

WHITHER TO, THE JUDICIARY IN ZIMBABWE? A CRITICAL ANALYSIS OF THE HUMAN RIGHTS JURISPRUDENCE OF THE GUBBAY AND CHIDYAUUSIKU SUPREME COURT BENCHES IN ZIMBABWE AND COMPARATIVE EXPERIENCES FROM UGANDA.

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF PRETORIA,
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW
(LLM HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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DECLARATION

I, **Tafadzwa Mapfumo**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DEDICATION

To the judiciary in Zimbabwe and the brave judges who toil for human rights. Your efforts bring hope for the future.

ACKNOWLEDGEMENT

I am grateful to my supervisor, Professor Fredrick Jjuuko for his supervision throughout the dissertation. Thank you for the meticulous guidance, invaluable criticism and encouragement that made completion of this dissertation possible.

I am sincerely indebted to Professor Michelo Hansungule for all the help and guidance in bringing this research work together. Thank you so much.

I am greatly obliged to the Centre for Human Rights, University of Pretoria for the opportunity to participate in this programme. Thank you Professor Christof Heyns and Professor Frans Viljoen. Martin Nsibirwa, Jeremy, Waruguru, Gabriel thank you for the roles that you played that made my stay in Pretoria pleasant.

Thank you, Arnold Tsunga. Your zeal for the empowerment of young and upcoming human rights activists inspires me. You are a good mentor.

Special thanks to Greg Lennington for assisting with research materials and insight into this dissertation. Thank you, Otto Saki, Brian Crozier, Professor Geoff Feltoe for taking time out assisting during my research.

Thank you Livingston, the director of Foundation for Human Rights Initiative. My internship was pleasant and valuable for my future. Thank you for the invaluable experience.

To my classmates, thank you for being friends. Special thanks to Monica, Tarisai, Yoseph and Nyasha for being good friends throughout the programme. To the Makerere group, Liliana, Michel, Thulani, Tarisai and Mwiza, thank you for making my stay in Kampala memorable. Jacob Mafume, thank you for all the laughter in Kampala.

Edson, you are special. Thank you for the encouragement and support throughout this programme. Thank you for believing in me.

God bless you all.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
AJA	Acting Judge of Appeal
ANZ	Associated Newspapers of Zimbabwe
AU	African Union
CC	Constitutional Court
CCJP	Catholic Commission for Justice and Peace
CFU	Commercial Farmers Union
CJ	Chief Justice
ECHR	European Commission for Human Rights
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IJAZ	Independent Journalists Association of Zimbabwe
JSC	Judicial Service Commission
LRP	Land Reform Programme
MDC	Movement for Democratic Change
NGO	Non-Governmental Organisation
NRM/A	National Resistance Movement/Army
PF ZAPU	Patriotic Front for Zimbabwe African People's Union
POSA	Public Order and Security Act
SADC	Southern African Development Community
SAHRIT	Human Rights Trust of Southern Africa
SC	Supreme Court
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UPC	United Peoples' Congress
USA	United States of America
ZANU PF	Zimbabwe African National Union Patriotic Front
ZLR	Zimbabwe Law Reports
ZWD	Zimbabwean Dollar

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CHAPTER 1: INTRODUCTION

1.1 Background to study

The judiciary in Zimbabwe has seen four Supreme Court (SC) benches under different Chief Justices (CJ).¹ The first bench was under CJ Fieldsend and endured from independence until the mid-1985 when the second bench under CJ Dumbutshena took over, the third under CJ Gubbay came in the 1990s until 2000.² The enduring bench is under CJ Chidyausiku.³

The Constitution gives the SC the mandate to protect human rights.⁴ In addition, the SC is the guardian of the supreme law of the land and any act that is inconsistent with the Constitution can be struck down to the extent of its inconsistency.⁵ The promotion and protection of human rights, through the judiciary, is a fundamental aspect of a democratic society.⁶ The study of the benches in Zimbabwe will thus be premised on the above summations.

One notes that each bench has been peculiar in its human rights jurisprudence. This peculiarity is curious in light of the fact that all of them were appointed on the same constitutional and legislative framework. Similarly, the interaction of each bench with the other organs of state, particularly the executive, varies from bench to bench. This work strives to investigate the causes of these differences, if at all.

A comparative evaluation with the Ugandan experience will be made. Uganda has generally had a turbulent political climate since its independence in 1962. Each political dispensation has seen a reshuffle in the judiciary and the appointment of a new CJ each time there was a change in political leadership. However the 1995 Constitution ushered in a new era with regards to human rights protection. The mandate to protect human rights vests with the judicature, which obtains more or less like the Zimbabwean scenario. Thus this work will evaluate best practices from Uganda and how they can inspire the Zimbabwean SC.

¹ Each bench is distinguished by the name of the CJ.

² A de Bourbon "Litigation –human rights in Zimbabwe: the past, present and future" 3 African Human Rights Law Journal 2 (2003) 195-221. See also Zimbabwe Human Rights Bulletin produced by Zimbabwe Lawyers for Human Rights October 2003.

³ Not above.

⁴ Section 24, Constitution of Zimbabwe.

⁵ Section 3, Constitution of Zimbabwe.

⁶ J Apple "The role of judicial independence and judicial leadership in the protection of human rights" in E Cotran et al, *The role of the judiciary in the protection of human rights* (1997) 197.

1.2 Problem statement

The judiciary in Zimbabwe used to be viewed as a progressive bench recognised for its activism particularly its purposive approach in interpreting the Bill of Rights to ensure protection of human rights. It was one of the best Commonwealth judiciaries, which was inspired by international standards in interpreting human rights and at the same time contributed to the origination of normative standards through its decisions.⁷ Although Zimbabwe is a dualist system, the judiciary accepted and drew inspiration from international human rights treaties.⁸

The SC under former CJ Gubbay (the Gubbay bench) made several progressive pronouncements that favoured the promotion and protection of human rights. In tandem with its tradition of judicial independence, the judiciary interpreted draconian legislation in favour of human rights often striking down the offensive clauses in legislation.⁹ Indeed the perception towards the judiciary by the common person was that of a protector of human rights.

One landmark human rights decision on the Land Reform Programme (LRP) stated that, farm invasions were unlawful and an affront to section 16 of the Constitution. The SC ordered the executive to take necessary measures to ensure that invasions were sanctioned. It further requested the executive to furnish a plan of action for the LRP.¹⁰ The executive did not welcome this ruling and the SC judges were hounded out of office in a clear culmination of judiciary-executive tension.

A new bench came in under CJ Chidyausiku (the Chidyausiku bench). This bench made several rulings that took away individual property rights without justification.¹¹ In a clear shift of jurisprudential ideology, the current bench has not engaged in activism resulting in less, if not, no protection of human rights. The disparity in the jurisprudence is evident in other cases. The current bench seem to have abrogated its mandate to protect human rights.

⁷ The case of *CCJP v Attorney General, Zimbabwe and others* 1993 (1) ZLR 242 (S), on death penalty was quoted in the Human Rights Committee Communication No. 606/1994: Jamaica, CCPR/C/54/D/606/1994.

⁸ The ruling in *Chavhunduka & another v Minister of Home Affairs* 2000 (1) ZLR 552 (S) found freedom of expression as one of the values of democracy and drew reference from international law.

⁹ K Saller *The judicial institution in Zimbabwe* (2004).

¹⁰ *CFU v Minister of Lands and Another* (2) 2000 ZLR 469 (S).

¹¹ *Minister of Lands, Agriculture and Rural Resettlement and others v CFU*. This decision confirmed that the Government had complied with the conditions set in the earlier ruling referred in note 10 above, although there was no evidence to justify that.

This study is thus prompted to investigate why the different benches in Zimbabwe have produced totally variant jurisprudence particularly in light of the fact that the judiciary is operating under the same laws and is appointed under the same procedures as before.

1.3 Objectives of study

The objectives of this study are:

1. to examine the extent of protection of human rights by the different SC benches in Zimbabwe,
2. to bring to the fore the factors and circumstances that have influenced the different approaches to human rights protection by each bench,
3. to advocate for best practices for protection of human rights by the Zimbabwean bench in light of international norms,
4. to provide recommendations towards the strengthening of human rights protection through the judiciary in Zimbabwe.

1.4 Relevance of study

Commonwealth constitutions inherited at the dawn of independence embraced the concept of separation of powers.¹² Its significance was devolution of power among the three arms of the state while contemplating integration of the dispersed power in a workable government, which enjoins upon its branches separateness but dependency, autonomy but reciprocity.¹³ The judiciary is an arm of the tripartite state organs. According to Montesque, the prime mandate of a judiciary is to uphold the supreme law of the land. In contemporary discourse, this role is now particularised to protection of individual freedoms and liberties against executive excesses.

The relevance of this study is to explore the extent to which Zimbabwe's judiciary has lived up to this mandate mentioned above. In a state of affairs where many academic writings have predicted the near irrelevance of the judiciary, this study further wishes to enunciate possible resuscitation mechanisms for ensuring the restoration of judicial activism.

¹² Montesque, a French theorist, propounded this concept.

¹³ *Youngs Town Sheet & Tube co v Sawyer* 343 US 579 725 CJ 863 96 L Ed 1153 1952.

1.5 Research questions

- 1 Have the different benches of the judiciary in Zimbabwe protected human rights through their jurisprudence?
- 2 What are the factors and circumstances that have influenced the respective benches in the approach to human rights in their decisions?

1.6 Limitations of the study

The judiciary in Zimbabwe has seen four different benches headed by four different CJs. This study focuses on the later two, the Gubbay bench and the Chidyausiku bench. However, this study will make a cursory look at the first two benches, the Fieldsend bench and the Dumbutchena bench. This will present a limitation with regards to exhaustion of the work of the first benches while at the same time their brief overview is necessary to enable continuity in examining the later benches.

There is a wide array of jurisprudence on human rights issues of the SC benches under consideration. This will present another challenge with regards to the methodology for selection of cases. To this extent, the study may not be exhaustive of all the human rights jurisprudence. This means that the paper will only highlight the landmark cases on human rights of the two benches.

This study will inevitably narrow down the time frame of the Chidyausiku bench because it is the enduring bench. Thus, there is the limitation of confinement to a time span focusing on the cases that this bench has already decided. However the limitations noted do not render the fundamentals of the study irrelevant.

1.7 Literature review

An array of literature exists on the judiciary and the justice delivery system in Zimbabwe. Lennington wrote on constitutional law and the practice in Zimbabwe.¹⁴ His work also discusses the judiciary and enforcement of fundamental freedoms and liberties, among other issues. He analyses jurisprudence from the different benches that endured since independence. The work does not however cover enforcement of human rights by the current bench.

¹⁴ G Lennington, *Constitutional law of Zimbabwe* (2001).

Hatchard studies the adequacy of constitutional safeguards and domestic laws in protecting individual liberties during a state of emergency.¹⁵ His work was influenced by a proclamation of a state of emergency on Zimbabwe since independence until early 1990. He reviewed human rights cases pertinent to the state of emergency. The work does not cover the current bench but provides useful insight into the approach of the previous benches.

Hatchard et al, explores constitutionalism in Eastern and Southern African states.¹⁶ The work makes reference to the practices of the judiciary in Zimbabwe. The work advocates for best practices and draws from various jurisdictions on independent and effective judiciaries. Thus, the work does not cover the area contemplated in this study.

Saller makes a comprehensive review of the judiciary in Zimbabwe.¹⁷ She focuses on the constitutional provisions establishing the judiciary, structure of the courts and an analysis of several rulings of the superior courts and the response of the government and finally she analyses the concept of separation of powers.¹⁸ In essence, her study assesses the independence of the judiciary in Zimbabwe.

A report entitled “The state of justice in Zimbabwe” studies of the justice delivery system in Zimbabwe, from formal and special courts to the attorney general, police, prisons and the legal profession.¹⁹ It evaluates institutional independence of the stakeholders named above and the extent of executive influence on same. Mention is made of several human rights jurisprudence of the current bench and this work develops these cases in greater detail.

Another report called “Justice in Zimbabwe” covers a wide spectrum of issues including intimidation of judges by the executive, politicisation of the police, repressive legislation and its effect on human rights, and also specific human rights cases from the current bench.²⁰ This work also develops on the approach of the current bench in human rights protection.

¹⁵ J Hatchard *Individual freedoms & state security in the African context: The case of Zimbabwe* (1993) 35.

¹⁶ J Hatchard et al, *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspectives* (2004) 150.

¹⁷ Saller note 9 page 1.

¹⁸ Note above.

¹⁹ “The State of Justice in Zimbabwe”, Report by the International Council of Advocates and Barristers (2004).

²⁰ “Justice in Zimbabwe”, Report by the Legal Resources Foundation WO 41/84 September (2002)
<http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/LRFreport30-09.pdf> (accessed 14 July 2005).

Former CJ of the SC of Zimbabwe, Anthony Gubbay, also wrote on the judiciary, focussing on the independence of the judiciary through security of tenure, conditions of service and autonomous budgets.²¹ Gubbay also examined the role of the courts in promoting human rights.²² He further analysed the international standards for the protection of rights at the domestic level. This paper develops the jurisprudential analysis particularly taking into account the jurisprudence of the current bench.

De Bourbon²³ discusses how protective the jurisprudence of the courts has been in the past and he predicts a difficult future for human rights litigation because of certain constitutional impediments made by the current bench in terms of protecting human rights.

Dumbutshena²⁴ wrote on judicial activism in Africa including Zimbabwe as a way to protect human rights.²⁵ He saw judicial activism as a tool to achieving social justice by interpreting bills of rights in a generous and purposive way to give effect to human rights particularly in African society where the common people have several odds against them. He analysed the jurisprudence relating to women rights in the above-referred work.²⁶ This paper essentially looks beyond the studies mentioned above into the factors that have influenced the two judiciaries above in deciding cases. In particular, it analyses how these benches have protected human rights in their jurisprudence.

1.8 Research methodology

The research methodology is mainly literature search and comparative analysis. This includes library research, internet sources and comparative studies. These will focus on tracing thorough various writings, case law and international instruments and how the judiciary in Zimbabwe has protected

²¹ A Gubbay "The independence of the judiciary with special reference to parliamentary control of tenure, terms and conditions of service and remuneration of judges: judicial autonomy and budgetary control and administration" Paper delivered at the Latimer House conference 1998 <<http://www.clea.org.uk/articles/gubbay.htm> >(accessed 2 April 2005).

²² A Gubbay "The role of courts in promoting human rights: The case of Zimbabwe", Paper submitted for the Bergen Seminar on Development 2001 held on June 19 and 20
<<http://www.suntimes.co.za/business/legal/2001/07/08/carmel01.asp> >(accessed 9 May 2005).

²³ De Bourbon note 2 page 195-221.

²⁴ Late former CJ of Zimbabwe.

²⁵ E Dumbutshena "Judicial activism in the quest for justice and equity" in B Ajibola *The judiciary in Africa* (1998).

²⁶ Note above.

human rights. Critical and analytical skills will be employed in order to come up with conclusions. Comparative materials will be used from other countries particularly from Uganda.

1.9 Outline of chapters

Chapter 1 sets out the focus and content of the study. Chapter 2 gives a national framework for human rights protection in Zimbabwe. This looks at the structure of courts in Zimbabwe. Special emphasis is placed on the SC as the court that has the prime mandate of protecting human rights. Constitutional guarantees for the independence of the judiciary and the Bill of rights, among others is analysed.

Chapter 3 deals with human rights jurisprudence of the SC benches. The chapter focuses on approach of the benches to human rights protection. It examines the approach to procedural and technicalities that often hinder human rights litigation and protection such as standing, delay, interpretation, compliance with court orders and use of international instruments. Chapter 4 focuses on the experiences from Uganda and analyses the approach of the Ugandan courts. Chapter 5 consists of best practices from the two jurisdictions, conclusion and recommendations for the Zimbabwean judiciary.

CHAPTER 2: NATIONAL FRAMEWORK FOR HUMAN RIGHTS PROTECTION IN ZIMBABWE

2.1 Introduction

The national framework defining the mandate, scope and extent of the judicature gives insight into how a judiciary functions. Examination of constitutional provisions setting up and giving mandate to the courts is essential. It is further imperative to examine the international standards in order to set benchmarks against which to critique the national framework. This chapter is devoted to outlining normative standards in terms of international law, the constitutional provisions on the structure and functioning of the judiciary, the provisions entrenching the Bill of Rights and the provisions guaranteeing independence of the bench.

2.2 Normative standards on judiciary structures

Zimbabwe is party to various international instruments, which set out normative standards for judiciaries with a view to enhancing the protection of human rights. Treaties and numerous soft law sources including declarations, resolutions and principles, give rise to obligations applicable to Zimbabwe. While soft law sources have no formal status like treaties because they give no binding obligations, they however exert a moral force on governments and are internationally accepted as standard settings mechanism by which states are adjudged.²⁷ The normative standards on judiciary contained in soft law impact on structures of the judicature while those in treaties relate to substantive issues and consequently, the former will be outlined first.

The Commonwealth (Latimer House) Principles²⁸ endorse the concept of judiciary independence as “integral to upholding the rule of law, engendering public confidence and dispensing justice”²⁹. It further notes that the application of “national constitutions and legislation consistent with international human rights conventions and international law”³⁰ as the function of judiciaries. These principles are a follow up to other Commonwealth declarations, such as the Harare Declaration³¹ and the Millbrook

²⁷ Article 26, Vienna Convention, 1969.

