulting the Office of the President (Section 16), both punishable by imprisonment. Further, Section 19 of the *POSA* effectively bans any form of assembly in the absence of explicit police permission and prohibits any act that “forcibly disturbs the peace, security or order of the public of any section of the public; or invades the rights of other people; [or intends] to cause such disturbance or invasion or realising there is a risk or possibility that such disturbance or invasion may occur.” Sections 21 and 23 to 31 inclusive regulate the convening of public gatherings, and restrict any conduct that is considered to create hostility against police forces.

The **2003 Administrative Justice Bill** authorises various administrative authorities to depart from the principles of natural justice when making decisions in certain circumstances. Principles that may be abrogated include the obligation to act lawfully, reasonably and in a fair manner, the requirement for written reasons for decisions, and the right of affected persons to have an adequate opportunity to be heard.

The *Miscellaneous Offences Act (MOA)*, which dates back to the pre-independence period of repressive white rule in Zimbabwe, has been used extensively in recent years to limit freedom of expression, assembly and association. The *MOA* is most commonly used to arrest or charge human rights defenders and other political opponents when authorities have insufficient evidence to establish that an offence has been committed under the *POSA*.

The **2003** amendments to the *Criminal Procedure and Evidence Act* relate to offences such as corruption, money laundering and foreign currency fraud, and allow the detention of an accused person for up to 21 days before being charged with an offence. The constitutionality of the law is currently being challenged by **James**

Makamba, a businessman and prominent **ZANU-PF** member charged with foreign currency offences.

Despite the existence of constitutional due process guarantees that have been consistently upheld by the courts, the political climate has seen police and other state security forces engage in the arbitrary arrest and detention of political opponents and civil society activists with impunity between **2002** and **2004**. Tactics used include arrest on criminal charges without credible evidence, the use of torture during interrogation, and the arrest or beating of those associated with the accused such as family members without any evidence of wrongdoing.

It is also common for individuals to be detained without charge beyond the maximum period of 48 hours specified by the Constitution. These individuals are also denied access to a judge who may determine the legality of their arrest and continued detention. Finally, the failure of police to follow up investigations after they have laid charges against a suspect has maintained a climate of fear amongst accused persons.

In **2004**, the President removed the jurisdiction of the Court to grant bail by enacting regulations. *Statutory Instrument 137/04* provides that where there is no *prima facie* case against an accused person in certain cases (including where charges have been laid under the *POSA*), a court can order that he or she be detained for at least seven days without bail. At the same time, the President enacted regulations providing that where a *prima facie* case can be established against an accused person, the court must order that the suspect be held in custody for a period of 21 days and cannot be granted bail for 14 days after the detention is ordered. These regulations have subsequently been used to override court orders for the release of detainees. Police typically oppose bail applications even when no grounds exist for so doing. These bail regulations are contrary to the Constitution, in that they permit the detention of suspects in circumstances where a *prima facie* case against them cannot be established. The Constitution provides that a person shall only be arrested where there is reasonable suspicion that he or she has committed, or is about to commit an offence, and imposes a requirement that an accused person be notified of the reasons for his or her arrest as soon as possible. These regulations have been replaced by the amendments to the *Criminal Procedure and Evidence Act* through the enactment of the *Criminal Procedure and Evidence Amendment Act 2004* (No 14 of 2004).

Police frequently obstruct lawyers' access to their clients in clear violation of the right of accused persons to have unimpeded access to legal representation. It is common for the police to tell lawyers that they are merely "providing accommodation" to persons who have been detained at the request of the police force's law and order section. By differentiating the situation from that of arrest, the police are able to use this justification to deny lawyers access to their clients. Arrested persons are commonly detained for more than 48 hours before they are brought before a court for the legality of their detention to be determined by a judge.

There are reported instances of torture and ill treatment of suspects between **2002** and **2004**, particularly of political opponents or human rights activists. While the *Magistrates Court Act* sets out procedures for dealing with complaints about police mistreatment, and officers can theoretically be prosecuted for assault and other forms of abuse, this rarely occurs.

The courts have held that where the state seeks to rely upon a confession made by an accused person, it bears the onus of proving beyond reasonable doubt that the statement is admissible.

Cases

In the **March 2004** case of *S v Masera & Ors*, **Justice Sandra Mungwira** of the High Court threw out the alleged confessions of six opposition activists charged with the murder of a ZANU-PF official on the basis of their mistreatment by police. The judge found that the police had assaulted the six accused persons and their relatives as well as depriving them of sleep and food, threatening them with guns and denying them medical attention and access to lawyers. Justice Mungwira also held that where there has been a flagrant and wilful denial of access to a lawyer by the police, any extra-curial statement or indication made before the accused person is legally represented will be excluded from evidence.

Over the course of several cases, and particularly in *S v Masera & Ors*, the courts have observed that the practice of keeping suspects in incommunicado detention not only breaches their fundamental human rights but their right to equality of arms in the conduct of their defence. A prisoner in custody is equally entitled, through his or her legal representatives, relatives and friends, to gather evidence and prepare a case in defence of the charges brought. The courts have also held that a detained person is entitled to instruct and consult his or her legal adviser in conditions of privacy.

In **April 2004**, **Tinashe Lukas Chimedza**, a long-time student and youth rights activist, was arrested prior to his giving a speech on the right to education. Reportedly, Mr Chimedza was beaten so severely by police that he required medical treatment. He was hospitalised under police surveillance on the basis of an arrest warrant issued in **2001** in connection with a student demonstration. The lawyers representing Mr Chimedza, who insisted that he required medical attention, were subjected to abuse and threats while trying to represent the interests of their client.