²⁸ Abuja Communiqué 2003< http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{EA5732A8-839C-459C-A7D2-46C725815FDF}_abuja%20communiqué%20sans%20crops.pdf> (accessed 10 September 2005).

²⁹ Article iv, Commonwealth Principles.

³⁰ Note above.

³¹ Adopted by Commonwealth Heads of Government at Harare 1991.

Commonwealth Action Programme on the Harare Declaration³², all vouching for independent judiciaries that have the ability to protect human rights. Perhaps the pertinent question is the applicability of these since Zimbabwe pulled out of the Commonwealth.³³ Having noted that declarations and other instruments do not create binding obligations but exert only moral force through standard setting, there is therefore no renunciation clause in declarations. However, since there is no provision for ratification one is inclined to argue that the moral obligations apply and will continue to apply after the cessation of membership. Moreover, customary international law decrees that denunciation of obligations under one instrument will not absolve a state from fulfilling its similar obligations under other international instruments.³⁴

At the international plane, the UN Basic Principles on the Independence of the Judiciary³⁵ support constitutional guarantees for independence of the judiciary and the impartiality of the judiciary in adjudicating cases without influences. It further endorses the notion of exclusive jurisdiction and non-interference with decisions except in cases of judicial review sanctioned by the law.

The AU and the African Commission on Human and Peoples' Rights has also set standards for African judiciaries. The Mauritius Declaration and Plan of Action³⁶ gave recognition to "an independent, open, accessible and impartial judiciary which can deliver justice at an affordable cost"³⁷ as a foundation for sustainable development of the rule of law, democracy and human rights protection.

The African Commission has made several direct and indirect resolutions on the judiciary as a protector of human rights. The resolution on the Role of Lawyers and Judges in Integration of the Charter and Enforcement of Commission's work in the National and Sub-regional Systems³⁸ is notable for the call to use international law in domestic courts in particular the African Charter and the

and it affirmed their commitment to independent judiciaries in article 9<http://www.dfait-aeci.gc.ca/foreign_policy/commonwealth/imoc310-en.asp> (accesses 15 August 2005).

³² The Millbrook Commonwealth Action Programme on the Harare Declaration was a follow up to the Harare Declaration, which birthed the Latimer House Principles.

³³ Zimbabwe left the Commonwealth in 2003.

³⁴ Article 43, Vienna Convention, 1969.

³⁵ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Milan 1985 and endorsed by General Assembly Resolutions 40/32 of 1985 and 0/146 of December 1985< http://www.unhchr.ch/html/menu3/b/h_comp50.htm>(accessed 23 August 2005).

³⁶ Adopted in Mauritius CONF/HRA/DEC/.

³⁷ C Heyns *Human rights law Collection of Africa 1* (2004) 378.

³⁸ Adopted at the 19th Ordinary Session of the African Commission held in Ouagadougou, Burkina Faso, 1996.

decisions of the African Commission. The resolution on the Respect for and Strengthening of the Independence of the Judiciary³⁹ calls for appointment and conditions of service that recognise universal principles for the attainment of independent judiciaries. Fair trial resolutions⁴⁰ by the African Commission also call for competent judicial tribunals and implementation of fair trial rights.

The African Charter on Human and Peoples' Rights (African Charter)⁴¹, provides that "state parties to the present Charter shall have a duty to guarantee the independence of the courts ... and improvement of institutions entrusted with the promotion and protection of the rights and freedoms".⁴² The African Charter further entrenches fair trial rights particularly noting "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force".⁴³

Furthermore, the African Charter enjoins state parties "to adopt legislative and other measures" to ensure enjoyment of rights and freedoms enshrined in the Charter.⁴⁴ Judiciaries, as part of fulfilment of the state's obligations, ought to be protective of human rights. Zimbabwe as party to this treaty is obliged to fulfil the obligations in good faith in accordance with the *puncta sunt servanda* principle.⁴⁵

Moreover, some scholars of international law argue that international human rights instruments do not need to be domesticated for them to be applicable at a national level. They postulate that human rights are higher ideals and to that extent they automatically apply to a state upon ratification, thus, they are capable of immediate application in national courts. Zimbabwe is a dualist country and according to the Constitution, international instruments can only be invoked in domestic courts after being incorporated by an Act of Parliament.⁴⁶

The conflict between the Constitution and contemporary human rights thinking becomes stark. One would be inclined to argue that all international instruments ratified by Zimbabwe implore it to take legislative and other measures to bring its national laws, including the Constitution, in conformity with international obligations. On this basis, one would not elevate the Constitution above the accepted

³⁹ Note above.

⁴⁰ Resolution on the Right to Fair Trial and Legal Assistance in Africa adopted at the 25th Ordinary Session of the African Commission held in Bujumbura, Burundi, 1999.

⁴¹ Zimbabwe ratified the African Charter on 30 May 1986.

⁴² Article 26.

⁴³ Article 7.

⁴⁴ Article 2.

⁴⁵ Article 26, Vienna Convention, 1969.

principles of international law, when there is a conflict. Further to this, article 27 of the Vienna Convention makes it clear that a state party cannot invoke domestic legislation as a defence to non-fulfilment of treaty obligations.

Besides the above, the International Bill of Rights⁴⁷ also buttresses the notion of an independent and effective judiciary that has the ability to protect human rights. In the adjudication of human rights cases, the ICCPR calls for fair trial rights, similarly worded to article 7 of the African Charter, including competent judicial bodies provided for by the law, effective remedies and enforcement of the judicial orders by free and competent authorities.⁴⁸ As party to these instruments, the structure of the Zimbabwean courts ought to conform to the standards enunciated in them.

2.3 Mandate of the judicature in Zimbabwe

The scope and extent of powers of the courts enhance understanding of the human rights protection mechanism of a judiciary. The structure of the courts outline courts endowed with jurisdiction on human rights issues and how the inferior courts refer human rights questions, in the event of the lower court recognising that an individual liberty is at stake.

Section 79 of the Constitution of Zimbabwe provides for the court system. It states that judicial authority vests in the SC, the High Court (HC) and subordinate courts as may be prescribed by an Act of Parliament. The SC is the “superior court of record and the final court of appeal in Zimbabwe” as provided for in section 80(1) of the Constitution. Its powers and mandate derive from the Constitution and any other Act of Parliament. The court exercises appellate jurisdiction as the court of last instance. The SC also has original jurisdiction in human rights cases. The SC decisions are binding on all other courts but the SC “shall not be bound by its own judgements, rulings or opinions nor by those of any of its predecessors”.⁴⁹

In the case of *CFU v Mhuriro & others*⁵⁰, the CJ, then judge of the HC, granted a provisional order to a group of farm occupiers to bring a class action in the SC to oppose their eviction from farms. The effect of this order was to overrule a SC decision which interdicted the government from proceeding with the land reform and which had ordered eviction of illegal farm occupiers such as the petitioners in

⁴⁶ Section 111B(1).

⁴⁷ Comprises of the UDHR, ICCPR and ICESCR. Zimbabwe acceded to the twin covenants on 13 May 1991.

⁴⁸ Article 3, ICCPR.

⁴⁹ Section 26, Supreme Court Act Chapter 7:13.

⁵⁰ 2000 (2) ZLR 405.

the above case.⁵¹ The SC set aside this decision because the HC has no jurisdiction to overturn a SC order.

Section 81 provides for the HC. The HC has original jurisdiction in all civil and criminal matters and over all persons in Zimbabwe. It also acts as an appellate court for cases from the magistrates' courts. Appeals from HC lie to the SC. In the case of *In Re Chinamasa*⁵², a judge of the HC overturned the judgement of another HC judge contrary to the appellate hierarchy above. The SC has not spoken on the propriety of this nor has the judge written his judgement giving the basis of his actions. While the Constitution does not explicitly bestow powers on it to hear cases relating to constitutional issues the SC has held that it may.⁵³

An Act of Parliament creates the magistrates' courts,⁵⁴ as courts of first instance dealing with both criminal and civil cases and their jurisdiction is revised based on monetary value from time to time. Appeals lie to the HC. The Administrative courts⁵⁵ and the Labour relations tribunal⁵⁶ are also creatures of statute. The Administrative court has special jurisdiction conferred by the Act over administrative issues and acts as a court of appeal over issues decided by administrative tribunals.⁵⁷ The jurisdiction of this court includes original jurisdiction in land matters and since the LRP in Zimbabwe, the exercise of this jurisdiction has had human rights implications on the right to property enshrined in section 16 of the Constitution.⁵⁸ Appeals from the Administrative Court lie with the SC.

The Labour Relations tribunal has jurisdiction over all labour matters and it has the same authority as that of the HC and appeals go to the SC. Other special tribunals may be appointed in terms of the Constitution for instance when removing a sitting judge.⁵⁹

⁵¹ Note 10 above.

⁵² HH-118/02.

⁵³ *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* SC-128/02. The SC indicated that the HC has jurisdiction to hear constitutional applications and to declare a statute unconstitutional.

⁵⁴ Magistrates Court Act Chapter 7:10.

⁵⁵ Section 3, Administrative Court Act Chapter 7:01.

⁵⁶ Labour Relations Act Chapter 28:01.

⁵⁷ G Feltoe *A guide to administrative law, (1998)*.

⁵⁸ "The state of justice in Zimbabwe", note 19.

⁵⁹ Section 87 (2), Constitution of Zimbabwe.

2.4 Conditions of service

Section 84 of the Constitution of Zimbabwe provides for the appointment of judges. The President appoints judges after consultation with the Judicial Service Commission (JSC).⁶⁰ There is no constitutional provision limiting the number of SC judges hence from Independence until March 2001, the number of judges on the bench did not exceed five and after July 2001 the bench was increased to eight.⁶¹

In the appointment process, the JSC has been viewed widely as an extension of the President's office in that the President appoints virtually all of its members. The JSC consist of the CJ or acting CJ or the most senior judge of the SC, the chairman of the Public Service Commission, the Attorney General and two other persons appointed by the President.⁶² It operates without any written rules of procedure.

There is no independent representation on this body.⁶³ The former three are all presidential appointees by virtue of the offices they hold while the later two are direct presidential appointees. Thus, Hatchard argues for representation of the wider legal community to offer "peer assessment of fitness for office" as well as provide suitable candidature, which may be left out because of anti-government sentiment.⁶⁴ This ought to be adopted as the best practice.

Furthermore nomination process is shrouded in mystery. The South African position on nomination presents a better approach. In terms of section 174 (4) of the Constitution of South Africa, the JSC prepares a list of nominees and submits it to the President from which he is obligated to make appointments. If he is of the opinion that the candidates are unsuitable then he advises the JSC with reasons whereupon the JSC will prepare a supplementary list and again appointees have to be from that list. Therefore, executive input is present in the appointment process yet there are safeguards to guard against executive excesses, in the form of nomination process as well as requiring reasons from the President if he disagrees with the list.

⁶⁰ Section 90-91 Constitution of Zimbabwe.

⁶¹ "The state of justice in Zimbabwe" note 19 page 24. This was criticised as packing the bench with executive sympathisers.

⁶² See section 90 (1), Constitution of Zimbabwe.

⁶³ The South African JSC is comprised of cross section of representation. Section 178 states the JSC should include, one judge president, a cabinet member, two practising advocates, two practising attorneys, one teacher of law at a South African University, six persons from the National Assembly, four permanent delegates from the National Council of provinces, four persons designated by the President as head of the National Executive and judge resident of that court or the premier of the province in the event of a specific HC judge.

⁶⁴ Hatchard et al, note 16 page 153.

In Zimbabwe, in the event that the President disregards the recommendations of the JSC, section 84(2) states that he shall cause parliament to be informed but there is no provision stating what action parliament may take. Thus, the appointment process of judges, while it is constitutionally provided for, is fairly amenable to manipulation by the presidency in light of the imbalance of the JSC and the lack of meaningful intervention powers on the part of parliament. Moreover considering the nomination process, which is not open to scrutiny, the process does not engender public confidence as being transparent and free from influence.

Conditions of service for the judiciary are also a pertinent determinant to the shaping of a judiciary and indeed its protection of fundamental freedoms. Section 86 provides that SC judges may sit until they reach the age of sixty-five and they have a choice to elect to sit for five more years up to the age of seventy. However such election is encumbered by the discretion of the President to accept it.

In spite of this, judges are appointed for life and can only be removed in terms of the provisions of the Constitution.⁶⁵ Judges can be removed only on the grounds of inability to discharge functions of office due to infirmity of the body or mind or for misbehaviour. In such circumstances, a tribunal is set up in terms of section 87 (2) for purposes of the removal proceedings. The tribunal will investigate the matter and report their findings to the President. If a judge has to be removed, the JSC will advise the President.

In Zimbabwe, the removal provisions have been invoked at least two times since Independence. In one case involving retired Justice Fergus Blackie, a tribunal was set up to investigate the conduct of the judge in granting bail at a police station to two suspects on a weekend.⁶⁶ The case caused a stir particularly in light of the fact that the accused were white and the fact that the judge had travelled in the same car with the defence attorney to the police station where the accused were being detained. While noting factors giving rise to strong suspicion of bad judgement and unusual behaviour, the tribunal found no “sinister motive on the part of the judge or improper design”.⁶⁷

In a recent case, another tribunal was set up to investigate corruption charges against Judge Benjamin Paradza. In a humiliating manner, the police arrested the judge in his chambers, contrary to the requirement of the removal provisions.⁶⁸ The tribunal is still investigating this case. The SC⁶⁹ found

⁶⁵ Section 87.

⁶⁶ Lenington note 14 page 168.

⁶⁷ Note above 169.

⁶⁸ “Operating environment of the Legal Profession in Zimbabwe in 2003” Report by Zimbabwe Lawyers for Human Rights (2003).

that there had been a violation of the removal provisions because of the actions of the police. Suffice it to point out that the removal provisions have not been invoked against a SC judge.

Remuneration of judges is covered in section 88, which states that an Act of Parliament will fix judges' salaries and allowances from time to time and the salaries are paid out of the Consolidated Revenue Fund (central fund for government income and expenditure). During his/her term, a judge's salary shall not be reduced and indeed paying salaries from the central fund puts the issue beyond executive influence.

2.5 The Bill of Rights

The Bill of Rights opens with a declaration of values for the observance, promotion and protection of individual freedoms and liberties in the preamble.⁷⁰ In *Frontline services marketing (Pvt) Ltd v The Grain Marketing Board (GMB) and others*⁷¹ the court stated that fundamental rights and freedoms afforded protection are those specified in the Constitution. In this case the applicant sought to impugn provision of the Grain Marketing Board Act chapter 18:14 giving monopoly to the GMB to deal in importing, buying and selling of maize.

The court refused to accord to applicant the right to freedom of trade as a right envisaged in the preamble. This view of the preamble is narrow and hampers human rights protection. The preamble further imposes correlative duties to be observed by individuals for the attainment and the enjoyment of their rights. While noting that rights are inherent, the preamble places a general limitation on the enjoyment of rights and in this context rights are subjected to public interest as well as other people's rights.

The rights protected are civil and political rights, traditionally called first generation rights.⁷² Hatchard notes that individual freedoms are not an "all or nothing" commodity⁷³ and thus the rights and freedoms are internally demarcated or limited in consideration of public interest, defence, public security and order, public morality and public health or a state of emergency.⁷⁴ However, there are

⁶⁹ *Benjamin Paradza v Minister of Justice, Legal and Parliamentary Affairs and others* S-46/03.

⁷⁰ Section 11, Constitution of Zimbabwe.

⁷¹ SC-116/02.

⁷² Section 12-22, Constitution of Zimbabwe.

⁷³ Hatchard note 15 page 36.

⁷⁴ Note above.

non-derogable rights such as freedom from slavery and freedom from torture, inhuman and degrading punishment.

Socio-economic rights, also called second generation rights are not protected neither are there directives for state policy to give guidance in the implementation of these rights.⁷⁵ There is also no reference to third generation or solidarity/group rights. According to customary international law, the stratification of rights into first, second and third generation is now used merely for convenience but it is accepted that rights are indivisible, interdependent and interrelated.⁷⁶

Furthermore, it is of the essence to observe that virtually every provision in the Bill of Rights has a counterpart in international human rights conventions or general principles of international law to which Zimbabwe is party.⁷⁷ The use of international law in the domestic litigation becomes very pertinent on this issue and is developed further in the subsequent chapters.

2.6 Enforcement of human rights and *locus standi*

A crucial aspect to the realisation of human rights is an effective enforcement mechanism. The Constitution deals with issues of *fora* and *locus standi* and provides as follows:

[i]f any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the SC for redress.⁷⁸

The SC, as outlined above, is the proper court for a litigant who alleges actual or contemplated infringement of his rights. The mandate of the court is wide in that even anticipated injury is sufficient ground to bring a complaint. The jurisdiction of the court is also broad and lower courts can refer cases when it appears to the presiding officer that there arises a constitutional question.⁷⁹ The requirement of proof that the request for a referral is not frivolous and vexatious can be criticised as placing a stumbling block to human rights litigation.

⁷⁵ The Indian Constitution contains Directives Principles of State Policy in article 37 on socio-economic rights as principles and not rights. Fascinating judicial attitudes and techniques have linked these to civil and political rights to create a basis for justiciability of socio-economic rights.

⁷⁶ Article 5, Vienna Declaration and Programme of Action 1993.

⁷⁷ Gubbay note 22.

⁷⁸ Section 24 (1).

⁷⁹ Section 24 (2).