LEGAL REFORMS DURING THE PERIOD

(see also <http://www.niza.nl/docs/200502171050443131.html> for legislation updates)

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| January 2002: | The <i>Public Order and Security Act</i> (POSA), enacted. |
| March 2002: | The <i>Access to Information and Protection of Privacy Act</i> (AIPPA), amended 2003. |
| 2003: | The <i>Citizenship of Zimbabwe Act</i> , enacted. |
| March 2003: | The <i>Labour Relations Amendment Act</i> , enacted. |
| 2004: | The <i>Criminal Evidence and Procedural Act Amendment Statutory Regulations 37 of 2004</i> , enacted. |
| 2004: | The <i>Presidential Powers (Temporary Measures) Regulation 2004</i> amending the <i>Criminal Evidence and Procedural Act</i> , enacted. |

- September 2004:** The *Administrative Justice Act*, enacted.
- January 2005:** The *Access to Information and Protection of Privacy Amendment Act*, enacted.
- January 2005:** The *Anti-Corruption Commission Act*, enacted.
- January 2005:** The *Non-Governmental Organisations Bill*, under consideration by Parliament.
- February 2005:** The *Electoral Act*, enacted.
- February 2005:** The *Zimbabwe Electoral Commission Act*, enacted.

GENERAL COUNTRY INFORMATION

a. Legal System Overview

1. Rule of Law and independence of the judiciary

Constitutional Structure

The Constitution of Zimbabwe, known as the **Lancaster House Constitution**, was enacted upon independence in **1980**. It provided for a **bicameral parliament**, a **Prime Minister** as the head of the government, and a ceremonial **President**. Pursuant to section 52, amendments to the Constitution may be made by a two-thirds majority of Parliament.

The Constitution has been amended 16 times, resulting in the abolition of the office of the **Prime Minister**, the establishment of a **unicameral Parliament**, and the transformation of the role of the **President**. A 17th amendment has recently been published as a Bill. The majority of these constitutional changes took place **between 1985 and 2000** when the **ZANU-PF** held more than two-thirds of the seats in Parliament. As a consequence of these amendments, the separation of powers in Zimbabwe has become blurred and the power of the executive has been expanded to the detriment of the other branches of government.

Section 11 of the Constitution provides that it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe. The *Declaration of Rights* is set out in Chapter III of the Constitution, providing for the protection of specified fundamental rights and freedoms, including the right to life, to equality before the law, freedom from slavery and forced labour, freedom from inhuman treatment, and freedom of conscience and expression, assembly, and association, and movement. The Constitution states that these rights may be exercised provided that their enjoyment does not prejudice the public interest or the rights and freedoms of other persons.

Section 23 of the Constitution contains certain anti-discrimination provisions which are supported by specific legislation. However, the exemption of certain areas of personal law and of African customary law from the ambit of section 23 undermines the protections it is able to afford.

Executive

The Executive consists of the **President, Vice-Presidents, Cabinet Ministers** and **Deputy Ministers**. Pursuant to the Constitution, the President is now the **Head of State, Head of Government** and **Commander in Chief** of the armed forces. The President must be a citizen of Zimbabwe by birth or descent, at least 40 years old, and “ordinarily resident” in the country.

- **Presidential functions** are set out in Section 31H of the Constitution. The President is obliged to uphold the Constitution and the laws of Zimbabwe. Together with those powers specified in the Constitution, which include the power to prorogue and dissolve Parliament, the President may also exercise prerogative powers, including the prerogative of mercy.

Section 30 of the Constitution provides that the President is immune from personal liability in civil or criminal proceedings in any court whilst he or she is in office. While the **Supreme Court** has ruled that the President is liable to legal proceedings in his or her official capacity, section 31K of the Constitution states that where the President is required or permitted by the Constitution or any other law to act on his or her own deliberate judgment, or is required to act on the advice or recommendation, or after any consultation with, any person or authority, the court shall be prohibited from making certain enquiries regarding the decision-making process.

The Constitution provides that the President may appoint two **Vice-Presidents** at a time, who are responsible for assisting the President in the discharge of official functions, as well as a **Cabinet of Ministers**. The two Vice-Presidents and the Ministers are accountable to the President and to Parliament.

Legislature

Pursuant to Section 50 of the Constitution, legislative power is vested in a 150-member **Parliament** - 120 members are elected by universal suffrage, 10 are tribal chiefs elected by their peers, 12 are appointed by the President, and eight are provincial governors, also appointed by the President. Since **2000**, the Movement for Democratic Change's leader, **Morgan Tsvangirai**, has consistently called for the abolition of the President's power to appoint Members of Parliament on the basis that the President is likely to appoint members of his own party, and thereby gain an unfair advantage in the House. Members of Parliament hold office for five-year terms.

Section 39 of the Constitution provides that Members of Parliament shall elect a **Speaker** and **Deputy Speaker** to preside over Parliament. It is not necessary that the Speaker be a Member of Parliament, but he or she must possess the relevant qualifications set out in the Constitution. This procedure was not adopted for the election of the present Speaker and Deputy Speaker, and both were appointed by the **President** from the ranks of his political supporters following the **March 2002** election. The role of the Speaker is not set out in the Constitution and allegations of partisan conduct have been made, particularly where the Speaker has intervened to curtail debate regarding legislative reforms proposed by the government.

The fifth session of Parliament, opened in **July 2004**, saw the introduction of **portfolio committees**, made up of members of both sides of the House, to monitor each ministry. While the committees have been largely critical of the President's regime, their reports have, on the whole, been accepted by the Executive.