The question of *locus standi* has presented an even greater challenge to human rights litigation. Zimbabwe being a common law country adopts the common law approach of “personal, direct or substantial interest”.⁸⁰ The Constitution states that “any person who alleges” on his own behalf or only on behalf of a person who is detained and cannot litigate on their own, is one whom the court will give audience. Contemporary human rights litigation is enhanced through public interest litigation and there is no provision for that in the Constitution.⁸¹ The subsequent chapter will fully canvass the approach by the Zimbabwean bench to this important issue.

2.7 Independence of the judiciary

Judicial independence is the yardstick of a functional judiciary and has been explained not only to mean independence from the legislature or the executive but also from political organs, the public or from themselves.⁸² It is universally accepted in modern day democracy discourse that a Constitution must effectively guarantee judicial independence. The Constitution provides that “in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority”.⁸³

It is also universally acknowledged that the inclusion of bold statements of the traditionally accepted safeguards in the Constitution is not sufficient.⁸⁴ It is pertinent to have, in addition to the traditional safeguards, individual independence of the judge coupled with institutional independence to achieve a human rights based approach in their work. In South Africa, the Constitutional Court (CC) has reiterated judicial independence as the complete liberty of individual judges to hear cases before them with no outside pressure from government, pressure group, or even another judge.⁸⁵

Financial autonomy is also fundamental to judicial independence.⁸⁶ Without it, judicial independence is at stake through executive withholding of funds. Scholarly work has advocated for self-accounting and

⁸⁰ *Zimbabwe Teachers Association v Minister of Education and Culture* 1990 (2) ZLR 48.

⁸¹ Article 50 (2), Constitution of Uganda provides for public interest litigation.

⁸² E Dumbutshena “The rule of law in a constitutional democracy with particular reference to the Zimbabwean experience” 5 South African Journal of Human Rights (1989) 313.

⁸³ Section 79 B.

⁸⁴ Introductory remarks by the Honourable CJ Chidyausiku on The Independence of the judiciary at the Judges Continuing Education Seminar, Leopard Rock May 2002.

⁸⁵ *Van Rooyen and others v The State and others* 2002 (5) SA 246 (CC).

⁸⁶ Latimer House Principles clause 11 (2) implores state parties to provide sufficient funding and resources to Judiciaries.

financial independence.⁸⁷ Thus it is pertinent to note that the independence of the judiciary is all embracing and indeed include issues of appointment, conditions of service as well as removal from the bench.⁸⁸ In the context of Zimbabwe, this issue has had implications on the protection of human rights as emerges in the subsequent chapter.

2.8 Concluding observations

The constitutional provisions establishing the framework for human rights protection is fairly good. In compliance with international norms, one notes in particular the constitutional entrenchment of the guarantees of independence of the judiciary in section 79B, the Bill of Rights is also entrenched and justiciable. One also notes the entrenchment of appointment procedures, remuneration of judges and provisions for removal from office.

Potentially, one would be inclined to state that while noting gaps in the national framework, the minimum protection and provisions for an active judiciary are present. Some of the gaps can be covered by judicial revolution and activism, for instance drawing on comparative jurisdictions that have used civil rights to extend protection to socio-economic rights can cater for the absence of socio-economic rights.

Similarly, the non-incorporation of international instruments should also not work against human rights protection since many of the rights in the Constitution have correlative rights in international instruments. Thus an opportunity exists for the judiciary to draw from interpretative tools such as UN General Comments, the decisions of the African Commission as well as soft law. In conclusion it is apparent that while the current Constitution is not the best in comparison to other constitutions, it nonetheless is not the worst either and can be used for the protection of fundamental civil liberties and freedoms.

⁸⁷ Hatchard note 16 page 164.

⁸⁸ M Singh "Securing the independence of the judiciary--the Indian experience" 10 *Indiana International and Comparative Law Review* (2000) 245.

CHAPTER 3: HUMAN RIGHTS JURISPRUDENCE OF THE SUPREME COURT BENCHES

3.1 Introduction

Human rights jurisprudence is reflective of the dynamics of judicial leadership.⁸⁹ The concept of judicial leadership entails the role of the CJ as a leader of the judiciary to come forth with a plan of action for the smooth functioning of a judiciary.⁹⁰ Apple notes that through judicial leadership, proper administrative structures and judicial interpretation of constitutional provisions and legislation may ensue resulting in effective protection of human rights.⁹¹

The SC benches portray differing viewpoints in their jurisprudence, albeit with convergence in some aspects. This chapter will analyse the historical setting of each bench particularly the latter two benches. It will further seek to establish the circumstances and factors setting the centre stage for operations. This will be done in the context of the national framework for human rights enforcement discussed in chapter 2.

3.2 Contextual background

The Dumbutchena/Gubbay benches endured from the 1980s until the beginning of 2000. The political challenges during the time of CJ Dumbutchena's bench included the Matebeleland civil war⁹² characterised by atrocities committed by the Fifth Brigade military outfit on the Ndebele people for alleged dissident activities. The country was placed under a state of emergency.⁹³ An estimated 20 000 civilians were killed and hostilities ceased in 1987 after a Unity Accord between ZANU PF and PF ZAPU, which resulted in a merger.⁹⁴ Detentions without trial, rape, beatings and disappearances were rampant.⁹⁵

⁸⁹ Apple note 6 page 201.

⁹⁰ Note above.

⁹¹ Apple note 6.

⁹² "Breaking the silence, Building True Peace" A report on the disturbances in Matebeland and the Midlands 1980-1988 by Catholic Commission for Justice and the Legal Resources Foundation April (1999) <http://www.sokwanele.com/pdfs/BTS.pdf> (accessed 13 September 2005).

⁹³ Hatchard note 15.

⁹⁴ International Commission of Jurists (ICJ) Report on Zimbabwe <http://www.icj.org/IMG/pdf/zimbabwe.pdf> (accessed 4 September 2005).

⁹⁵ "Zimbabwe, Wages of war" A report by the Human Rights Lawyers Committee for Human Rights, New York 1986.

Judicial involvement and accountability for human rights violations was minimal and was further exacerbated by blanket amnesty.⁹⁶ The judiciary clung to its independence despite pressure and continued to fulfil its role in protecting human rights.⁹⁷ The Gubbay bench appointed in 1990 served with apparent distinction in spite of the political challenges.

Like its predecessor, the Chidyausiku bench exists in a highly charged political setting. The bench, comprising of almost entirely new judges⁹⁸ made its entrance in 2000 at the height of the highly controversial LRP⁹⁹, intertwined and interlinked to the changing political landscape which saw the ruling ZANU PF party face its strongest opposition ever, in the outfit of the Movement for Democratic Change (MDC). The LRP resulted in voluminous litigation, as landowners sought protection of property rights while the government sought legitimisation of the process.

The political scene was characterised by the deterioration of the observance of the rule of law and human rights because of the violence on farms, which resulted in murder, assault and massive displacements.¹⁰⁰ The growth and strength of opposition politics presented a challenge to the ruling party regarding competition for political office. To counter this, the incumbent government reduced the democratic space by enacting draconian legislation, with the acquiescence of Parliament.¹⁰¹

The pernicious use of law as a weapon of oppression,¹⁰² reduced space for exercising individual rights and liberties. The judiciary's role as a guardian of the supreme law and was thus put to the test, but the current bench has displayed a new philosophy of human rights protection, which this paper argues is far below standard.

⁹⁶ Clemency Order 1/1988 granted immunity to those implicated in the Matebele atrocities thereby removing them from the reach of the judiciary and frustrating human rights protection by the courts.

⁹⁷ *Slatter v Minister of Home Affairs* HC-313/83 shows the resilience of the bench in publicly condemning torture.

⁹⁸ "Enforcing the rule of law in Zimbabwe" Report by the Zimbabwe Human Rights NGO Forum September (2001) 41.

⁹⁹ B Rutherford "The rough contours of land in Zimbabwe" 29 Fletcher Forum Of World Affairs (2005).

¹⁰⁰ "Who is responsible? Politically motivated violence in Zimbabwe 2000-2001" Report by the Zimbabwe Human Rights NGO Forum August (2001).

¹⁰¹ POSA Chapter 11:17 limits drastically freedom of association, assembly and freedom of speech. AIPPA drastically curtails freedom of expression by requiring media houses and journalists to register . NGO Act proscribes work in issues of civil and political rights.

¹⁰² *Malawi Association & others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) where the African Commission stated that law must be consistent with international law.

3.3 Case allocation

The concept of case management requires judicial control of pre-trial and trial processes to ensure prompt, effective and systematic movement of the cases through the courts.¹⁰³ Effective case management and allocation ensures efficient administration of justice and the protection of human rights. Case allocation in the Zimbabwean court system used to be controlled by the Registrar of court.¹⁰⁴ The Registrar of court is the epicentre of the administration of the court being responsible for preparation of the court rolls and assigning hearing dates, permitting access to records and even fixing security amounts in election petitions.¹⁰⁵

However this function was removed from the office of the Registrar in 2000 when the incumbent CJ was then Judge President of the HC. The Judge President or his nominee now performs the function.¹⁰⁶ The criterion used is not known and furthermore, the Rules of Procedure have not been amended. This has impacted negatively on the functioning of the courts and in turn on the protection of human rights in that political cases and human rights issues are normally allocated to judges perceived to be sympathetic to the executive.¹⁰⁷

This is further exacerbated by the emerging trend that urgent applications have to be cleared by the President's Office before being allocated to a judge¹⁰⁸, a practice that clearly undermines the rule of law, the concept of separation of powers and the authority of the courts envisaged in the Constitution. A further disturbing fact is that the courts have sublimely accepted this abominable practise thus tacitly condoning such acts.

3.4 Procedural aspects

Procedural issues and technicalities place stumbling blocks in access to justice through the requirement of strict adherence to rules of procedure.¹⁰⁹ Contemporary discourse on efficacy of judiciaries emphasises the necessity of replacing the old rigorous rules with simple ones to enable

¹⁰³ Apple note 6 above page 204.

¹⁰⁴ Section 33, SC Act Chapter 7:13.

¹⁰⁵ Saller note 9 page 51.

¹⁰⁶ "The State of Justice in Zimbabwe" note 19 page 62.

¹⁰⁷ B Mtetwa "Judicial System under siege" *Zimbabwe Independent* 8 April 2004.

¹⁰⁸ Note above. Mtetwa relates a case when she attended at the HC with an urgent application. She, including the clerk of court, had to be cleared by the President's office to enter the court building.

¹⁰⁹ K Eso "The role of the judge in advancing human rights" in *Developing Human Rights Jurisprudence*, Judicial Colloquium in Banjul Gambia (1990) page 98.

access to justice for many of the poor and uneducated people who form the bulk of African populations.¹¹⁰ Poverty is not just income poverty but also the lack of a whole host of rights and capabilities responsible for the impoverishment of many people.¹¹¹

The protection of human rights by judiciaries requires doing away with technicalities. The Constitution of Uganda provides that in adjudicating of civil and criminal cases, the courts shall apply, among others, the principle that “substantive justice shall be administered without undue regard to technicalities.”¹¹² Judicial leadership, creativity and activism ought to ensure that human rights cases are not dismissed on technicalities but rather on merits. The approaches of the benches in Zimbabwe provide an invaluable insight to protection of human rights.

3.4.1 *Locus standi* and public interest litigation

The *locus standi* test established in terms of the Constitution¹¹³ and the judicial precedent¹¹⁴ with regards to the Declaration of Rights is the personal interest test. In the *Zimta* Case¹¹⁵, the court stated that legal rights do not exist in a vacuum but vest in legal persons. Public interest litigation is recognised as a tool in cotemporary human rights litigation to expand access to justice for the poor and disadvantaged by relaxing rules of *locus standi*.¹¹⁶ The Class Action Act chapter 8:17, in Zimbabwe allows third parties who have no interest in a case to litigate, albeit with the leave of court. The technicality of requiring leave disadvantages human rights litigation and obstructs the objective of the Act.

The Gubbay bench started from the conservative position and developed flexibility particularly in human rights litigation to enable the protection of human rights. In the earlier cases such as the *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others*¹¹⁷ the court refused a political party standing on the basis that the party could not “carry the torch for claimants generally”, thus

¹¹⁰ Note above.

¹¹¹ R Sudarshan “Interdependence in Overcoming Injustice(s) of Poverty: Some Preliminary Observations” Paper prepared for the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, India.

¹¹² Article 126(2).

¹¹³ Section 24, Constitution of Zimbabwe.

¹¹⁴ *Chairman of the Public Service Commission v Zimbabwe Teachers Association & others* 1996 (9) BCLR 1189 (ZS).

¹¹⁵ Note above.

¹¹⁶ See note 109.

¹¹⁷ 1997 (2) ZLR 254.

shooting down an opportunity to enhance public interest litigation. Madhuku, criticising the judgement, noted that electoral issues while affecting the general public also affect political parties and thus a political party ought not to be denied *locus standi*.¹¹⁸

Later judgements of the Gubbay bench took a broad and liberal approach to issues of standing noting that “it would be wrong ... for [the] court to fetter itself by pedantically circumscribing the class of persons who may approach it...”¹¹⁹ Thus in the *CCJP* case the bench extended standing to a non-governmental organisation to bring an action on behalf of condemned prisoners. The Gubbay bench realised the impediment of a pedantic approach to standing regarding human rights matters. The move from a conservative approach to a more liberal ensured the fulfilment of its mandate.

However the Chidyausiku bench has retrogressed on this aspect by apparently opting to strictly and narrowly construe *locus standi*, consequently dismissing cases on mere technicalities. In the case of *Tsvangirai v Registrar General of Elections & others*¹²⁰, the litigant contended that the Electoral Act (Modification) Notice, Statutory Instrument 41D of 2002 published three days before the 2002 Presidential election by the President¹²¹ violated his rights to protection of law and freedom of expression envisaged by the Constitution.

The litigant petitioned the court in terms of section 24(1) in an urgent application. The President was a candidate in the election and the laws he made materially altered the conduct of the election in his favour by restricting postal voting only to members of the uniformed forces thereby disenfranchising all Zimbabweans outside the country.¹²²

The finding of the court that the applicant lacked standing because he was not himself affected by postal voting nor had his rights been infringed by the extension of voter registration which he averred had benefited the incumbent President’s supporters, can only be said to be unfortunate.¹²³ Who can have a greater interest but a candidate in an election and surely electoral laws affect him? Sandura, in

¹¹⁸ L Madhuku “Constitutional Interpretation and the SC as a political actor: some comments on *United Parties v Minister of Justice Legal and Parliamentary Affairs*” Legal Forum, 1998 (1) page 48, quoted in Lenington note 14 page 597.

¹¹⁹ Note 7 above.

¹²⁰ SC-20/2002.

¹²¹ Section 158 of the Electoral Act Chapter 2:1 empowers the President to make statutory instruments “he considers necessary or desirable” in election matters in breach the separation of powers concept.

¹²² “Justice in Zimbabwe” note 20 page 72.

¹²³ CJ Chidyausiku and Justices Malaba, Cheda and Ziyambi, from the new bench, concurred. Justice Sandura, from the Gubbay bench, dissented.

his dissenting judgement, noted that the view of the past bench (Gubbay bench) would have been to adopt a broad view of standing in order to determine the real issues.¹²⁴

In an earlier case *Stevenson v Minister of Local Government and National Housing*¹²⁵, Justices Sandura and Abraham had rejected a narrow construction by the HC denying the litigant standing to seek an order to compel the Minister to hold urban councils election for Harare Municipality. The court found that a ratepayer and resident of Harare had a direct and substantial interest in how the affairs of the Harare City Council were run.

The unfortunate streak on using standing to deny access to courts for human rights protection has characterised the Chidyausiku jurisprudence. Other cases include the *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*¹²⁶ where the court denied audience to the litigant on the basis that it was not licensed in terms of the Broadcasting Services Act chapter 12:06, which Act it was challenging. The paradox is clear, in that the litigant was asking the court to protect its rights, which it averred were being infringed by the Act yet the court was saying that litigant had to submit to the same law before challenging.

3.4.2 Delay

The Constitution entrusts the SC with original jurisdiction in human rights cases to ensure speedy resolution of human rights cases.¹²⁷ The approach of the court since independence has been that:

a favourable judgement obtained at the conclusion of a normal and lengthy, judicial process is of little value to the litigant [and] there are obvious advantages to litigants and to the public to have important constitutional issues decided without protracted litigation.¹²⁸

This approach was adopted and developed by the Gubbay bench recognising that delay is a denial to fair trial. The old adage “justice delayed is justice denied” now a principle of customary international law was developed during the term of this bench to ensure the realisation of individual freedoms and liberties. In human rights cases, the Gubbay bench exercised expediency. For example, judgement in

¹²⁴ “Justice in Zimbabwe” note 20 page 76.

¹²⁵ SC-38/2002.

¹²⁶ SC-128-02.

¹²⁷ Section 24. Article 126 (2) (b) of the Constitution of Uganda provides that in dispensing justice “delays shall not be tolerated”

¹²⁸ Hatchard note 15 page 37 quoting Baron J in *Mandirwhe v Minister of State Security* 1981 ZLR 61.

the *CCJP* case was delivered in just about a month from close of arguments. In *S v Ncube*¹²⁹ a case proscribing adult whipping, judgement was given just over two months after arguments.

The current bench has however not given recognition to the principle of speedy resolution of human rights cases. In fact delays have been used to avoid deciding human rights cases particularly those deemed to be politically sensitive as evidenced by the *Tsvangirai* case above¹³⁰. In that case, the court heard an urgent application where applicant sought to have his electoral rights protected in the election, which was a day away yet the court reserved judgement until more than a month after the election had passed.¹³¹ There can be no clearer abrogation of its mandate to protect human rights than this.

The electoral petition cases provide another unpleasant revelation of the denial of justice through delays. After the 2000 Parliamentary elections in Zimbabwe, the MDC filed 37 electoral petitions averring widespread violence, intimidation among other electoral irregularities.¹³² At the time of the next Parliamentary election held in March 2005, nineteen petitions had been heard but not completed while those on appeal to the SC have not been heard to date.¹³³

When confronted about these delays, the CJ blamed the non-completion on the MDC litigants citing non-cooperation by counsel for litigants whom he accused of constantly postponing the cases and stated that interest in those petitions had waned.¹³⁴

The assertion of the CJ is at complete variance with the role of the court, in ensuring speedy resolution of cases whether or not the interest of parties has waned. The court has discretion to grant or refuse a postponement and further it has the powers to compel litigants to meet certain deadlines and ensure speedy resolution of cases. Thus the election petition cases show the failure of the current bench to achieve human rights for litigants using delay to circumvent decisions on merits.

The *Capitol Radio, Association of Independent Journalist of Zimbabwe* and the *ANZ* cases all involving the fundamental right to freedom of expression took each an average of one year to have a

¹²⁹ 1987(2) ZLR 246 (SC).

¹³⁰ Note 120 above.

¹³¹ "Justice in Zimbabwe" note 20 page 73.

¹³² Section 133 (2), Electoral Act states that challenges can be within 30 days after an election.

¹³³ Annexure 1, Schedule of election petitions.

¹³⁴ "Judiciary blames the MDC for delays in poll cases" *The Daily Mirror*, 11 January 2005.

decision given on the merits.¹³⁵ This stance serves only to appease executive lawlessness by condoning executive excesses.

3.5 Interpretation

The effectiveness of human rights law to redress abuses is significantly reduced without the ability to ensure the proper interpretation.¹³⁶ The proliferation of international instruments and a corresponding increase in jurisprudence from international, regional and national courts interpreting human rights standards offer a rich source from which courts may source tools for interpretation.

The Gubbay bench adopted and advanced the purposive and generous approach towards constitutional interpretation.¹³⁷ The approach takes words in context of provisions from which they derive and the whole constitution to give effect to the true objective of the constitution. This way, the bench avoided narrow and pedantic interpretations and eschewed the “austerity of tabulated legalism”.¹³⁸

A constitution does not exist in a void, thus its interpretation ought to conform to the traditions and usages yet maintain the essential elements, which the framers had in mind. The bench relied on the principle that the “primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society...governed by some acceptable concepts of human dignity”.¹³⁹ Thus the bench achieved recognisable strides in human rights protection.

The approach of the current bench has been dismayingly narrow and undesirable for human rights protection. In *Minister of Lands, Agriculture Rural Resettlement and others v CFU*¹⁴⁰, the court averred that section 16 and 16A relating to property rights and compulsory acquisition had to be separately construed. This goes against the principle of interpreting all provisions in context of each other and the

¹³⁵ *Under Siege? Freedom of expression in Zimbabwe: The ANZ Saga* A publication by the Zimbabwe Lawyers for Human Rights 15.

¹³⁶ “Cross-border traffic in human rights jurisprudence: Interrights’ Experience” Paper at the session on International human rights norms and their domestic application: judicial methods & mechanisms’, 12th Commonwealth Law Conference, Kuala Lumpur, Malaysia, September 1999.

¹³⁷ Lennington note 14 page 221.

¹³⁸ *Rattigan & others v Chief Immigration officer* 1995 (1) BCLR 1 (ZS) at 9.

¹³⁹ Lennington note 14.

¹⁴⁰ SC- 111/2001.

whole constitution. The piecemeal interpretation approach by the bench has inevitably given rise to lost opportunities for human rights protection.

3.6 Reliance on authorities not cited by the parties

A disturbing phenomena developed by the Chidyausiku bench, which none of its predecessors had adopted, is the tendency of the court to base its rulings on authorities not cited by any of the parties without giving litigants the opportunity to address the court on those authorities. In the Namibian case of *Kauesa v Minister of Home Affairs*¹⁴¹ Dumbutchena AJA stated that:

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or in written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a court to deliver judgement with a substantial portion containing issues never canvassed or relied on by counsel.¹⁴²

The constitution protects fair trial rights particularly the right to one's defence and fair hearing.¹⁴³ Natural justice principles of hearing the other side envisages that one has a right of response even to issues raised *mero motu* by the court. Customary international law also embraces this norm. In the *CFU v Minister of Lands & others*¹⁴⁴, the CFU obtained an interdict, from the then Gubbay bench, stopping the Government from proceeding with the LRP until a proper programme had been put in place among other issues.¹⁴⁵

In discharging the interdict, the reconstituted bench of Chidyausiku relied on the Presidential Powers (Temporary Measures) (Land Acquisition) (No 2) Regulations SI-338/2001, which statutory instrument was not in existence when the matter was argued. Counsel for the CFU was not given an opportunity to challenge the validity and applicability of the law either in oral or written submissions. International law has since settled the position that law does not apply retrospectively and parties in this case had a right to have their rights determined in accordance with the law in existence at the time they argued their case.

¹⁴¹ 1995 (11) BCLR 1540; 1996 (4) SA 965.

¹⁴² Note above.

¹⁴³ Section 18.

¹⁴⁴ 2000 (2) ZLR 469.

¹⁴⁵ "Justice in Zimbabwe" note 20.

Similarly, in the case of *Associated Newspapers of Zimbabwe (Private) Limited v Minister of Information and others*¹⁴⁶, the Chidyausiku bench relied on the English case of *Hoffman-La Roche and others v S of S for Trade and Industry*¹⁴⁷, and declined to hear the merits of the applicant's case on the basis of the "dirty hands" doctrine as enunciated in that case. The case was not relied on by any of the parties in their submissions to the court and equally no opportunity was given to counsel to make submissions on the relevance or otherwise of the case.¹⁴⁸

The court disregarded without distinguishing earlier SC authorities¹⁴⁹ as well as comparative jurisprudence cited by counsel for the applicant stating that in constitutional litigation courts are reluctant to deny a litigant access on the same doctrine except in exceptional circumstances.¹⁵⁰ Cotterrell notes that the doctrine of judicial precedent imports that "precedents must be followed unless flatly absurd or unjust".¹⁵¹

Clearly, this tendency violates the rights of litigants to fair trial. Fair trial rights are now an embodiment of progressive judiciaries bent on advancing the cause of human rights protection. The phenomenon no doubt is a regression and impedes judicial activism without which rights will remain inert in the Bill of Rights.

3.7 Enforcement of judgements

The Constitution provides that the SC "may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights".¹⁵² The language gives the court wide and unfettered discretion and the objective is to ensure the court utilises the most equitable method of remedying human rights abuses.¹⁵³ Viljoen notes that the international position on remedies is that they must be available, effective, sufficient and must not be unduly prolonged.¹⁵⁴

¹⁴⁶ SC-20/2003.

¹⁴⁷ (1975) AC 293.

¹⁴⁸ "The state justice in Zimbabwe" note 19 page 57.

¹⁴⁹ *Minister of Home Affairs v Bickle* 1993 (1) ZLR 99.

¹⁵⁰ G Felto "Whose hands are dirty? An analysis of the SC judgement in the ANZ case" in *Under Siege? Freedom of expression in Zimbabwe: The ANZ Saga* A publication by the Zimbabwe Lawyers for Human Rights 15.

¹⁵¹ R Cotterrell *The politics of jurisprudence: A critical introduction to legal philosophy* (1989) 26.

¹⁵² Section 24 (4), Constitution of Zimbabwe.

¹⁵³ Gubbay CJ in *In Re Mlambo* 1991 (2) ZLR 242.

¹⁵⁴ F Viljoen "Admissibility under the African Charter" in M Evans et al, *The African Charter on Human and*

In the history of the judiciary in Zimbabwe, executive-judiciary tension has often manifested itself in the executive as wilful disobedience of lawful court orders and refusal to enforce court orders. Gubbay¹⁵⁵ notes that “courts do not have armies to enforce their decisions”¹⁵⁶ but rely on municipal police and armies who answer to the executive. However, the court ought to use such tools as contempt of court proceedings to rein in those who disobey its orders.

In the aftermath of the torture of Mark Chavhunduka and Ray Choto, the SC ordered the investigation and prosecution of the torturers.¹⁵⁷ To date no such prosecution has taken place and Mark Chavhunduka has since demised allegedly partly from the permanent harm inflicted when he was tortured.

The tradition of disrespecting court orders accelerated to alarming levels with the political and economic changes, which occurred in 2000. Clearly the courts are no longer the final arbiters of fundamental rights and freedoms. The police, prison officials and politicians choose with impunity what orders to obey and enforce. This has been exacerbated by lack of executive will to obey court orders. For instance, while opening a Parliamentary Session, the Presidency gave credence to selective obedience to court orders.¹⁵⁸

In the enforcement of the rule of law, government is the best teacher and ought to lead by example. It is dangerous for the rule of law and all tenets of democracy if a government picks and chooses which court orders it will obey. In the land reform cases orders made by the court declaring that farm invasions were unlawful and ordering the eviction of farm invaders were completely ignored.¹⁵⁹ Another series of judgements flouted by the executive related to the ANZ cases.¹⁶⁰

Regrettably, the courts have shown a magnitude of reluctance to punish those who flout court orders through contempt of court proceedings. Where the judiciary invoked contempt charges against culprits, other members of the judiciary have undermined these efforts for instance, *In Re*

Peoples Rights: The system in practise 1986-2000 (2004) 61.

¹⁵⁵ Gubbay note 22.

¹⁵⁶ Note above.

¹⁵⁷ *Chavhunduka & another v Commissioner of Police* 2000 (1) ZLR 418.

¹⁵⁸ “Justice in Zimbabwe” note 20 page 21.

¹⁵⁹ Agricola “The land cases in Zimbabwe” in *Zimbabwe Human Rights Bulletin* by Zimbabwe Lawyers for Human Rights September (2002) 154 at 159.

¹⁶⁰ *Under Siege? Freedom of expression in Zimbabwe: The ANZ Saga* A publication by the Zimbabwe Lawyers for Human Rights.

*Chinamasa*¹⁶¹. In that case, the Minister of Justice was found to be in contempt for intemperately criticising sentences imposed on three American nationals who had been found in possession of firearms.¹⁶² However, another HC judge reversed the order of contempt, without basis at law and in flagrant violation of the rule that only the SC can overturn a HC judgement.¹⁶³

Furthermore the judiciary has also undermined itself by not sufficiently punishing contemptuous behaviour. After the SC granted bail to alleged murderers of one Cain Nkala the prison officials refused to release them from custody on the basis that they were awaiting orders from their bosses.¹⁶⁴ This behaviour is indicative of the fact that courts' authority as final arbiters has been usurped. The court exacerbated this by failing to admonish this behaviour strongly through its decision. When the officials were convicted of contempt they were sentenced to wholly suspended sentences of ZWD\$10 000 fine or 60 days imprisonment in spite the gravity of their offence.¹⁶⁵

3.8 Use of international instruments

The use of international law in domestic courts comes in four ways, that is, direct application of international law, use of international law as a guide for interpreting domestic law, establishment of a jurisprudential principle based on international law and where there are deficiencies or inadequacy in domestic law, reference to international law can be made.¹⁶⁶

Morr recognises that in addition to constitutional provisions on human rights protection, courts should not be limited to these but should expand their judicial sources to encompass "established norms of international law and the aspirations of civilised peoples for human rights and fundamental freedoms as reflected in international agreements that have widespread and representative support among the world's nations."¹⁶⁷

¹⁶¹ HH-118-02.

¹⁶² In a later case, Judge Blackie who heard the *Chinamasa* case was arrested on spurious charges and publicly humiliated.

¹⁶³ Justice Hungwe reversed the judgement.

¹⁶⁴ *Mpofu and another v Madida & Ors* HB-76-2002.

¹⁶⁵ Note above.

¹⁶⁶ "Use of International Law by Domestic Courts" International Training Centre of the International Labour Organization Standards and Fundamental Principles and Rights at Work Programme July 2004 http://training.ilo.org/ils/ILS_Judges/training_materials/english/Legal%20Research%20August%202004.pdf >(accessed 29 August 2005).

¹⁶⁷ E Morr "Judicial sources for supporting the protection of human rights" in E Cotran et al, *The Role of the Judiciary in the Protection of Human Rights* (1997) 5 at 11.

The Gubbay bench was not hesitant to draw on international law.¹⁶⁸ In the celebrated case of *S v A Juvenile*¹⁶⁹, the Gubbay bench stated that:

[t]he courts of this country are free to import interpretations of similar provisions in International and Regional Human Rights Instruments, such as, among others, the International bill of Human Rights, the European Convention for the protection of Human Rights and Fundamental freedoms, and the Inter-American Convention of Human Rights. In the end, international human rights norms become part of our domestic law. In this way our jurisprudence is enriched.¹⁷⁰

The SC considered the *Soering v UK*¹⁷¹ decision in *CCJP v Attorney-General and others*¹⁷² when the court held that inordinate delays for prisoners awaiting execution on death row constituted inhuman and degrading punishment contrary to section 15(1) of the Constitution of Zimbabwe.¹⁷³

The court expressly noted that section 15 of the Constitution was to be interpreted in light of “the emerging consensus of values in the civilised international community...as evidenced in the decisions of other courts”.¹⁷⁴ The SC of India's judgment in *Vatheeswaran v State of Tamil Nadu*¹⁷⁵ was also referred to where it was held that a prisoner's contribution to the delay in carrying out execution “would not alter the dehumanising character of the delay”.

The principle on inordinate delays constituting inhuman and degrading punishment as developed in the *CCJP* case has been cited in other jurisdictions outside Zimbabwe such as the Jamaican case of *Pratt and another v Attorney General for Jamaica*,¹⁷⁶ Human Rights Committee case of *Francis Clement v Jamaica*¹⁷⁷ and most recently, in the Nigerian case of *Kalu v State*.¹⁷⁸

The Gubbay bench made several decisions on issues such as corporal punishment,¹⁷⁹ prison conditions,¹⁸⁰ fair trial rights, freedom of movement, freedom of expression,¹⁸¹ and freedom of

¹⁶⁸ Gubbay note 22.

¹⁶⁹ 1989 (2) ZLR 61 at 72.

¹⁷⁰ Note above.

¹⁷¹ (1989) 11 EHRR.

¹⁷² 1993 (1) ZLR 242.

¹⁷³ Parliament subsequently passed an amendment to section 15(1) effectively overruling the decision.

¹⁷⁴ Note 172 above.

¹⁷⁵ AIR 1983 SC 361.

¹⁷⁶ [1993] 2 LRC 349. In which litigants who had been on death row for 14 years successfully cited the CCJP principle.

¹⁷⁷ CCPR/C/54/D/606/1994.

¹⁷⁸ [1998] 13 NWLR 531. The SC of Nigeria also used comparative jurisprudence in finding that capital punishment as a violation of the right to life.

¹⁷⁹ In *State v A Juvenile* and in *State v Ncube* 1987 (2) ZLR 246 the court in proscribing corporal punishment drew

association and assembly rights by using decisions of the ECHR, referring to the ICCPR, the UN standards on prison conditions and US court decisions to fortify its interpretation and demarcation of human rights. It is pertinent to note that the jurisprudence of the Gubbay bench shows innovation in use of international law and hence, its rich human rights jurisprudence.¹⁸²

In contrast, there appears to be uncertainty bordering on reluctance in the approach of the Chidyausiku bench in applying international human rights principles. The recent SC ruling in the case of *Jeffa Madzingo and others v Minister of Justice, Legal and Parliamentary Affairs and others*¹⁸³ ruled that voting is not a fundamental right that can be exercised through freedom of expression. In that case the court was referred to the African Charter, ICCPR and the SADC Principles and Guidelines on Democratic Elections¹⁸⁴ to draw on best practices. The court refused to be persuaded citing the non-domestication of the treaties. Thus its jurisprudence has remained obscure regionally and internationally often attracting harsh criticism from academics.

3.9 Actual rights

3.9.1 Civil and political participation rights

Political participation rights have revealed a strategic shift in the philosophy of the benches. Jurisprudence on freedom of expression, association and assembly as well as electoral rights is starkly different. Much progress was made in the Gubbay era rather than the Chidyausiku era. The role of the court is to balance competing interests so much so that even if the decision is not in favour of the litigant, it is carefully considered and justified by human rights tenets.

inspiration from ECHR decision of *Tyre v UK* (1978) 11 EHRR and UN Standard Minimum Rules for the Administration of Juvenile Justice.

¹⁸⁰ The Gubbay Bench gave recognition to UN Standard Minimum Rules for the treatment of Prisoners in *Conjwayo v Minister of Justice & Another* 1991 (1) ZLR 105 in recognising the principle that a prisoner retains all basic rights of a citizen except those taken away by law in the interests of security.

¹⁸¹ In *Retrofit Pvt Ltd v Minister of Posts and Telecommunications* 1995 (2) ZLR; the court found that the monopoly to provide telecommunications services was an abridgement of the freedom of expression. The court drew from the ECHR decisions of *Autronic v Switzerland* (1990) 12 EHRR 485 and *Informationsverein Lentia v Austria* (1993) 17 EHRR 93.