Sections 40A and 40B of the Constitution provide for the establishment of a **Parliamentary Legal Committee (PLC)**. The PLC must have at least three ordinary members and half of its members must hold legal qualifications. Its role is to examine every non-constitutional bill (being a draft law introduced by a political party or Member of Parliament) and statutory instrument (being an ordinance issued by the President in his own name or a piece of subordinate legislation), and to identify any inconsistencies with the provisions of the Constitution. These inconsistencies are then notified to Parliament within a specified period of time. Schedule 4 of the Constitution provides that where Parliament has not received a report from the PLC regarding inconsistencies, it may assume that the bill or statutory instrument in question does not contravene the Constitution.

If the PLC informs Parliament that a provision in a bill or statutory instrument is contrary to the Constitution and its recommendation is accepted, Parliament is prohibited from passing the offending sections of the legislation. Should these sections be redrafted, they must be resubmitted to the PLC and be deemed compatible with the Constitution before they can be passed.

The PLC has notified Parliament of inconsistencies between numerous draft laws and the rights guaranteed by the Constitution, including the *Presidential Powers (Temporary Measures) (Broadcasting) Regulations*, the *Broadcasting Services Bill* (the precursor to the BSA), and the *Labour Relations Amendment Bill* (the precursor to the LRAA). However, in these instances the government opted not to accept the PLC's recommendations and instead fast-tracked the legislation through Parliament in the face of strong opposition.

Office of the Attorney-General and Ministry of Justice

The **Minister of Justice, Legal and Parliamentary Affairs** is appointed by the President pursuant to section 31D of the Constitution. The **Ministry of Justice** employs all magistrates, public prosecutors, prison officials and court support staff, and is responsible for the administration of justice.

The **Attorney-General** is the principal legal adviser to the government, and, according to Section 76 of the Constitution, is appointed by the **President** following consultation with the **Judicial Service Commission**. To be eligible for appointment, a candidate must hold the same qualifications as are required for appointment as a judge of the Supreme Court or High Court.

While the **Attorney-General** holds public office, he or she is independent from the public service and is paid a salary and allowances out of the Consolidated Revenue Fund as prescribed by Parliament. The remuneration of the Attorney-General cannot be reduced during his or her period of office. He or she is a member of the Cabinet and of Parliament, but does not have voting rights and cannot be elected to any Parliamentary office, post or committee.

The powers of the **Attorney-General** are set out in section 76(4) of the Constitution. In short, he or she may institute and undertake, or take over and continue any criminal proceedings before an ordinary court on behalf of the state. The Attorney-General is required to carry out the duties of the office impartially and must not be subject to direction or control by any person. Section 110 of the Constitution sets out the special procedure by which the Attorney-General may be removed in the event of misconduct.

The **Office of the Ombudsman** was established as an independent institution by statute in **1982** with a mandate to protect citizens against breaches of administrative power committed by ministries, government departments and statutory authorities, including the investigation of human rights violations. The Ombudsman may only act once a complaint is formally lodged and is not empowered to enforce his or her findings. However, he or she may make recommendations as to future conduct. The Ombudsman tables a report in Parliament annually on the activities that it has

undertaken. The Ombudsman is appointed by the **President** acting on the advice of the **Judicial Service Commission**, and is required to hold legal qualifications.

The **Office of the Ombudsman** operates under government pressure and is supportive of police and militia action even when it breaches legal standards (see http://www.kubatana.net/html/archive/hr/040719au.asp?sector=DEMG&range_start=1). The defence forces, police and prison services are specifically excluded from the scope of the Ombudsman's investigatory powers, as are the President and his staff, the Cabinet Office, the Attorney-General and judicial officers.

2. Sources of Law

Domestic Law

Section 89 of the Constitution provides that the law of Zimbabwe is the **Roman Dutch law** that was in force in the Cape Colony on **10 June 1891**, as modified by subsequent legislation. **African customary law** is also applicable where permitted by Zimbabwean legislation. Some rules of **English common law** had been adopted by the judges in the Cape prior to 1891, and further common law rules have subsequently been adopted by Rhodesian and Zimbabwean judges since that time. The doctrine of precedent applies, and lower courts are bound to follow decisions made by superior courts when determining cases.

Indigenous Law

African customary law is recognized in Zimbabwe and statutory provision is made for its application by all courts in appropriate cases. Section 23(3)(b) of the Constitution provides that the application of African customary law in any case involving Africans, or an African and one or more persons who are not Africans but have consented to customary law being applied, shall not be deemed discriminatory.

The Constitution also provides that the preservation of customary law concepts in matters of personal law such as adoption, marriage, divorce, burial or inheritance shall not be deemed discriminatory. This has resulted in the preservation of practices that discriminate against women in breach of Zimbabwe's international human rights obligations, as customary law has been upheld and applied in cases of conflict.

International law

Zimbabwe is a party to most major international human rights instruments, but not the *Convention Against Torture* or either of the *Optional Protocols to the ICCPR*. It ratified the *African Charter on Human and Peoples' Rights* in **1986**.

It is also a signatory to the *Harare Commonwealth Declaration*, signed by the heads of government of member countries of the Commonwealth on **20 October 1991**. The Declaration affirms a commitment to certain fundamental principles, including equal rights under law and the establishment of national systems based on the rule of law and the independence of the judiciary.

International treaties that have been ratified by Zimbabwe do not automatically become part of domestic law. Section 111B of the Constitution provides that international conventions, treaties and agreements that have been ratified are subject to the approval of Parliament, and will only become part of the nation's laws once an Act of Parliament has been passed.

In 1993, the **Human Rights National Committee** was established by the government to advise the government on human rights issues and to deal with national obligations under international instruments. The Committee has 20 members, all from the public service, and is chaired by the Ministry of Justice, Legal and Parliamentary Affairs. There are no representatives on the Committee from non-governmental organisations. Although the Committee's agenda included the conduct of national legal education programmes, financial constraints have prevented their implementation.

3. Legal Publicity and Judicial Transparency

The Ministry of Justice is obliged to ensure that all laws and regulations are published in the **Government Gazette**. These are not widely available but copies can be obtained by lawyers. While there is no official electronic database of legislation and court judgments, the **Veritas Trust**, a local non-governmental organisation, follows the progress of parliamentary bills and places copies online.

Section 194 of the *Criminal Procedure and Evidence Act* provides that all court proceedings are open to the public except for those involving juveniles. In addition, the courts are empowered to order that proceedings be held in camera where this will serve the interests of justice.

High Court and Supreme Court decisions are published in law reports and circulated. In addition, the media may publish articles concerning proceedings that have been conducted in open court but cannot disclose the identity of juveniles involved in court proceedings unless it has been ordered that such reports are just and equitable in the public interest. In addition, section 196 of the *Criminal Procedure and Evidence Act* prohibits the publication of the identity of witnesses where the accused is charged with sexual offences.

Courts have the power to issue petitions for contempt where inappropriate public statements are made concerning legal proceedings, or where court orders have been disobeyed. While this power is regularly exercised by judges to lay charges against government officials who criticise decisions or flout orders, the culture of impunity means that sanctions imposed upon those found guilty of contempt are not carried out in practice.

English is the official language of Zimbabwe, although Shona, Sindebele (the language of the Ndebele people) and numerous other tribal dialects are widely spoken. Court proceedings are conducted in English, and laws and court reports are published in English. However, information pamphlets containing basic criminal and family law information have been produced in Shona and Ndebele as well as English. The state funds the provision of court interpreters, who are members of the public service. Interpreters are an essential part of the legal process, as more than half of the population is not proficient in the language.

b. The Judiciary

1. Judicial Structure Court System

Section 79B of the Constitution protects the independence of the judiciary by providing that in the exercise of judicial authority, a judge shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him or her under the direction or control of another member of the judiciary.

The court system is composed of the **Supreme Court, High Court, Magistrates' courts and local courts.**

Pursuant to Section 80 of the Constitution, the **Supreme Court** is the final court of appeal for Zimbabwe. It has original jurisdiction to enforce the protective provisions of the constitutional *Declaration of Rights* and is competent to hear these constitutional cases at first instance, as well as cases concerning constitutional issues that are referred to it by other courts. It also exercises appellate jurisdiction in appeals from the High Court and other courts and tribunals. The Supreme Court's permanent seat is in Harare but it also sits regularly in Bulawayo. Section 80(3) of the Constitution provides that the Court shall consist of the Chief Justice and such other judges of the Supreme Court, being not less than two, as the president may deem necessary. It sits as a bench of five judges when hearing constitutional cases.

The **High Court** has original full jurisdiction in both civil and criminal matters and has permanent seats in Harare and Bulawayo as well as conducting circuit sittings. The Bench is headed by the **Chief Justice**, assisted by the **Judge President** who assumes effective control of the Court's business. Judges are assigned to the Court from time to time as required.

Under the *Small Claims Court Act*, **small claims courts** dealing with minor disputes have been established to reduce the workload of the ordinary court system. The procedure is designed to be as informal as possible to facilitate the speedy resolution of matters. Simple application forms replace formal pleadings. A qualified lawyer with three years' experience, a former legal practitioner or a magistrate may be appointed to preside over proceedings in these courts. Legal representation is not permitted. The decision of the adjudicator is final and appeals are only permitted on the basis of procedural impropriety. These are heard by the High Court.

Magistrates' courts are established by statute, and are divided into **regional and provincial courts**. The magistracy is led by the **Chief Magistrate**. Magistrates are appointed by an executive authority. **Regional magistrates' courts** are superior in the court hierarchy and exercise criminal jurisdiction. They fit in between the jurisdiction exercised by the High Court above them, and the provincial magistrates' courts below them. They are established in Harare and Bulawayo and also hold sittings in other town centres. **Provincial magistrates' courts** have been set up in 20 cities throughout Zimbabwe and exercise both civil and criminal jurisdiction.

The **local courts** system is divided into **primary courts** and **community courts**. **Primary courts** are competent to try certain types of civil cases and have jurisdiction only where African customary law is applicable. Hearings are presided over by headmen appointed from the local population, assisted by assessors. **Community courts** have jurisdiction over all civil cases where customary law is applicable and also deal with appeals from village courts. Community courts also have limited

criminal jurisdiction in relation to petty offences. They are presided over by chiefs, assisted by assessors.

Appellate System

Appeals from primary courts are brought to community courts, and from community courts to magistrates' courts. Decisions of lower courts can only be reversed on review or appeal in the **High Court** or the **Supreme Court**, following proper legal procedures.

Under section 26 of the *High Court Act 1981*, the **High Court** may exercise powers of review in relation to civil and criminal decisions and proceedings for all inferior courts, tribunals and administrative authorities within Zimbabwe. Section 26 also provides that judicial proceedings must be conducted fairly and the rights of parties must be respected when the Court exercises its powers of judicial review. Section 27(1) of the Act sets out the grounds upon which review may be sought, which are:

- (a) Interest in the case, bias, malice or corruption on the part of the judicial officer;
- (b) Absence of jurisdiction on the part of the court, tribunal or authority to deal with the matter;
- (c) Gross irregularity in the proceedings or decisions.