¹⁸² M Adjami "African courts, international law, and comparative case law: chimera or emerging human rights jurisprudence?" 24 Michigan Journal of International Law (2002) 103 at 124.

¹⁸³ SC-22/05.

¹⁸⁴ Adopted by the SADC Summit, Mauritius, August 2004<
http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/elecprinciples.pdf> (accessed 14 September 2005).

In the arena of freedom of expression, the Chidyausiku bench has all but found against litigants seeking to enforce freedom of expression in judgements criticised by the academia both in and outside Zimbabwe.¹⁸⁵ In the ANZ case a newspaper sought to impugn certain sections of the AIPPA imposing controls on the practice of journalism including registration of both journalists and the media houses to a government appointed body as a violation of freedom of expression.¹⁸⁶

The court refused to hear this case on the basis of the “dirty hands doctrine” stating that the newspaper had openly defied the law by failing to register as required by that law and hence its hands were dirty and it was precluded from seeking relief.¹⁸⁷ The essence of the decision was, “lose your rights and complain later”¹⁸⁸ in that the court was stating the litigant had to put its right to freedom of expression aside, comply with a law it held to be an affront to its right and then come to court later. This is contrary to the duty of the court to hold the Constitution above parliamentary legislation, which may take away rights and its mandate in section 24 of the Constitution, which states that a person who has an apprehension of violation of his rights may approach the court.¹⁸⁹

Likewise, in the case of *Association of Independent Journalists and others v Minister of Information and Publicity*¹⁹⁰, the court was not persuaded to interpret registration as a violation of the right to freedom of expression as outlined in the Inter-American Court of Human Rights Advisory Opinion.¹⁹¹ The minority judgement of Justice Sandura found registration to be more than a mere formality because accreditation was subject to approval by the Minister’s appointee and he found that the controls were not justifiable in a democratic society.¹⁹² In fact, in *Capital Radio v the Broadcasting Authority of Zimbabwe and others*¹⁹³, an earlier decision, the court had enunciated this restrictive interpretation.

The disparity between the approaches of the two benches is evident. The current approach has not used sufficiently the principles expounded by the previous benches particularly in demarcating the

¹⁸⁵ “The Access To Information and Protection of Privacy Act: Two years on” Report by MISA Zimbabwe and Article 19-London September (2004) 26.

¹⁸⁶ A Magaisa “Clean Hands? Thou hath blood on your hands? A critique of the judgement in the ANZ Case” in *Under Siege? Freedom of expression in Zimbabwe: The ANZ Saga* by Zimbabwe Lawyers for Human Rights.

¹⁸⁷ Feltoe note 150.

¹⁸⁸ Magaisa note 185.

¹⁸⁹ Magaisa note 185.

¹⁹⁰ SC-136/02.

¹⁹¹ O-C 5/85, Series A No 5.

¹⁹² Note 190 page 29.

¹⁹³ SC-128-02.

scope of rights. De Waal et al, applauds the approach to expansively demarcate rights in order to broaden their scope of application.¹⁹⁴

Freedom of speech was widely interpreted in the *Retrofit* case and the *United Parties* case yet the court found no persuasion from these. Electoral free speech rights have also been narrowly interpreted as shown in the *Tsvangirai and others v Registrar General* case above which stated that freedom of expression does not include the right to receive information nor can it be called upon where applicant seeks information for the purposes of giving effect to other rights.¹⁹⁵

Judge Friedman¹⁹⁶ noted that the decision of the Chidyausiku bench was fundamentally flawed in that a voters' roll is in the public domain and a candidate in an election has a right to receive this information to enable him to exercise his rights.¹⁹⁷ The report criticised the converse and technical approach by the bench. The inadequacy of the current bench's approach has also been shown in delay in the finalisation of the 2000 electoral petitions.¹⁹⁸

POSA has largely curtailed freedom of assembly and association by creating a complex bureaucracy, which demands authorisation by the police before persons gather for public meetings. In *In re Munhumeso*,¹⁹⁹ the Gubbay bench held the right to associate and assemble as a fundamental right in a democratic society for expressing oneself or public opinion. The provisions were impugned but resurfaced in POSA, couched in similar language granting wide powers on the police to refuse licensing a procession or public gathering. Thus courts have not found favourably for litigants denied permission to hold processions or public meetings.

¹⁹⁴ J De Waal et al, *The Bill of Rights Handbook*, (2001) 126 at 134.

¹⁹⁵ In *Chavhunduka and another v Minister of Home Affairs*, the Gubbay bench found that freedom of expression includes the right to receive information to exercise of other rights.

¹⁹⁶ Representative of the International Bar Association's Forum for Barristers and Advocates who observed the Tsvangirai trial.

¹⁹⁷ Report on the appeal in the SC of Zimbabwe in the matter between *Morgan Tsvangirai and others v The Registrar General Elections of Elections in Zimbabwe* Human rights Bulletin no 8 by Zimbabwe Lawyers for Human Rights (2003) 156.

¹⁹⁸ H Zhou "Judicial enforcement of electoral morality: a reflection on the 2000 Election Petitions: Elections in Zimbabwe" Human rights Bulletin no 6 by Zimbabwe Lawyers for Human Rights (2002) 95.

¹⁹⁹ 1994 (1) ZLR 49.

3.9.2 Land cases

The controversy of the LRP in Zimbabwe is associated more with the approach adopted by the government rather than with the process itself.²⁰⁰ The national consensus is that land reform was necessary to remedy the historical imbalances in land where 4500 whites owned 11 million acres of arable land while black Zimbabweans were relegated to 16 million acres of arid and semi arid land.²⁰¹ The African Commission's Fact Finding Mission to Zimbabwe also recognised that land reform was critical to Zimbabwe but could not agree that it was a divisive issue contrary to the government's assertion.²⁰² In the process of acquisition the role of the courts was prominent because of the need to adjudicate challenges.

In the *CFU* case, the Gubbay bench noted that "there is no dispute that land reform is necessary and indeed essential for the future prosperity of Zimbabwe".²⁰³ It further noted that for such a matter of national importance meant to rectify historical imbalances, there was need for the programme to be in conformity with the law. It noted that the court had a role to insist on compliance with laws and thus ordered the government to produce a workable programme for the land reform. The court found that even in political issues it still has a role to ensure protection of rights and compliance with the law.

The Chidyausiku bench concluded that land was a political issue needing political solutions and the court had a limited role. In the *Minister of lands v CFU* case, the current bench confined its role to seeing if the procedures were followed but not to marry that to the factual circumstances obtaining on the ground.²⁰⁴ Thus even if the contention that there was lawlessness and criminal acts on the farms was unassailable, the court in that case went ahead to certify that the land reform was in accordance with the law.²⁰⁵ This approach puts a limitation to the protection of human rights and is clearly divergent from the approach by the Gubbay bench. The approach by the Chidyausiku bench was criticised and contributed to the perception that the judiciary was rubber-stamping executive lawlessness.

²⁰⁰ International Bar Association "Report of the Zimbabwe Mission 2001"
<<http://www.derebus.org.za/archives/2001May/between/IBA%20full%20Zimbabwe%20report.pdf>> (accessed 9 May 2005).

²⁰¹ Note above page 34.

²⁰² Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights. 2004< <http://www1.umn.edu/humanrts/annualreport17.doc> > (accessed 7 October 2005) 14.

²⁰³ Agricola note 159.

²⁰⁴ SC-111/2001.

²⁰⁵ Note above.

3.9.3 Economic, social and cultural rights

Human dignity is the quintessence of human rights. The linkage between human rights and human development is now accepted internationally. The quality of governance in a country determines the degree of its respect for human rights and also its Human Development Index, determinative of the country's ranking and progress. The non-existence of a legal framework, compounded by the absence of justiciable socio-economic rights in the Constitution has worked against the realisation of rights through the judiciary²⁰⁶. Judicial timidity and political challenges, characterising Zimbabwe, have endangered judicial activism in economic social and cultural rights litigation.

The destruction of shacks in “Operation Murambatsvina” (meaning get rid of trash) in the urban areas rendering thousands homeless in contravention of their right to housing, is an example.²⁰⁷ In contravention of section 119 of the Urban Council Act, which requires the officials to give 28 days notice before eviction, and in a manner inhuman and degrading to the evictees, the authorities evicted without affording rights to be heard and without alternative accommodation.²⁰⁸

In a petition for an interdict, the court ruled that the evictions were legal and regretted the human suffering but was not brave enough to seize that opportunity to advance economic rights.²⁰⁹ This contravenes Zimbabwe’s obligations to respect, protect and fulfil human rights under both the ACHPR and the ICESCR. International law has proscribed forced evictions.²¹⁰ Jurisprudence on the right to housing in South Africa has outlawed evictions without alternative shelter.²¹¹ A report from the UN summarised the inadequacy of the role of the judiciary as follows:

²⁰⁶ E Dumbutshena “Opening Speech” in *Developing Human rights Jurisprudence*, Judicial Colloquium in Harare , Zimbabwe, 1989 page 27.

²⁰⁷ Statement by Zimbabwe Human Rights Ngo Forum “On The Demolitions Of Structures And Eviction Of Occupants By The Police And Local Authorities” < http://www.hrforumzim.com/frames/inside_frame_press.htm> (accessed 27 June 2005).

²⁰⁸ “Clear the Filth” Mass Evictions and Demolitions in Zimbabwe A Human Rights Watch Briefing Paper, September (2005)< <http://hrw.org/backgroundunder/africa/zimbabwe0905/zimbabwe0905.pdf> >(accessed 6 October 2005).

²⁰⁹ *Dare Remusha Co-operative v Minister of Local Government and Urban Development & others* HC-2467/05.

²¹⁰ General Comment 7 “The right to adequate housing : forced evictions” 20/05/97< [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument)>(accessed 15 September 2005).

²¹¹ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1228.

There is general concern that the HC's failure to safeguard the right of the victims of the Operation reaffirms the argument that the Zimbabwean Judiciary has generally failed to act and been seen to act as custodians of human rights in Zimbabwe and that there has been a regrettable failure by members of the Bench to remain independent from the national and local politics of the day. The general view among many stakeholders is that this has had a severe impact on the rule of law and the administration of justice, and has caused the ordinary person on the street to lose faith in achieving justice through legal channels.²¹²

3.10 Positive developments

The Gubbay bench following on its predecessors, advanced women rights particularly in inheritance, marriage and the protection of property rights at marriage dissolution as well as rights to live with foreign spouses. In *Rattigan v Chief Immigration Officer and others*²¹³, the court upheld the right of a woman to live with her husband in Zimbabwe finding that to deny her that would affront her right to freedom of movement.

Similarly, the current bench has also adopted this approach, in spite of the amendment to the Constitution²¹⁴ after the *Rattigan* decision that had the effect of proscribing change of status of aliens upon marriage to either a man or a woman. The stance of the current bench in interpreting women rights favourably despite the impediment brought about by the amendment is recognised.

In *Mudyanduna v Mukombero, Chief Immigration Officer and another*²¹⁵, the Chidyausiku bench found in favour of a spouse to live in Zimbabwe stating that such right can only be limited according to the recognised constitutional limitations and the court drew authority from the finding of its predecessor that "the effect of the amendment is merely to re-state the law in relation to the rights of non-citizens. It leaves untouched the rights of a citizen spouse."²¹⁶

Prison rights such as the conditions of detention have also positively concerned the Chidyausiku bench as the benches before. In a recent case of *Kachingwe and others v Minister of Home Affairs and another*²¹⁷, conditions of detention cells at two police stations were found to be inhuman and

²¹² A Tibaijuka "Report of the Fact-Finding Mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina" by the UN Special Envoy on human settlements issues in Zimbabwe <<http://www.unhabitat.org/documents/ZimbabweReport.pdf> (accessed 14 September 2005) 62.

²¹³ 1994 (2) ZLR 54.

²¹⁴ Constitutional Amendment Act 14/1996.

²¹⁵ SC-63/03.

²¹⁶ *Kohlhaas v Chief Immigration Officer and another* 1997 (2) ZLR 441 at 445.

²¹⁷ SC-145/04.

degrading in contravention of section 15(1) of the Constitution, in that they had no running water, no private toilet, filthy and stinking, among other findings.

3.11 Constitutional Amendment no. 17: implications for human rights protection

The need for constitutional reform in Zimbabwe has been dire since the rejection of the 2000 Draft Constitution by Zimbabweans.²¹⁸ Constitution making requires national consensus where there is direct participation by citizens.²¹⁹ The Constitutional Amendment no 17 was brought about by a two-thirds majority of the ruling ZANU PF party, amidst criticisms from the opposition parties, the MDC, civil society and academics, and is apparently devoid of a consensus.²²⁰

It is thus widely perceived as a means to a political end rather than a true representation of citizens' wishes and thus squarely fits into the paradigm of constitutions without constitutionalism.²²¹ Magaisa notes "[i]nstead of the constitution being the [supreme legal document regulating the exercise of state power, it has become an instrument for control and attempts to legitimise arbitrary actions]"²²²

The implications for human rights in the amendment are dismaying in that it takes away vested rights by broadening the scope of limitations. Even more distressing is the fact that the limitations are vague hence there is a reasonable apprehension of abuse by the executive. This is a compelling reason why the process should have involved the whole citizenry rather than parliament.

The amendment introduces section 16B to the Bill of Rights, which will amend the right to property. The effect of the amendment is to nationalise acquired land in terms of the LRP and it will oust the powers of the courts to adjudicate issues on land acquisition except if the issue relates to compensation for improvements on that land.²²³ The encroachment on the individual rights to property and anyone else with rights in land is obvious.

²¹⁸ "The Zimbabwe Constitutional Referendum" Report of the Centre for Democracy Observer Mission 2000.

²¹⁹ ACHPR article 13 provides for participation in governance of one's country.

²²⁰ Hatchard et al, "Devising popular and durable constitutions" note 16 page 28.

²²¹ H Okoth-Ogendo "Constitutions without constitutionalism: reflections on the African political paradox" in I Shivji *State and constitutionalism: An African debate on democracy* (1991) 4.

²²² A Magaisa "Zimbabwe: Constitution without constitutionalism" <
<http://www.newzimbabwe.com/pages/senate18.13087.html>> (accessed 9 September 2005).

²²³ Submissions by the Zimbabwe Human Rights NGO Forum to the Parliamentary Legal Committee on Constitutional Amendment no 17 <
<http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6FA5FW?OpenDocument>> (accessed 9 September 2005).

The ouster clause of the courts' jurisdiction violates the separation of powers concept, rule of law and the independence of the courts as espoused in section 79B in that this is a direct interference in the operations of the courts.²²⁴ The Human Rights Committee in its concluding observations on Zimbabwe has said that it is concerned with the fact that constitutional amendments have been used to nullify decisions of the SC.²²⁵

This is parallel to the international obligations undertaken by Zimbabwe. The implications for human rights are to take away citizens rights to property as well the right to protection of the law as contained in section 18. LRP has had grave implications on the right to food in Zimbabwe, and the economic implications of this is that no one would find it worthy to invest in agriculture when their property rights are not secure especially in the absence of court remedies.

The provision further amends section 22, which protects freedom of movement by extending the limitations to include "national interest", "public interest" and "economic interest of the state". All these are not defined and are left to executive prerogative. In addition, there are regulations anticipated in terms of this new amendment, which will make exit visas mandatory for Zimbabweans whose conduct is deemed detrimental by the authorities.²²⁶ The right to leave Zimbabwe will thus be capable of being denied.²²⁷ Opposition parties noted that this would be used against persons who criticise the government and the Minister of Justice seemed to have authenticated the claims.²²⁸

The amendments to the constitution will require the current bench to be robust in its approach to human rights protection. A wide and expansive interpretation of rights in the Bill of Rights as well as interpreting limitations restrictively will be the best approach. Furthermore it needs to reclaim its power as the protector of human rights in light of the ouster clause in Section 16B.

3.12 Public perception of the benches

Courts of law need to ensure public accountability. Kirby notes, "[t]he public's concept of courts is that they are unbiased and neutral" and hence the confidence that courts are neutral arbiters between the

²²⁴ Comments on Constitutional Amendment (No 17) Bill Submitted by SAHRIT to the Parliamentary Portfolio Committee Parliamentary Portfolio Committee for Justice, Legal and Parliamentary Affairs<
<http://www.sahrit.org/downloads/publications/38pub1123228248.doc>>accessed (9 September 2005)

²²⁵ Concluding Observations of the Human Rights Committee: Zimbabwe. 06/04/98. CCPR/C/79/Add.

²²⁶ "Government to impose exit visas" *Zimbabwe Independent*, 16 September 2005.

²²⁷ Article 12, ACHPR provides for the right to leave and enter one's country.

²²⁸ Note above.

state and the citizen.²²⁹ Emile Short stated,²³⁰ “independence . . . even the perception of independence is important”²³¹, thus when courts are biased the citizen is able to uncamouflage decisions judges dress up in purported neutral application of the existing law.