2. Special Courts

“Special courts” are defined by Section 92(4) of the Constitution. They include the **Administrative Court**, the **Fiscal Appeal Court** and the **Special Court for Income Tax Appeals**. The **Labour Court** is also a special court by virtue of section 84 of the *Labour Act* (Chapter 28:01).

The *Administrative Court Act* (Chapter 7:01) establishes the **Administrative Court**, which functions as a court of appeal in respect of a variety of administrative and judicial decisions issued under legislation, and by tribunals and statutory authorities. The Administrative Court has heard and determined a number of significant proceedings since **2000** relating to land acquisition, broadcasting licences and media accreditation.

Section 92(1) of the Constitution gives to the **President** the power to make appointments to special courts after consultation with the **Judicial Service Commission**. In addition, **Parliament** may empower the **Chief Justice** to appoint a **High Court judge** to preside over a special court for a specified period, after consultation with the **Judicial Services Commission**. The office of a person appointed to a special court may not be abolished without his or her consent, and his or her conditions of service may not be amended.

Appeals against decisions of special courts may be brought to the **High Court**.

3. Military Tribunals

In Zimbabwe, everyone is entitled to be tried by the ordinary courts or tribunals using established legal procedures. Members of the defence forces are tried by a court martial only when they have committed offences against military regulations. In these instances, they must still have their constitutional rights protected, meaning that they

are entitled to be informed of the reasons for their arrest and detention, and must be brought before a tribunal without undue delay. Civilians cannot be tried by courts martial.

In theory, when members of the military forces commit crimes, they are subject to the jurisdiction of the ordinary courts. However, state-sanctioned violence is prevalent in Zimbabwe, and the armed forces are routinely dispatched to deal with public assembly “offences”. Crimes and human rights violations committed in this context are rarely reported by the police who refuse or are practically unable to enforce civilian laws against the armed forces as they are refused access to army barracks. While the armed forces remain subject to military policing and courts-martial, these procedures are not transparent and not subject to public scrutiny in the same manner as the ordinary court system.

4. Judicial Service Commission

The **Judicial Service Commission (JSC)** is constituted under Section 90 of the Constitution. It comprises at least five persons, with a maximum of six members permitted. Three commissioners are directly appointed by the President, while the remaining three positions are filled by the Attorney-General, the chairperson of the Public Services Commission, and either the Chief Justice or the most senior judge holding office in the Supreme Court. However, as the latter three appointments are also made by the President, in reality, the entire JSC is appointed and controlled by the government. This clearly jeopardises the Commission’s impartiality. The JSC’s ostensible independence is protected by Section 109(1) of the Constitution which provides that “no commission established under the Constitution shall be subject to the authority or control of any person.”

While Section 109(5) guarantees that the salaries of JSC members shall not be reduced during their period of office, financial realities have undermined this protection.

Pursuant to Section 91 of the Constitution, the **JSC**’s function is to provide advice and carry out duties in relation to the judiciary pursuant to the Constitution and any other laws. In practice, its primary roles pertain to the appointment and removal of judges. Pursuant to Section 84(1) of the Constitution, the President must consult the JSC before appointing judges to the Supreme Court and High Court. He is not bound by the JSC’s advice but must inform Parliament immediately in circumstances where he chooses not to adopt its recommendation. Where it is sought to remove a judge due to misconduct or disability, Section 87 of the Constitution provides that the President must present the findings of the tribunal constituted to investigate the charges to the JSC for decision. In this instance, the President has no option to remove the judge if this course of action is recommended by the JSC. It should be noted that the JSC operates in the absence of any written procedures and rules.

5. Court Administration

The reluctance of judges to accept unpopular cases for fear of attacks or political interference means that delays may be experienced in the hearing of, and the delivery of judgment in, controversial matters or cases that challenge government conduct. This is particularly problematic given the high inflation rate in Zimbabwe, and results in the value of settlements being greatly reduced by the time they are awarded.

6. Budget and Autonomy

The legal system is severely under-resourced, resulting in poor public access to the courts and significant delays in the hearing and determination of cases. Decisions concerning court funding are the sole province of the **Ministry of Justice**. Funding is used as a means of controlling judicial decision-making, with the courts of compliant judges receiving greater financial resources and benefits.

7. Enforcement of Decisions

There is a requirement for judicial decisions to be provided with reasons in written form. However, lack of court resources sometimes prevents judgments from being published due to the expense involved.

The government reportedly has a long history of enacting amnesty laws in respect of politically-motivated crimes, including human rights abuses and enforced disappearances, thereby circumventing the judicial process (<http://www.lrf.co.zw/>). **President Mugabe** has also exercised presidential clemency on a number of occasions to give amnesty to individual members of ZANU-PF, dissidents and collaborators involved in political violence, and to pardon party members serving custodial sentences issued by the courts.

c. Judicial Actors

c.1. Judges

1. Internal Independence

Pursuant to Section 79B of the Constitution, a judge may be placed under the direction or control of another member of the judiciary by a written law.

The removal of responsibility for case allocation from the registrar to the **Judge President of the High Court** has led to the suggestion that specific cases are allocated to particular judges in order for a desired political outcome to be achieved. **Stephen Irwin QC**, Chairman of the Bar of England and Wales noted in his **April 2004** report, prepared for the **International Council of Advocates and Barristers**, that there are instances where the manner of case allocation has given rise to the inference that political influence has expedited or delayed the setting down of a case for hearing (see http://www.kubatana.net/html/archive/legal/040420si.asp?sector=HR&range_start=181). This contravenes Article 14 of the *UN Basic Principles on the Independence of Judges*, which provides that the assignment of cases shall be “an internal matter of judicial administration”.