Furthermore, perception is earned from judicial leadership and administration of courts, from the jurisprudence and response to executive pressure. The Gubbay bench was largely perceived as independent, proactive in human rights protection albeit with criticisms in the approach it took in some cases. Thus, frosty relations endured between the Gubbay bench and the executive as a result of its resolute stance on human rights, its firm adherence to the tenets of rule of law and its refusal to yield to executive pressure.²³²

On the other hand, the current bench is largely perceived as a willing tool for the executive. In March 2000 the current CJ was inaugurated ahead of most senior members of the SC. The practice has largely been that senior judges would ascend to this post²³³ but at the time of his appointment, the CJ was the Judge President of the HC with the largest number of his HC decisions having been overturned by the SC.²³⁴

There is a strong and valid perception of judicial bribing in that members of the judiciary were offered and acquired farms during the controversial LRP.²³⁵ This makes them highly susceptible to political control and manipulation when dealing with land cases. Their impartiality in land related cases is doubted. A case in point is that of HC judge, Justice Hlatshwayo who was dragged before the HC in a land wrangle.²³⁶ The decision of the court was in his favour denying the aggrieved petitioner leave to

²²⁹ M Kirby “The role of the judge in advancing Human Rights by reference to Human Rights norms” in *Developing Human Rights Jurisprudence: The domestic application of International Human Rights Norms*, Judicial Colloquium in Bangalore, India 1988.

²³⁰ Former Commissioner, Ghana Human Rights Commission.

²³¹ Human Rights Watch World Report 2001 “Protectors or Pretenders: Government Human Rights Commissions in Africa” < <http://www.hrw.org/reports/2001/africa/overview/recommendations.html#top> (accessed 21 May 2005).

²³² In the *Mark Chavhunduka and Ray Choto* case the judiciary protested against executive lawlessness. The President castigated the SC judges for calling on him to restore the rule of law.

²³³ Justices of the SC McNally, Muchechetere, Sandura and Ebrahim were senior and more experienced.

²³⁴ Saller note 9 page 25.

²³⁵ The CJ Chidyausiku, Justices of the SC Ziyambi, Cheda, Malaba, and Gwaunza are confirmed beneficiaries of the land reform. See, Saller note 9 page 26.

²³⁶ B Zulu “ Justice Hlatshwayo in new land wrangle” *Zimbabwe Independent* < http://www.zimbabwesituation.com/jun20a_2003.html#link2 > (accessed 13 September 2005).

sue the judge for eviction from the farm on the basis of illegal occupation.²³⁷ The conflict of interest is apparent in that he is expected to rule on these land matters and maintain his independence when he has an interest. Thus the current bench is largely viewed with suspicion regarding institutional and individual independence.²³⁸

3.13 Concluding observations

The restrictive approach by the Chidyausiku bench to human rights cases makes it impossible to protect human rights. Consequently, human rights jurisprudence from the current bench has been weak and the court is increasingly losing its position as the protector and guarantor of universally recognised human rights and fundamental freedoms.²³⁹ Rule of law is the bedrock of democracy and the human rights movement in the new millennium needs judiciary activism charged towards protection of human liberties.²⁴⁰

Furthermore, the current bench has not adopted the various techniques like public interest litigation, giving expansive interpretation to human rights, creating new kind of compensatory jurisprudence, and requiring transparency and probity in the conduct of public affairs, to enable efficacy in the protection of human rights.²⁴¹ De Bourbon notes that in the Gubbay era and the era before, human rights protection was rife in that even if the court did not find for the litigant, it did so after carefully considering all points and thus court decisions were readily acceptable as the impartial finding of the court.²⁴² In this way the Gubbay era made huge advances in human rights protection.

Public opinion in the current environment views court decisions as largely favouring the executive position to the detriment of the citizen. Fortifying this view is the failure of the current bench to adopt new interpretative tools and the use of technicalities and procedural issues to avoid deciding substantive issues has further eroded the credibility of the current bench as a human rights protector. Moreover the trend to seemingly rubberstamp executive lawlessness strengthens the view that the

²³⁷ Saller note 9 page 17.

²³⁸ ICJ Report note 95.

²³⁹ C O'Regan "The enforcement and protection of human rights: The role of the CC in South Africa in B Ajibola et al, *The judiciary in Africa* (1998) 14.

²⁴⁰ M Buenger "Of money and judicial independence: can inherent powers protect state courts in tough fiscal times?" 92 *Kentucky Law Journal* (2004) 979.

²⁴¹ Justice J S Verma "Human Rights and the Judiciary" in "Human Rights and the Administration of Law" Report of Suhakam's Conference Held in Conjunction with the Third Malaysian Human Rights September 2003, Kuala Lumpur, Malaysia.

²⁴² De Bourbon note 2.

current bench is not the final arbiter on human rights.²⁴³ The current bench has thus not acquitted itself as a bastion for human rights protection.

²⁴³ Seventeenth Annual Activity Report note 201.

CHAPTER 4: THE UGANDAN EXPERIENCE

4.1 Historical perspective

The evolvement of the political landscape in Uganda has influenced the judiciary's character, its independence and ability to protect human rights. The judiciary under colonial Uganda was an extension of the British Crown with its prime purpose being "maintenance of law and order".²⁴⁴ Colonial judicial officers also served as executive functionaries as exemplified by local chiefs thereby assisting in the perpetuation of subjugating the popular majority by the coloniser. Thus there was no independence of the bench and no separation of powers to the detriment of human rights protection.²⁴⁵

The same state of affairs obtained under the first independent government of Milton Obote, which endured between 1962 and 1971. Although there was a semblance of separation of powers amongst the organs of state, the independence of the judiciary was not assured.²⁴⁶ The executive openly undermined the judiciary for instance in the case of *Grace Ibingira v Uganda*²⁴⁷, the court declared that the Deportation Ordinance Chapter 46, 1964 Laws of Uganda was bad law. It further noted that ministers who had been detained because of a vote of no confidence they intended to pass in the Obote government could not be held under that Ordinance because it had been overridden by the 1962 Constitution and it interfered with their freedom of movement. Therefore it could not apply to the applicants and the court ordered their release.

In a clear affront of the judiciary, the executive transported the arrestees to Entebbe where they saved them with new detention orders under the Emergency Powers (Detention) Regulations. A Parliamentary Act was promulgated validating these Regulations the same day. The subsequent petitioning of the court to declare the Regulations unlawful was not successful and the court ruled in favour of the government to the detriment of the detainees' rights. This approach was not protective of human rights and shows a fusion of powers amongst the organs of state.

²⁴⁴ J Oloka-Onyango "Judicial power and constitutionalism in Uganda: A historical perspective" in M Mamdani et al, *Studies in living conditions, popular movements and constitutionalism* (1994) 463 at 470.

²⁴⁵ Note above page 472.

²⁴⁶ G Tumwine-Mukumbwa "Ruled from the grave: Challenging antiquated Constitutional doctrines and values in Commonwealth Africa" in J Oloka-Onyango *Constitutionalism in Africa: Creating opportunities, Facing challenges* (2001) 287.

²⁴⁷ (1996) E.A 306.

The Idi Amin era was a total dictatorship and thus there were no pretences about the judiciary protecting human rights.²⁴⁸ Amin ruled by decree and he was the law unto himself. Widespread human rights violations characterised his rule and sometimes even the members of the judiciary were casualties.²⁴⁹ The military courts usurped the powers of the formal courts by trying and sentencing civilians²⁵⁰ and death by firing squads was a common punishment.

The current dispensation boasts of two phases, the pre-1995 era before the Constitution and the post-1995 Constitution phase. The pre-1995 period was largely characterised by judicial frustration and self-censorship because of the historical experiences of its predecessors.²⁵¹ The judiciary was wary of making radical decisions in politically sensitive cases. Thus, human rights were sacrificed on the altar of political expediency. Nevertheless, some decisions upheld human rights for instance in *Ssempebwa v Attorney General*²⁵², the Court declared illegal a Legal Notice²⁵³ which prohibited claims for compensation against the NRA/M resulting from activities attendant to the government's ascent to power.

However, the judiciary has changed and become more robust in the post 1995 era partly because of the constitutional provisions giving them more space for activism. This does not mean the judiciary is the surest guarantor of human rights because activism has not advanced far enough. Kibalama notes that often times the judiciary is intimidated and influenced to make decisions that rubber stamp executive excesses at the expense of human rights.²⁵⁴

4.2 Institutional framework

The court structure and mandate of the judiciary was revised under the 1995 Constitution. The court structure presents in the same way as the Zimbabwean judicature. At the bottom are the magistrates' courts. The HC is a court of original jurisdiction in all civil and criminal cases and any other matters provided by the constitution or an Act of Parliament.²⁵⁵ It also has jurisdiction to hear election petitions.

²⁴⁸ Oloka-Onyango note 244 page 488.

²⁴⁹ The first CJ Benedicto Kiwanuka disappeared and was murdered.

²⁵⁰ Military Tribunals Decree 12/1973.

²⁵¹ H Onoria "Protection and enforcement of fundamental rights and freedoms under the 1995 Constitution" Centre for Basic Research, Makerere (2003) 2.

²⁵² Constitutional Case 1/1987.

²⁵³ No 6/1986.

²⁵⁴ E Kibalama "Opening up a cul-de-sac: The state of constitutionalism in Uganda in 2002" in F Jjuuko *Constitutionalism in East Africa: Progress, Challenges and Perspectives in 2002* (2005) 9.

²⁵⁵ Article 139, Constitution of Uganda.

The Constitutional Court (CC) is a new court created under the 1995 Constitution.²⁵⁶ The jurisdiction of the court is to deal with constitutional interpretation. Regrettably, in its earlier decisions, which required that the court define its jurisdictional competence, it tied its noose by narrowly construing its mandate to only interpretation of constitutional clauses and refused to venture into interpretation of petitions seeking enforcement of human rights provisions.²⁵⁷

In *Attorney General v Tinyefunza*²⁵⁸, the court stated that its jurisdiction was limited to article 137(1) and that no other jurisdiction is given apart from jurisdiction to interpret the Constitution. Similarly in *Uganda Journalists Safety Committee and Haruna Kanabi v Attorney General*, the court declined to entertain a petition brought in terms of article 50 of the Constitution on the same grounds. Thus it was unable to protect human rights.

However, the court seems to have appreciated its mistakes and is slowly encompassing petitions seeking enforcement of human rights provisions. In *Ismail Serugo v Attorney General*²⁵⁹, the SC held that petitions for redress of infringed rights could only be made to the CC only in the context of a petition brought in terms of article 137 of the Constitution principally for interpretation. In *George William Alenyo v Attorney General & another*²⁶⁰, the court went further and said it can grant redress even in terms of article 50 if the issue imports interpretation as envisaged in article 137 of the Constitution. Thus the court has remedied its erroneous interpretation of its jurisdiction.

The SC is the highest and final court of appeal.²⁶¹ It has jurisdiction to hear appeals from the CC on constitutional issues and enforcement of human rights. It can depart from its decisions but it binds all other courts by its precedents just like its Zimbabwean counterpart. In discharging their mandate, courts are guaranteed independence to decide matters before them in accordance with the assessment of facts before them without influence, inducements or directives from any organ of state or private organisations.²⁶² In addition, the judiciary is self-accounting and to this extent, the risk of the executive to use funding to influence the judiciary is minimised.²⁶³

²⁵⁶ Article 137, Constitution of Uganda.

²⁵⁷ H Onoria "Review of the major decisions on rights and fundamental freedoms in 2001 and 2002" 9 East African Journal of Peace and Human Rights (2003) 361.

²⁵⁸ Constitutional Appeal 1/1997.

²⁵⁹ Constitutional Appeal 2/1998.

²⁶⁰ Constitutional Petition 5/2000.

²⁶¹ Article 132, Constitution of Uganda.

²⁶² Article 128, Constitution of Uganda.

Other guarantees include, security of tenure, which dictates removal proceedings to follow constitutional provisions and guaranteeing remuneration of judges.²⁶⁴ Appointment of judges involves the JSC, which advises the President, and appointments are subject to approval by Parliament.²⁶⁵ Thus while the composition of the JSC is dominated by presidential appointees²⁶⁶, improper influence may be checked by Parliament.

4.3 Constitutional framework

The drafters of the 1995 Constitution were cognisant of human rights as the premise for “democracy, peace security and stability, constitutionalism and rule of law” to flourish.²⁶⁷ The 1990s wave of democratisation at that time influenced the drafters to draw from progressive constitutions from other jurisdictions as well as international law.²⁶⁸ In that regard, the National Objectives and Directive Principles of State Policy²⁶⁹ underpin the values and norms that inspire the new dispensation and no doubt aid in interpreting the demarcation of rights.²⁷⁰

The Bill of Rights is impressive and boasts of inclusiveness of all three generations of rights. The civil and political rights²⁷¹ include new guarantees, universally recognised internationally such as the right to participate in the governance of one’s country²⁷², which were absent in previous constitutions. Additionally, economic, social and cultural rights have been embraced including rights of special interest groups such as minorities, persons with disabilities, women and children.²⁷³ Environmental rights, which are traditionally classified as solidarity or group rights, are also protected in article 39 and have been tested in court as shall be discussed below.

Pertinent to note is the guarantee that rights and fundamental freedoms are “inherent and not granted by the state”.²⁷⁴ This is a milestone of achievement given the historical context of Uganda and its

²⁶³ Note above.

²⁶⁴ Article 144, Uganda Constitution.

²⁶⁵ Article 142, Uganda Constitution.

²⁶⁶ Article 146, Constitution of Uganda.

²⁶⁷ Onoria note 251 page 3.

²⁶⁸ B Odoki *The search for a national consensus: The making of the 1995 Uganda Constitution* (2005) 290.

²⁶⁹ Objective I-XXVIII, Constitution of Uganda.

²⁷⁰ Indian Constitution contains similar objectives.

²⁷¹ Articles 21-29, Constitution of Uganda.

²⁷² Article 38, Constitution of Uganda.

²⁷³ Articles 30-40, Constitution of Uganda.

²⁷⁴ Article 20 (1), Constitution of Uganda.

experiences with total dictatorship or governments with dictatorial tendencies, which parcelled out rights as a privilege from the state.²⁷⁵ Additionally, the limitation clause²⁷⁶ requires limiting of rights only to the extent that it is demonstrably justifiable in a democratic society and thus removes the pervasive limitations contained in the previous constitution.²⁷⁷

Application of rights is vertical, state and individual, as well as horizontally between non-state actors and the individuals. In addition, article 45 specifically mentions that rights and fundamental freedoms mentioned in the Bill of Rights shall not exclude those not specifically mentioned. This sustains the argument by scholars that even rights in international treaties ratified by Uganda ought to be capable of being invoked in domestic law.²⁷⁸

4.4 The approach to procedural issues

Article 126 of the Constitution of Uganda appears to be revolutionary and ground breaking in as far as it subordinates technicalities and procedural issues to the giving of substantive justice. The courts have however given dominance to procedural issues and have extinguished their powers to adopt a liberal approach.²⁷⁹ In the case of *Rwanyarare and another v Attorney General*²⁸⁰ the CC stated that:

we do not see that article 126 (2) (e) has done away with the requirement for litigants to comply with rules of procedure in litigation. The article merely gives constitutional force to the well-known and long established principle at common law that rules of procedure are handmaidens of justice.

The court went on to decipher that the intention of the framers was to pay attention to technicalities and procedure, subject to the law. This position no doubt undermines litigants' rights to enforce human rights. Procedures ought to facilitate access to justice and legal rights and should not be permitted to obstruct and subserve them.²⁸¹

However, the approach of the Ugandan judiciary to *locus standi* ought to be commended. In giving effect to article 50 of the Constitution, which defines standing, the courts have adopted a wide and

²⁷⁵ Odoki note 268 page 293.

²⁷⁶ Article 43, Constitution of Uganda.

²⁷⁷ Onoria note 251 page 4.

²⁷⁸ G Tumwine-Mukumbwa "Domestic application of human rights norms" 3 East African Journal of Peace and Human Rights (1996) 3.

²⁷⁹ M Mbabazi "The interpretation and application of article 126(2) (e) of the 1995 Constitution of Uganda: Desecration or consecration?" 7 East African Journal of Peace and Human Rights (2001).

²⁸⁰ Constitutional Petition 11/1997.

²⁸¹ *Kendall and others v Hamilton* (1878) 4 AC 504 at 525.

liberal approach on standing.²⁸² This provision provides for any person or organisation to approach the court seeking enforcement of his rights or third parties' rights. This has opened doors to public interest litigation, which is essential in human rights protection to ensure that grievances of people will not go unredressed because "they are unable to reach the doors of court owing to their abject poverty, illiteracy, ignorance and disadvantaged conditions".²⁸³

Thus, in *The Environmental Action Network (TEAN) v the Attorney General*²⁸⁴, the court permitted litigation by an NGO on behalf of non-smokers. The NGO averred that smoking in public places was a violation to the right to a clean and healthy environment, right to life and right to health. The court refused to give credence to a lacuna that would prevent public-spirited litigation on the basis of outdated technical rules on *locus standi*.

4.5 Civil and political rights

In spite of a generally progressive Constitution and human rights guarantees, the approach of the judiciary has, by and large, been punctured by timidity and lack of judiciary innovation and activism.²⁸⁵ This is evident in freedom of expression jurisprudence. In *Uganda v Haruna Kanabi*²⁸⁶, the presiding officers in the magistrates' court hearing and the HC hearing were timid in that, while recognising that the law on sedition in the Uganda Penal Code violated the right to freedom of expression, they chose to apply the law as it was. This was in spite of article 137(5) of the constitution, which mandates a referral to the CC, if during the proceedings a constitutional question arises. This approach no doubt, traverses the courts obligation towards human rights protection.

Similarly, in the *Uganda v Onyango-Obbo and another*²⁸⁷, the magistrates convicted journalists of publishing falsehoods in spite of recognising the inconsistency of these Penal Code provisions with the right to freedom of expression. Suppression of media and freedom of speech rights is accentuated by such lack of activism. Fortunately, the SC overturned this decision on appeal, finding that the provisions of the Penal Code criminalising publishing of falsehoods was not demonstrably justifiable in

²⁸² G Tumwine-Mukumbwa "Public Interest Litigation and Public interest law: The role of the judiciary in Uganda" in P Walubiri *Uganda: Constitutionalism at cross roads* (1998) 99.

²⁸³ L Tibatemwa-Ekirikubinza "The judiciary and enforcement of human rights: Between judicial activism and judicial restraint" 6 East African Journal of Peace and Human Rights (2002) 164.

²⁸⁴ Misc Application 39/2001.

²⁸⁵ Tibatemwa-Ekirikubinza note 283.

²⁸⁶ Criminal case U 977/95.

²⁸⁷ Criminal case U 2636/97.

a democratic society.²⁸⁸ This was a welcome jurisprudential pronouncement on the part of the bench and will no doubt influence decisions to come.

The freedoms of assembly and association have not been spared the onslaught. The political space, particularly pre-1995 was characterised by the abeyance of political parties' activities²⁸⁹, and the Constitutional provisions on political systems institutionalised the Movement as the only legal system of political organisation.²⁹⁰ Inevitably, rights of assembly and association for political activity were severely curtailed.²⁹¹ Early jurisprudence from the courts²⁹², far from upholding rights of association and assembly, denied applicants these rights in an approach largely viewed as rubber-stamping the executive.

The case of *Rwanyarare v Attorney General*²⁹³ is typical of the above approach. In that case the petitioners alleged that the Constituent Assembly Election Rules Statute 6/1993 contravened their rights to freedom of assembly and association by proscribing participation in election on the basis of their political party ticket the United People's Congress (UPC), campaigning and calling for rallies to propagate their policies and solicit the voters' support. The SC in an act of timidity declined to strike down this law arguing that this was within the confines of the legislature. The court further stated that in any case the issues were resolved in the imminent deliberations on the draft constitution.²⁹⁴

This approach is indicative of a judiciary timid to engage with political issues. It is clear that the law in question infringed on freedom of assembly and association by forcing all contestants for political office to contest under the Movement system in clear violation of international standards.²⁹⁵ However in 2002, the court in *Ssemogerere and others v Attorney General*²⁹⁶, impugned section 18 and 19 of the Political Parties and Organisation Act no 18/2002 and stated that they rendered political parties non-

²⁸⁸ Constitutional Appeal 2/2002.

²⁸⁹ R Wengi *Founding the Constitution of Uganda: Essays and materials* (1994) 217 at 223.

²⁹⁰ "Hostile to Democracy: The Movement and political system in Uganda" Human Rights Watch Report New York October (1999).

²⁹¹ Note above.

²⁹² *Rwanyarare v Attorney General* Constitutional Petition 11/1997.

²⁹³ Note above.

²⁹⁴ Wengi note 289.

²⁹⁵ Clause 25 of General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service CCPR/C/21/Rev.1/Add.7

<http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument> (accessed 10 October 2005).

²⁹⁶ Constitutional Petition 5/2003.

functional and inactive by placing severe restrictions to operations consequently violating rights of assembly and association.²⁹⁷

Critics have however castigated the judiciary for a little too much, a little too late in that these progressive decisions were made just at about the same time the executive had conceded to liberalising the political space, yet before that, the judiciary had endorsed the notion that the Movement was not a political organisation. In *Ssemogerere*, the court finally pronounced the Movement to be a political party and that its continued sole existence would amount to a *de facto* one party state.²⁹⁸ This is indicative that indeed, court decisions even if positive can be unmasked for what they are, and public opinion is not easily deceived. However, all good precedent is applauded for laying the foundation for the future of the judiciary.

Electoral rights have also been subject to judicial challenge. In the case of *Kizza Besigye v Yoweri Kaguta Museveni and another*²⁹⁹, even though the court found a multitude of electoral vices it held that these did not meet the test of substantial fraud, enough to vitiate the election. In addition, the court stated that the respondent was not personally involved in the commission of the offences. Thus the court endorsed electoral fraud to the detriment of the petitioner. This reasoning was followed in *Masiko Winfred Komuhangi v Babihuga Winnie*³⁰⁰, signifying the judiciary's failure to protect electoral rights.

It is encouraging to note the self-redeeming efforts of the judiciary in *Amama Mbabazi and another v James Guruga Musinguzi*³⁰¹, where the court found that the electoral malpractices were of a substantial manner and vitiated the election. That case further established that the vices committed by agents acting in the name of the contestant were imputable to the agent whether it was or was not within his knowledge.

The potential in the judiciary to ensure human rights protection is present and has been activated in several decisions. In *Attorney General v Salvatori Abuki and another*³⁰², the SC found corporal punishment repugnant to protection of human dignity and an affront to the freedom from inhuman and

²⁹⁷ H Onoria "Major decisions on fundamental rights and freedoms in Uganda in 2003, 11 East African Journal of Peace & Human Rights (2005) 150.

²⁹⁸ Note above.

²⁹⁹ Election Petition 1/2001.

³⁰⁰ Election Petition Appeal 9/2002.

³⁰¹ Election petition Appeal 12/2002.

³⁰² Constitutional Appeal 1/1998.

degrading punishment. Persuasive authority was derived from comparative jurisprudence³⁰³ and internationally acclaimed standards.

The use of international instruments in domestic jurisprudence enriches the courts.³⁰⁴ The adoption of wide and purposive interpretation by the courts is also another positive development in the domestic jurisprudence.³⁰⁵ Tumwine-Mukumbwa notes that it is the function of the courts to set standards when interpreting the Constitution and enforcing human rights.³⁰⁶

4.6 Social-economic rights and group rights

Socio-economic litigation in Uganda obtains at a minimal though encouraging level. These rights are justiciable under the 1995 Constitution, and with the liberalisation of *locus standi* as evidenced in article 50, the courts have defined their judicial competence in this arena. The *TEAN* case³⁰⁷ concerned an application brought by an NGO on behalf of non-smokers alleging violation of the right to a clean and healthy environment and the right to life. The case laid down several important principles including the principle of horizontal application of the Bill of Rights³⁰⁸, holding that British American Tobacco (Ltd) cited as a respondent was bound by the decision.

Furthermore, the court adopted the progressive approach of interpreting rights as interdependent, interrelated and indivisible as has been done in comparative jurisdictions such as India.³⁰⁹ In this way, the court was able to find that the denial of a right to clean and healthy environment is a denial of right to life.³¹⁰ While the court declined to make an order criminalising smoking in public places, this decision was generally welcome.

³⁰³ The court drew from comparative decisions in *S v Ncube* 1987(2) ZLR 246, *State v A Juvenile, Ex-parte Attorney Namibia: Re Corporal Punishment by Organs of state* 1991 (3) SA 76, *S v Williams* 1995 (3) SA 632, *Tyler v UK* [1978] 2 EHRR 1.

³⁰⁴ Tumwine-Mukumbwa note 278.

³⁰⁵ G Tumwine-Mukumbwa "The Uganda Constitution 1995 and human rights interpretation and enforcement of Chapter 4 rights and freedoms" in P Walubiri Uganda: *Constitutionalism at crossroads* (1998) 9.

³⁰⁶ Note above.

³⁰⁷ Note 284 above.

³⁰⁸ Article 20, Bill of Rights binds non-state actors.

³⁰⁹ S Muradiller "Economic social and cultural rights: An Indian response to the justiciability debate" in Y Ghai et al, *Economic social cultural rights in practice: The role of judges in implementing economic social and cultural rights* (2004) 23.

³¹⁰ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96.

In the case of *Joyce Nakawa v Attorney General and others*³¹¹, the petitioner invoked article 33 (3) alleging the failure by the state and Kampala City Council to provide medical and maternal care. Unfortunately, the petitioner died before the court had adjudicated the substantive issues. This is however indicative of the consciousness on the part of the citizen to invoke these rights.

In yet another case of *Dimache Sharon v Makerere University*³¹², the right to education was brought under scrutiny although the principal issue was right to religion. Seventh Day Adventist students averred a violation of freedom of religion, because of the University's mandatory policy of holding classes and other academic activities on Saturdays. The court found against the petitioners averring that the right to practice one's religion was not absolute and that the exercise of the petitioners' rights had to be in cognisance of the fact that Makerere University was a secular university.

The court also touched on the issue of right to education and stated that petitioners were not compelled to participate in academic activities on Saturday.³¹³ Needless to say, non-participation would be to their peril. Thus, the court found justification on the basis that the petitioners could have joined other universities whose policy did not hinder the practice of their beliefs and their right to education.

Oloka-Onyango laments a state of inadequacy and scanty litigation in this arena and even though the courts have embraced the justiciability of economic social and cultural rights, he notes the reluctance of courts to give full effect to the relevant constitutional provisions.³¹⁴ The court needs to attain a certain standard of vigilance to ensure these rights do not remain relegated to a secondary position to civil and political rights by adopting international standards when interpretation to these rights.³¹⁵

4.7 Concluding observations

The judiciary in Uganda shows a marked improvement in its role in protecting human rights, even though the executive through non-enforcement of its decisions or outright condemnation and attacks, often undermine it. Far from acting as the check it should be of the omnipotence of the executive in

³¹¹ Constitutional Petition 2/2001.

³¹² Constitutional Petition 1/2003.

³¹³ J Oloka-Onyango "Economic and social human rights in the aftermath of Uganda's fourth Constitution: A critical reconceptualisation" Working Paper No. 88/2004 Centre for Basic Research (2004) at 46.

³¹⁴ Note above.

³¹⁵ J Cottrell et al, "The role of the courts in the protection of economic social and cultural rights" in Y Ghai et al, *Economic social cultural rights in practice: The role of judges in implementing economic social and cultural rights* (2004) 58.

judiciary affairs by employing judicial activism, the courts have generally censored themselves leading to the continual addiction to judicial restraint.

The adoption of static and gothic interpretations often result in the erosion of rights for instance the approach to procedural issues discussed above. A more liberal, generous and purposive approach to interpretation of rights is preferable. Technicalities and procedural issues should not be allowed to override substantial justice in human rights cases. Indeed, some jurisprudence of the Uganda judiciary as exemplified by the *TEAN* case, show the readiness to engage with human rights protection while yet others show timidity of the bench. Thus, there is a mixed bag of jurisprudence from the judiciary.

CHAPTER 5: TOWARDS BEST PRACTISES

5.1 Introduction

It is the function of the court to set standards when interpreting the constitution and enforcing human rights. There is an expectation on the highest court of the judicature “to play a pivotal role in taming the excesses of power and promote constitutionalism”.³¹⁶ The judiciary ought to discard all technicalities that fetter access to courts. It must in the same vein adopt a broad and purposive approach aimed at guaranteeing and securing human rights.³¹⁷ Thus, courts ought to move away from submitting to executive whims. This chapter discusses best practices for judiciaries, make a conclusion on the SC bench in Zimbabwe and lastly make recommendations.

5.2 The practices of the judiciaries under consideration

In spite of considerably good national frameworks for human rights protection, both the current SC bench in Zimbabwe and the Ugandan judiciary have not realised their full potential as human rights protectors. Furthermore, international standards that are inspiring jurisprudence in other jurisdictions have found little favour with the judiciaries under consideration. Similar factors and circumstances obtain in both countries presenting challenges such as, interference with the judiciary, adherence to technicalities, inconsistencies in jurisprudence, narrow interpretation of the constitution and lack of judicial activism.

It is evident that the greatest challenger to human rights protection is the executive. Often the Presidency makes declarations that clearly undermine the judiciary. After the CC found in favour of the litigants in the *Ssemogerere* case, President Museveni threatened the judiciary for allegedly usurping the people’s power and stated that the executive would not tolerate that.³¹⁸ Similarly, President Mugabe reacting to the *In re Chinamasa* case said the executive would not respect judgments that are allegedly subjective.³¹⁹

The tendency of amending the constitution to address the mischief that courts would have spoken against is commonplace. In Zimbabwe, the Bill of Rights has been amended almost after every

³¹⁶ P Walubiri “Towards a new Judicature in Uganda: From reluctant guards to centurions of justices” in *Uganda: Constitutionalism at crossroads* (1998) 135 at 207

³¹⁷ *Dow v Attorney General* 1992 LRC 623 at 668

³¹⁸ *The Monitor* 30 June 2004 page 18.

³¹⁹ “Justice in Zimbabwe” note 20 page 22 quoting the *Herald* 27 July 2002.

significant decision upholding human rights as exemplified by the *CCJP case*, *Rattigan case* and *S v A Juvenile* discussed in chapter 3. The Ugandan experience also shows a similar trend. Laws and constitutions are tailored to suit the executive.

To attain best practices, the challenge for the judiciary is to remain independent and recognise its role as a human rights protector in spite of governments' failure of the test to promote and protect fundamental rights.³²⁰ It is up to the courts to define and extent their judicial competence through innovative approaches and demand accountability from the executive. Moreover, the courts must not undermine their constitutional authority to protect and enforce human rights. Marked hesitancy on the part of the courts to deal with political cases often result in the violation of rights. Human rights have become a legitimate concern world over hence the emerging right to an independent judiciary that can effectively protect human rights.³²¹

The Gubbay era was marked by best practices such expansive interpretation of human rights provisions while limitation clauses were narrowly construed according to what was justifiable by democratic standards. Use of contemporary interpretative tools concerned this bench resulting in a visible contribution to normative standards as evidenced by the *CCJP* principle, among others. Judicial independence was evident in the work and relations with other organs of state. The Chidyausiku era has retrogressed in many of these respects and it is commended to learn from the approach of its predecessor.

Best practices emerging form the judiciary in Uganda include its attitude towards public interest litigation, which is positive; as well as its jurisprudence on economic social and cultural rights such as the *TEAN case*. It is noted that the SC of Zimbabwe can learn from these positive developments. It is also worthy noting that after being attacked for the judgement in the *Ssemogerere case*, CJ Odoki publicly admonished the executive for interference³²² and drew its attention to the constitutional provision that binds all organs of state to guarantee the independence of the judiciary.³²³

This brave act of judicial leadership is worth learning from so that the executive is reminded of its obligations in terms of the Constitution and international law. This would be worth adopting in

³²⁰ C Larkins "Judicial independence and democratisation: a theoretical and conceptual analysis" 44 *American Journal of Comparative Law* (1996) 605 at 608.

³²¹ G Longo "The human right to an independent judiciary: international norms and denied application before a domestic jurisdiction" 70 *Saint John's Law Review* (1996) 111.

³²² S Muyita "Don't intimidate us, Chief Justice tells Government" *The Monitor* 30 June 2004

³²³ Article 128, Constitution of Uganda.

Zimbabwe with regards to the attitude of the executive towards its concept of selective application of the law and the non-enforcement of court orders.

5.3 Conclusion

After an interrogation of the research questions set out in Chapter 1, one can conclude that the current SC bench has not lived up to its mandate to protect human rights through its jurisprudence. Several factors, some external and others self-imposed have resulted in the failure to uphold fundamental freedoms and liberties. One notes the retrogression in civil and political participation rights such as freedom of expression, freedom of association and assembly and electoral rights. Virtually no progress has been made in the arena of socio-economic rights. Judicial timidity has seen the right to housing being trampled upon. Similarly the right to food particularly in light of the LRP has not been protected, in spite of comparative jurisprudence from South Africa and other jurisdictions.

Courts with the mandate to protect human rights are adjudged by the quality and character of the jurisprudence they deliver. The seeming support for certain political agendas by judges on the current bench subverts their independence and the agenda for human rights advancement.³²⁴ This is shown by the reluctance of the current bench to engage with “political questions”. This is not only a defeatist attitude by the SC but an abrogation of its constitutional mandate to check executive arbitrariness.

The previous benches such as the Gubbay bench served with apparent distinction and acquitted themselves well in spite of politically challenging times and executive pressure and often times direct confrontation.³²⁵ It is pertinent to note that the traditional executive- judiciary tension experienced by other benches is non-existent with this current bench. The conclusion one draws from this is that the current bench is rubber-stamping executive impunity through its decisions which are almost always favourable to the executive.

In the Chidyausiku era, courts are no longer final arbiters on human rights as they fail to tame executive lawlessness particularly in enforcement of judgements. Moreover, the tendency of the court to undermine itself by producing variant jurisprudence exacerbates violation of human rights. The different judgements by two HC judges in the *In Re Chinamasa* case provide an insight. The narrow and arcane approach to human rights interpretation has contributed to weakening jurisprudence. This

³²⁴ UN Report of the Fact-Finding Mission to Zimbabwe note 211 page 67.

³²⁵ After the invasion of the SC by war veterans and supporters of the government on 24 November 2003, CJ Gubbay petitioned the Presidency and entreated it to protect the integrity and independence of the judiciary.

is exacerbated by the use of procedural hurdles and technicalities to deny substantive justice. Consequently, public confidence in the judiciary has waned. Moreover, it is common knowledge that several SC judges benefited from the controversial LRP, thus tainting their impartiality. Thus judicial bribing has negated human rights protection.

The current bench has not favourably considered contemporary tools in human rights litigation such as public interest litigation. Additionally use of international instruments and normative standards have been shot down on the basis of non-domestication. This disregards standards that are being propagated globally and emerging favourable trends that are a result of globalisation. The new compensatory jurisprudence in human rights has also not inspired the current bench. Hence its failure to claim its position in the world, amongst eminent judiciaries.