2. Qualifications, Appointment and Training

The qualifications of judges of the Supreme Court and High Court are set out in Section 82 of the Constitution. To be eligible, a candidate must:

- a. Be or have been a judge of a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language; or
- b. Be or have been qualified to practise for not less than seven years as a legal practitioner in Zimbabwe, or in a country where the common law is Roman-Dutch and English is an official language or, if he or she is a citizen of Zimbabwe, in a country in which the common law is English and English is an official language.

Section 84(1) of the Constitution provides that the **Chief Justice**, together with members of the **Supreme Court** and **High Court**, are appointed by the President following consultation with the Judicial Services Commission.

Section 84(2) of the Constitution provides that the President must inform **Parliament** as soon as possible where a judicial appointment is made that is not consistent with any recommendation made by the Judicial Service Commission.

Section 85 of the Constitution provides for the appointment of **acting judges**, who are required to have the same qualifications as Supreme Court or High Court judges. Acting judges are not guaranteed tenure.

Section 7 of the *Magistrates' Court Act* provides for the appointment and qualifications of magistrates. They are appointed by the **Public Service Commission**, an executive authority established under the Constitution, and are employees of **Ministry of Justice**. However, their advancement depends on reviews of their professional work provided by members of the High Court and Supreme Court benches, as well as regional magistrates who operate in a supervisory capacity. Magistrates are not required to complete a law degree but may instead graduate from the **Judicial College of Zimbabwe**, an organisation established and financially supported by the **British government**.

Judges and magistrates are not required to participate in continuing education programmes.

As at **July 2004**, approximately one-third of judges in Zimbabwe are women, and about five per cent are whites.

3. Security of Tenure

Section 86(3) of the Constitution provides that the office of a Supreme Court or High Court judge shall not, without the judge's consent, be abolished during his or her tenure in office.

Pursuant to Section 86 of the Constitution, a judge of the Supreme Court or High Court shall retire at the age of 65 years. Where a judge is in good health, he or she may continue until the age of 70 years provided that a medical report attesting to his or her medical fitness has been submitted and accepted by the President after consultation with the Judicial Service Commission.

Section 84(3) of the Constitution provides that a judge of the Supreme Court or High Court may be appointed for a fixed period, and shall be exempted from the scope of Section 86.

Section 86(2) of the Constitution provides that a judge of the Supreme Court or High Court may resign from office at any time by giving written notice to the President.

The salaries and conditions of service of judges are fixed by the President. Section 88(1) of the Constitution provides that funds for the payment of salary and allowances to the Chief Justice and judges of the Supreme Court and High Court shall be charged upon and paid out of the Consolidated Revenue Fund. Section 88(2) of the Constitution provides that the salary and allowances of a judge may not be reduced during the period that he or she holds office.

Conditions of employment for magistrates, including remuneration, are poor. Magistrates are not guaranteed tenure, and may be hired or fired at the will of the Public Service Commission. Further, as public servants, magistrates are far more susceptible to personal attacks and intimidation, particularly in remote areas where they are in regular contact with those people who come before them in the courts.

4. Freedom of Expression and Association

In accordance with British practice, judges are constrained from publicly responding to the often slanderous attacks made against them in the state-owned media and convention demands that the executive - in particular, the **Minister of Justice** and **Attorney-General** - present a defence on their behalf and condemn and discourage such behaviour. However, these officers have systematically refused to take official action against those who harass and attack judges.

Judges and other judicial officers are free to form their own associations.

5. Professional Secrecy and Immunity

Judicial officers cannot be sued in their personal capacity for acts or omissions in the course of carrying out their official functions.

Section 18 of the Constitution requires judges to disqualify themselves from cases where there is a perception of bias or a conflict of interest.

While judges may not hold political office simultaneously with judicial office, in practice there is considerable movement between government posts and judicial duties. For example, the current **Chief Justice Godfrey Chidyausiku**, appointed in **2001**, had previously held office as a pro-Mugabe Member of the Rhodesian parliament during the 1970s, served as the Deputy Minister of Justice and became Mr Mugabe's Attorney-General shortly after independence in 1980. His appointment in 1999 as chairman of a ruling-party controlled commission to draft a new national Constitution drew widespread criticism, particularly after the draft produced contained a significant enhancement of President Mugabe's powers.

6. Discipline, Suspension and Removal

The investigation of charges and complaints against judges is conducted by the tribunals created under the Constitution. Section 87 of the Constitution provides that

judges in the Supreme Court or High Court may be removed from office only for inability to discharge their functions or for misbehaviour. Where it is proposed to remove the Chief Justice, section 87(2) of the Constitution provides that the President must appoint a tribunal to investigate the allegations made. In the case of other judges of the Supreme Court and High Court, section 87(3) also requires that a tribunal be appointed to conduct an inquiry. The tribunal is required to make a recommendation to the **Judicial Services Commission**, and the question of dismissal will be determined on this basis. Section 87(8) of the Constitution provides that a judge will be suspended from performing the functions of his or her office once the question of removal has been referred to a tribunal, and that the suspension shall remain in force until revoked by the President or until the judge is removed from office.