5.4 Recommendations

The approach of the bench ought to encompass a generous and purposive approach to interpretation that draws on international law and comparative jurisprudence to enable effective discharge of its mandate. Issues of technicalities and procedure ought not to obstruct substantive justice but rather aid in the attainment of justice. The current bench should also adopt innovative approaches towards the protection of socio-economic rights despite their absence in the national framework.

Independence and integrity of bench should be endeared. Judges must unambiguously maintain fidelity to the law and jealously guard their independence and integrity. The judiciary should enjoy institutional and financial independence. Commitment to constitutional provisions on independence of the judiciary by all organs of state is therefore required. The judiciary must also have financial autonomy in drawing up its budget and dealing directly with the relevant state authorities on financial matters. Judges must be persons of integrity and ability with appropriate qualifications.

The role of the CJ must be evident through prudent judicial leadership and must call for respect and enforcement of court orders. Administration of the courts must also be reflective of the commitment of the courts to human rights protection. The regaining of relevance and institutional competence are pertinent for the current bench. The judiciary needs to regain its role as the final arbiter in human rights matters.

There is need for continuous training for members of the judiciary. There are emerging needs, scientific advances, changing perceptions and modalities of thinking and ideas in human rights and

democracy. This calls for a paradigm shift in the training and retraining of members of the judiciary. It is therefore recommended that the judiciary continuously update themselves in changing and emerging human rights issues.

The JSC should be strengthened and mandated to improve access to justice and efficiency, advocate for conditions of service and handle complaints. The rules of procedure for the JSC should be written and precisely deal with issues of nomination of judges and revise the weight of its advice in the appointment process. The composition of the judiciary must be representative of the justice delivery system. The JSC should play a pivotal role in the protection of judges from political pressure and handle misconduct issues according to the constitutional principles. Legitimate concerns about the functioning of the judiciary should follow proper channels.

The arms of government should engage in institutional dialogue to ensure independence of the judiciary yet ensuring transparency and accountability. Conditions of service, judicial bribing and the strengthening of the national framework for human rights protection should be the focal points for dialoguing, among others. Networking among institutions in the justice delivery system is recommended and the Chain Linked Network³²⁶ adopted in Uganda is inspirational in this regard.

Word count without footnotes 17 747

³²⁶ Under this programme the judiciary, Prisons Service, Police, Ministry of Justice, Ministry of Internal Affairs, Ministry of Justice and Constitutional affairs, Uganda Law Society, Ministry of Local Governments-Local Council Courts, Directorate of Prosecutions, Uganda Law Reform Commission and Ministry of Gender, Labour and Social Development-Probation Services meet once a month to find a consensus to problems.

ANNEXTURE 1 (as referred on page 25)

Zimbabwe Parliamentary Elections 24- 25 June 2000: outcome of election petitions as at 12 October 2004 by Zimbabwe Lawyers for Human Rights

- A Election petitions filed by MDC candidates which were successful in the High Court (7 cases)
- B Election petitions filed by MDC candidates which were dismissed in the High Court (11 cases)
- C Election petition filed by a ZANU (PF) candidate which was successful in the High Court (1 case)
- D Election petitions filed by MDC candidates in the High Court but not yet completed (5 cases)
- E Election petitions filed by MDC candidates in the High Court but not proceeded with (16 cases)
- F Election petition filed by a ZUD candidate in the High Court but not proceeded with (1 case)

A Election petitions filed by MDC candidates which were successful in the High Court.

CUM TOT-ALS	IND TOT-ALS	CONSTIT UENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
1	1	Buhera North	Tsvangirai v Manyonda	Devittie J.	S Jarvis (A & C)	Trial commenced on 2/3/01. Judgement given in favour of MDC candidate on 26/4/2001. Reported in 2001(1) ZLR 295. Appeal lodged by Zanu (PF) candidate. Several tapes of the record were stolen from a locked office at the High Court. Some of the remaining tapes are inaudible. The Judge's notebooks are missing. Consequently, appeal has not yet been heard.	Preparation of the record, if this is possible. Thereafter, hearing of the appeal.
2	2	Hurungwe East	Chadya v Marumahoko	Devittie J.	S Hwacha (D M H)	Trial commenced on 16/2/01. Judgement given in favour of MDC candidate on 26/4/2001. Reported in 2001 (1) ZLR 285. Appeal lodged by Zanu (PF) candidate. A whole section of the appeal record is missing. However, the Judge	Preparation of the record, if this is possible. Thereafter, hearing of the appeal.

						summarised the evidence in his notes. The parties have agreed to proceed with the record as it is. Appeal has not yet been heard.	
3	3	Mutoko South	Muzira v Muchena	Devittie J.	T Biti (H & B)	Trial commenced on 15/3/2001. Judgement given in favour of MDC candidate on 27/4/2001. Reported in 2001 (1) ZLR 308. Appeal lodged by ZANU (PF) candidate in January 2001. Record has been transcribed. Petitioner's and Respondent's Heads of Argument filed. Appeal was set down for hearing in SC on 20/9/ 2004. However, it was postponed on that date at the instance of the Chief Justice. Now set down for hearing on 4/11/2004.	Hearing of appeal in SC on 4/11/2004.
4	4	Chiredzi North	Mare v Chauke	Ziyambi J.	B Mtetwa (K & I)	Judgement given in favour of M D C on 20/6/2001. Appeal lodged by ZANU (PF) candidate on 4/7/2001. Record recently transcribed. Appeal heard in SC on 14/6/2004. Judgement reserved.	Awaiting judgement of appeal from SC.

CUM TOT-ALS	IND TOT-ALS	CONSTIT UENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
5	5	Gokwe North	Mlandu v Mkandhla	Makarau J	L Uriri (H &B)	Judgement given in favour of MDC candidate on 15/1/2003. Appeal lodged by Zanu (PF) candidate on 31/1/03. Appeal record has been transcribed. Heads of Argument called for in June 2004 but not received. Consequently, i.t.o. R44 SC Rules, appeal deemed to have been dismissed.	Confirmation from Registrar of SC that appeal dismissed. The Speaker of Parliament should then be notified. Thereafter, by-election should be held.
6	6	Gokwe South	Muyambi v Machaya	Makarau J.	L Uriri (H & B)	Judgement given in favour of MDC candidate on 15/1/2003. Appeal lodged by Zanu (PF) candidate on 31/1/2003. Appeal record transcribed. Heads of Argument called for n June 2004 but not received. Consequently, i.t.o. R44 SC Rules, appeal deemed to have been dismissed.	Confirmation from Registrar of SC that appeal dismissed. The Speaker of Parliament should then be notified. Thereafter, by-election should be held.
7	7	Makoni East	Mudzenge -rere V Chipanga	Garwe J.P.	S Jarvis (A & C)	Trial before Garwe JP concluded on 11/10/2001. Judgement in favour of the MDC candidate was only granted two years later on 22 October 2003. Even later, the reasons for judgement were provided. An appeal has been lodged by the Zanu (PF) candidate. The record has not yet been transcribed.	Transcription of record. Thereafter, hearing of the appeal.

B Election petitions filed by MDC candidates which have been dismissed in the High Court.

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
8	1	Chinhoyi	Matamisa v Chiyangwa	Garwe J.P	I Chagonda (A & C)	Judgement given in favour of ZANU (PF) candidate on 9/5/2001. Appeal lodged by MDC candidate. Appeal record transcribed. Lawyers presently awaiting instructions whether to proceed. Next stage is to inspect record of appeal.	If so instructed, proceed to appeal.
CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
9	2	Chiredzi South	Tsumele v Baloyi	Ziyambi J	B. Mtetwa (K & I)	Judgement given in favour of ZANU (PF) candidate on 20/6/2001. Appeal lodged by MDC candidate on 10 July 2001. Appeal record not yet transcribed.	Transcription of record. Thereafter, hearing of appeal.
10	3	Chivi North	Chionden-gwa v Mumbenge-gwi	Makarau J	A Tsoka (Wintertons)	MDC candidate did not appear on the initial day of the hearing and, because of this, the Judge dismissed the petition. Matter closed.	Nil. Matter closed.
11	4	Goromonzi	Mapuranga v Murerwa	Hlatshwayo J.	S Jarvis (A & C)	Trial held in September 2001. Judgement reserved. Election petition by MDC candidate dismissed on 6 March 2002. However, since then, despite repeated requests, no Reasons for Judgement given. Consequently, MDC candidate unable, as yet, to lodge appeal.	Awaiting Reasons for Judgement from the Judge in the High Court. Thereafter, proceed to appeal.
12	5	Mberengwa West	M. Hove v Joram M.Gumbo	Hlatshwayo J.	B Mtetwa (K & I)	Trial commenced on 3/7/2001. Evidence completed on 26/7/2001. Petition dismissed on 6/3/2002. Reasons for Judgement only given on 9/4/2003. Appeal lodged by MDC candidate. Appeal record transcribed. Appeal heard in SC on 5/2/04. Argued by Mr S Hwacha of D M H.	Awaiting Judgement from appeal in SC.

						Judgement reserved.	
13	6	Mt Darwin South	Mumbama -rwo v Kasukuwe -re	Makarau J.	I Zindi (K & I)	Judgement given in favour of ZANU (PF) candidate in January 2002. Appeal lodged by MDC candidate on 29/1/2002. The record has been transcribed but appeal not yet heard.	Hearing of appeal. No date yet set.
14	7	Murehwa North	Mudzi-ngwa v Chitongo	Hlatshwayo J.	I Zindi (K & I)	Judgement given in favour of ZANU (PF) candidate in June 2002. Appeal lodged by MDC candidate on 24/6/2002. Record not yet transcribed.	Transcription of record. Thereafter, hearing of appeal.

CUM TOT-ALS	IND TOT - ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
15	8	Murehwa South	Nezi v Matiza	Ndou J.	A Mugandiwa (Wintertons)	Petitioner failed to attend court three times. Court absolved Zanu (PF) candidate. No further developments. Matter closed.	Nil. Matter closed.
16	9	Mwenezi	Masekesa v Shumba	Makarau J.	M Gwaunza (Wintertons)	Trial evidence completed on 25/10/01. Judgement subsequently given in favour of ZANU (PF) candidate. Awaiting instructions whether to appeal.	If so instructed, proceed to appeal.
17	10	Shurugwi	Matibenga v Nhema	Devittie J.	A Mugandiwa (Wintertons)	Judgement given in favour of ZANU (PF) candidate in April 2001. MDC candidate decided not to appeal. Matter closed.	Nil. Matter closed.
18	11	Zvishavane	Maruzani v Mbalekwa	Ziyambi J.	B Mtetwa (K & I)	Judgement given in favour of ZANU (PF) candidate on 23/3/01. Appeal lodged by MDC candidate on 26/3/01. Record of Appeal has been transcribed and now awaiting set down for argument.	Hearing of appeal.

C Election petition filed by a ZANU (PF) candidate which was successful in the High Court.

CUM TOT-ALS	IND TOT - ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
19	1	Seke	Chiota v Mutasa	Ziyambi J.	B Mtetwa (K & I)	Judgement given in favour of ZANU (PF) candidate on 23/1/02. Appeal lodged by MDC candidate on 30/1/2002. Record eventually transcribed. Set down for hearing in SC on 7/9/2004. However the MDC candidate died on 24/7/2004. and as a result the appeal was struck off the list.	By-election on 18/9/2004 won unopposed by P Chihota of ZANU (PF). No MDC candidate stood in line with their recent decision not to contest elections at this stage.

D Election petitions filed by MDC candidates in the High Court but not yet completed

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	HIGH COURT JUDGE	LAWYER	STAGE REACHED	MATTERS OUTSTANDING
20	1	Gokwe West	Sithole v Nyauchi	No Judge allocated.	L Uriri (H & B)	Petition filed by MDC candidate on 26/6/00. Same constituency as petition filed by ZUD candidate in No. 41. Petition filed by MDC candidate not yet heard.	Hearing of trial in High Court.
21	2	Marondera East	Munhenzva V Sekeramayi	Initially Ziyambi J and later Ndou J.	I Zindi (K & I)	Election narrowly won by ZANU (PF) candidate. Recount conducted but the original count was upheld. Petition originally commenced before Ziyambi J before her elevation to the SC. Petition then allocated to Ndou J. However, despite numerous requests for a set down date, the petition has not been set down for continuation of hearing.	Continuation of the hearing in the High Court.
22	3	Mazowe West	Chigonero v Kuruneri	No Judge allocated.	S Jarvis (A & C)	The factual allegations to be led by the MDC candidate in this matter are similar to those led in the petition in respect of Goromonzi (11). Because no reasons for judgement have been given in the Goromonzi petition, the petition for Mazowe West has not commenced.	Reasons for judgement in the Goromonzi petition (11) should be given . Thereafter, the petition for Mazowe West should be heard in the High Court.
23	4	Mazowe East	Mushonga v Chemutingwende	No judge allocated.	S Mushonga (Mushonga & Ass.)	Petition filed but not yet heard.	Hearing in the High Court.
24	5	Mberengwa East	Holland v Rugare A. N. Gumbo	Paradza J.	B Mtetwa (K & I)	Hearing of petition commenced but then postponed in March 2002 sine die. The presiding Judge, Paradza J, has since been suspended. No other Judge has been allocated to preside over the case.	Continuation of hearing in the High Court.

E Election petitions filed by MDC candidates in the High Court but not proceeded with

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	LAWYER	STAGE REACHED	SUBSEQUENT EVENTS
25	1	Bindura	Pfebve v Gezi	S Hwacha (D M H)	Before Petition was heard, Zanu (PF) candidate died.	By-election held on 28 – 29/7/2001. Won by Elliot Manyika of ZANU (PF).
26	2	Chikomba	Kaunda v Hunzvi	B. Kagoro (K & I)	Before Petition was heard, Zanu (PF) candidate died.	By-election held on 22-23/9/2001. Won by Bernard Makova of ZANU (PF).
27	3	Chegutu	Matibe v Ndlovu	I Chagonda (A & C)	The MDC candidate was a successful black commercial farmer. After he filed his petition, his farm was invaded. He was forced to withdraw his petition.	The MDC candidate was forcibly evicted from his farm and lost everything. He has since left the country.
28	4	Gokwe Central	Nyathi v Mupukuta	K Laue (K & I)	Petitioner is missing and his lawyers did not therefore proceed with petition.	Matter closed.
29	5	Gokwe East	Mudzori v Bhuka	A Machingauta (H & B)	Petitioner withdrew petition.	Matter closed.
30	6	Guruve North	McCormick v Mazikana	N Madya (Wintertons)	Delay in hearing. Petitioner prejudiced and decided not to proceed.	Matter closed.
31	7	Guruve South	Chamani-kire v Chininga	I Chagonda (A & C)	Petitioner decided not to proceed.	Matter closed.
32	8	Gutu North	Musoni v Muzenda	M Gwaunza (Wintertons)	Petitioner decided not to proceed.	Matter closed.

CUM TOT-ALS	IND TOT-ALS	CONSTITUENCY	PARTIES	LAWYER	STAGE REACHED	SUBSEQUENT EVENTS
33	9	Hurungwe West	Kanhema v Marko Madiro	S Hwacha (D M H)	Petitioner did not proceed with petition with the petition. He defected to ZANU (PF).	ZANU (PF) candidate later died. By-election held on 28-29/9/01. Won by deceased candidate's brother Phone Madiro of ZANU (PF).
34	10	Hwedza	Tachiveyi v Chigwedere	S Hwacha (D M H)	Petitioner did not to proceed with the petition.	Matter closed.
35	11	Kariba	Sigobole V Mackenzi e	S Jarvis (A & C)	Petitioner applied to withdraw his petition after threats were made against him. Since then, the petitioner has disappeared. Matter in abeyance.	Very unlikely to proceed.
36	12	Makoni West	Makuwaza v Mahachi	C. Lloyd (A & C)	Evidence was led at the trial of the election petition before Garwe J. However, the ZANU (PF) candidate then died.	By-election held on 8-9/9/01. Won by Gibson Munyoro of ZANU (PF).
37	13	Marondera West	Chipangura v Gwanzura	A Tsoka (Wintertons)	Petitioner did not proceed with the petition. ZANU (PF) candidate later died.	By-election held on 25-26/11/2000. Won by Ambrose Mutanhiri of ZANU (PF).
38	14	Masvingo South	Rioga V Zvobgo	I Chagonda (A & C)	Petitioner reached agreement with Respondent to withdraw petition.	Matter closed. The ZANU (PF) candidate, Dr Zvobgo, died on 22/8/2004. Walter Mzembe of ZANU (PF) was elected unopposed after nomination court sat on 8/10/04.
39	15	Zaka West	Musimiki V Chindanya	Mwonzora & Associates, Masvingo (through Wintertons)	Petition withdrawn.	Matter closed.
40	16	Zvimba North	Gomba V Chombo	C. Lloyd (A&C)	Petitioner did not proceed with the petition.	Matter closed.

F Election Petition filed by a ZUD candidate in the High Court but not proceeded with

CUM TOT- ALS	IND TOT -ALS	CONSTIT UENCY	PARTIES	LAWYER	COMMENTS	MATTERS OUTSTANDING
41	1	Gokwe West	Nyoni v Nyauchi	I Zindi (K & I)	Petition filed by ZUD candidate. However, did not proceed with it. Same as constituency No.20.	Matter closed.

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