The provisions of the *Commissions of Inquiry Act* (Chapter 10:07) shall apply to the operation of the tribunal and the commissioners who are appointed to it. Tribunals for removal of judges are composed of at least three duly qualified members who are selected by the President. Members must be selected from amongst persons who have held office as a judge of the Supreme Court or High Court, persons who hold or have held office as a judge of a court in the English or Roman-Dutch common law tradition having unlimited criminal or civil jurisdiction, or specifically nominated legal practitioners.

Misconduct by magistrates is handled pursuant to the *Public Service Regulations 2000*.

c.2 The Legal Profession

1. Qualifications and Training

Historically, the legal profession in Zimbabwe had a **Bar** divided between advocates and attorneys, similar in nature to that between barristers and solicitors. In **1981**, the legal profession was fused. Lawyers may still opt to practise as attorneys who provide advisory services and prepare documents, or as advocates who specialise in trial work and appear in court to represent clients. The majority of registered practitioners are based in Harare, with a substantial number in Bulawayo.

In order to be admitted to practice, lawyers must complete a university law degree course that has fulfilled the requirements of, and has been certified by, the **Council for Legal Education (CLE)**. The CLE is a statutory body established under the *Legal Practitioners Act* (Chapter 27:07), which sets all standards for qualification as well as entrance examinations for the profession. The only recognised minimum law degree is the Bachelor of Laws (LLB) offered by accredited public universities with faculties of law. In order to complete requirements and be entitled to registration in the Zimbabwe High Court, candidates must serve a three-year pupillage under the auspices of the **Zimbabwe Law Society**.

In addition, the *Legal Practitioners Act* provides for reciprocity in that it allows practitioners coming from a country with a Roman-Dutch law system to practise in Zimbabwe upon making a successful application to the Minister of Justice, Legal and Parliamentary Affairs. The **Council for Legal Education** must certify that the

standard of instruction received by the practitioner in his or her homeland is equivalent to that required of legal practitioners in Zimbabwe.

While continued legal education is not required of all lawyers, it is a prerequisite for those wishing to set up their own practice. As most lawyers in Zimbabwe practise in this manner, the rate of participation in continuing educational programmes is quite high.

Paralegals, who work under the supervision of lawyers, are the main providers of legal services in rural areas. This is largely due to the reliance upon customary African law to resolve disputes in these regions. While they are not licensed as lawyers and do not have the right to represent litigants in court, they are trained to provide legal advice to clients. They do not, however, complete law degrees.

In **2003**, the **Law Society** noted that there were 1,470 practising lawyers in Zimbabwe. Females comprise approximately one-third of the legal profession, and whites about 10 per cent.

2. Duties and Responsibilities

The *Legal Practitioners Act* is the primary legislation regulating the legal profession in Zimbabwe. The Act requires all lawyers or law firms to register with the Ministry of Justice, Legal and Parliamentary Affairs to practise in the country's courts. The annual registration process generally involves the submission of an audit certificate concerning funds held in trust for clients.

Lawyers are subject to strict ethical duties under the *Legal Practitioners Act* and the rules of civil court procedure, and may be held liable for professional negligence if they are derelict in the performance of their duties.

3. Freedom of Expression and Association

Whilst lawyers are free to form collectives which address particular areas of interest or affiliation, their groups may face persecution in the event that their agenda clashes with government interests.

4. Professional Associations

The **Law Society of Zimbabwe** is the primary professional organisation for members of the legal profession and is established pursuant to the *Legal Practitioner Act 1981*, which sets out its responsibilities. Membership of the Law Society is mandatory for all practising lawyers. The **Bar Association** continues to exist for those lawyers practising solely as advocates.

Although there have been claims that the Law Society reflects the interest of white lawyers in large firms in capital cities and is therefore not representative of the whole of the legal profession, this is reportedly not a widely held view. African lawyers are generally able to work and advance themselves in the profession. The legal community has resisted government proposals to give the state's legal work exclusively to black firms, and have denounced this as an attempt by the government to use economic incentives to silence its critics and to undermine the independence of the legal profession. However, to date, the government continues to wield its

economic power by providing legal work generated by statutory corporations and state business interests to firms in its favour.

The **Law Society of Zimbabwe** has led the legal profession in supporting the independence of the judiciary and condemning personal attacks and threats aimed at individual judges to force resignations and retirements. At its annual general meeting in **2001**, the Law Society's members passed a resolution reaffirming its commitment to these objectives. Reportedly, following the resolution, the **Minister of Information and Publicity** threatened to amend existing legislation to prevent lawyers from issuing similar statements in the future.

Lawyers enjoy a monopoly in courts and unqualified lay persons are prohibited from representing parties in court proceedings. While litigants may appear in person in the magistrates' courts, they must obtain leave to represent themselves in the High Court or Supreme Court.

5. Disciplinary Proceedings

Lawyers must abide by a compulsory code of conduct administered by the Law Society. The **Law Society** is empowered to initiate disciplinary proceedings for violations of the code. These proceedings are determined by a tribunal, composed of a judge and senior lawyers, in accordance with the provisions of the code. A lawyer accused of a disciplinary offence may be legally represented at a tribunal hearing and is entitled to seek judicial review of any decision made by the tribunal.

The annual reports of the Law Society indicate that most complaints received from clients about members of the profession relate to relatively insignificant matters such as failure by lawyers to respond promptly to correspondence, rather than serious breaches of ethics.

c. 3 Prosecutors

1. Qualifications and Training

The majority of prosecutors receive training at the **Judicial College of Zimbabwe**, although persons holding a law degree may apply to join the service. Prosecutors are not required to participate in continuing education programmes.

2. Status and Conditions of Service

In addition to the appointment of the Attorney-General, Section 76 of the Constitution provides for the appointment of one or more **Deputy Attorney-Generals**. The Deputy Attorney-General is required to hold the same qualifications as the Attorney-General and is appointed in the same manner. Similarly, he or she holds public office but is not a member of the public service.

The Deputy-Attorney-General's role is to assist the Attorney-General in the exercise of his or her functions, and to perform such other functions as are specifically assigned. He or she shall also act as Attorney-General when the office is vacant, or when the Attorney-General cannot fulfil his or her duties.

The Deputy Attorney-General's terms of employment (including remuneration) are fixed by the President, and his or her salary is paid from the Consolidated Revenue

Fund. The salary of a Deputy Attorney-General may not be reduced during his or her term of office. Section 110 of the Constitution sets out the special procedure by which the **Attorney-General** may be removed in the event of misconduct.

The **Ministry of Justice** appoints all other members of the prosecution service and prescribes their salaries and employment conditions. Like magistrates, they are employed as civil servants in the public service. As bureaucrats, prosecutors have not established a professional association and are not required to belong to one. As the state prosecution service forms part of the public service, senior appointments are made by the government and lower-level appointments are made by the **Public Service Commission**. The public service retirement age of 60 years also applies to prosecutors.

While the public service is in theory non-political and civil servants are prohibited from participating in party political activity under the *Public Service Regulations*, public prosecutors come under considerable political pressure in their role as the government's representatives in court in criminal matters, particularly where charges have been brought under the *Public Order and Security Act*.

Females comprise approximately one-third of the prosecution service. There are currently no white prosecutors working in Zimbabwe.

3. Role in Criminal Proceedings

Prosecutors carry out functions assigned by the Attorney-General, and are constitutionally required to be free from political direction or control. In theory, the Attorney-General is solely responsible for the decision to bring a prosecution. Under Section 76(4)(c) of the Constitution, he or she may discontinue any criminal proceedings instituted or take over at any stage before judgment.

In practice, however, frequently there is political interference in the decision. This is particularly the case where the accused person is a member of the ruling party, or is a friend or relative of a member of the government. As a result of the system of political patronage in Zimbabwe, crimes committed by public officials are simply not prosecuted. The decision to drop charges is commonly attributed to insufficient evidence or poor investigation by police.

Policing in Zimbabwe is selective. In their **September 2002** report, "Justice in Zimbabwe", the **Zimbabwe Legal Resources Foundation** (LRF) (<http://www.lrf.co.zw/>) noted numerous reports of police refusals to accept complaints against members of the ruling party and war veterans. It is also indicated that a large number of complaints are inadequately investigated. Judges and magistrates have criticised police inefficiency and incompetence, as well as their failure to conduct a proper investigation prior to arresting suspects. In the above-mentioned report, the LRF also noted that corruption in the police force has been frequently reported, and prosecutions under the *Prevention of Corruption Act* are common.

4. Disciplinary Proceedings

Pursuant to the *Public Service Act* (Chapter 16:03), the **Ministry of Justice** is responsible for disciplinary matters concerning prosecutors, including their removal where it is warranted. The legislation and regulations creating the civil service deal

with issues such as abuse of power, conflict of interest, bribery and the trading of inside information. In addition, the public service has adopted a *code of conduct*, inherited from the United Kingdom prior to independence.

Prosecutors are required to disqualify themselves from cases if there is a conflict of interest or perception of bias.

d. Access to Justice

1. Access to Justice

Section 13(3) of the Constitution requires that a person who is arrested or detained be informed as soon as is reasonably practicable of the reasons for his or her arrest and detention, and be afforded an opportunity to consult a lawyer at his or her own expense without delay. A person is entitled to be informed of the nature of charges in a language that he or she understands.

Police powers of arrest and detention are governed by the *Criminal Procedure and Evidence Amendment Act* (Chapter 9:07). While this legislation does provide for arrest without warrant, this is only available in limited circumstances. Arrest without warrant is permitted where a person commits or attempts to commit an offence in the presence of the arresting officer. Arrest without warrant is also permitted where a police officer has reasonable grounds to suspect that the arrested person has committed an offence listed in the *First Schedule* to the *Criminal Procedure and Evidence Act*, or if the police officer is ordered by a judge, magistrate or justice of the peace to effect such an arrest. Finally, it is permitted in any of the other circumstances listed under Section 25 of the *Criminal Procedure and Evidence Act*.

2. Fair Trial

Section 18 of the Constitution protects the right of a person charged with a criminal offence to have a fair hearing within a reasonable time. In **1991**, *In re Mlambo*, the **Supreme Court** held that where the length of a delay is such as to deny the accused of his or her right to a fair hearing, the section will be violated and the proceedings must be permanently stayed.

3. Legal Aid

Section 18 of the Constitution provides that a person charged with a criminal offence shall be permitted to defend himself or herself in person or, with the exception of proceedings before a local court, may be represented by a legal representative of his or her choice – albeit at his or her own expense. In practice though, every person charged with murder is provided with a lawyer in the event that he or she cannot afford one.

The *Legal Aid Act* (Chapter 7:16) also allows for the provision of legal representation to persons charged with a criminal offence who cannot afford a lawyer.

When the question of access to legal representation has been brought before the courts, the rights of the suspect have been consistently upheld. In the **1983** case of *S v Slatter & Ors*, the courts confirmed that a person's right to legal representation in criminal proceedings includes the right to have access to his or her legal advisers

before proceedings are commenced. The right will be breached where an accused person has been prevented in any way from having legal assistance, even if he or she has not stated a desire to be represented by a lawyer.

The formal legal aid programme is presently supplemented by projects operated by human rights organisations and lawyers' collectives.