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CIVIC SPACE IN ZIMBABWE: LEGAL DYNAMICS AND SUPPRESSION TACTICS

Otto Saki

Open civic space is crucial for Non Profit Organisations to function. In Zimbabwe, the government exploits Financial Action Task Force (FATF) recommendations, notably through the 2021 Private Voluntary Organisations Amendment Bill (PVO Bill) and the 2023 Criminal Law (Codification and Reform) Amendment Act, to close civic space. This paper argues that the PVO Bill's actual intention is to close civic space, contrary to international standards and FATF recommendations.

Darlington Marange

The Maintenance of Peace and Order Act (MOPA) replaced the repressive Public Order and Security Act [Chapter 11:17]. MOPA criminalises failure to notify the police of gatherings and grants them broad powers to prohibit public meetings. The paper argues that these provisions stifle civic participation, violate international standards, and are unconstitutional in restricting freedom of assembly. The author recommends amending or repealing them to align with human rights standards.

Bianca Mahere

Despite global efforts to support democracy, civic space is diminishing in Zimbabwe. The government uses the criminal justice system to curtail rights, including freedom of expression. The paper examines the application of the rule of law in Zimbabwe's pre-trial stage, comparing it with international standards to assess uniform legal application and potential misuse of courts to undermine the rights of accused individuals, especially those seeking bail.

Bright Thulani Chimedza

The paper explores allegations of politicisation of Zimbabwe's magistrate courts and the persistent persecution of Human Rights Defenders (HRDs) under the Second Republic. It discusses patterns which suggest political influence compromising judgments, criticising unorthodox practices, and concludes that this influence is endemic and systematic in select cases within magistrate courts.

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Hiding behind the Financial Action Task Force finger: the intended consequences of the proposed Zimbabwe Private Voluntary Organisations (PVO) Amendment Bill, 2021 on civic space

By Otto Saki

Key Words: NGOs, NPOs, suppression, open civic space, accountable governance

Abstract

Open civic space is a necessary condition for non-profit organisations (NPOs) or non-governmental organisations (NGOs) to operate, contributing to a healthy developmental democratic country. To operate, NGOs are, in most countries, required to undertake mandatory national registration. Best practices consistent with international law recommend registration only if not burdensome. Since 2001, with the September 11 terrorist attacks in the USA, recommendations on countering the financing of terrorism (CFT) and anti-money laundering (AML) adopted through the Financial Action Task Force (FATF) have compelled governments to amend NGO laws. In countries with poor democratic practices and authoritarian tendencies, authorities have weaponised FATF recommendations in order to suffocate civic space and undermine accountable governance. This paper demonstrates that in Zimbabwe, there is deliberate closing of civic space using FATF as an excuse. The manipulation of FATF recommendations through the Private Voluntary Organisations Amendment Bill of 2021 (PVO Bill) is compounded by other laws such as the Criminal Law (Codification and Reform) Amendment Act (Criminal Code Amendment) of 2023. The paper provides a working conceptual framework of civic space, traces the history of NGO regulation highlighting government official statements and practices, and analyses provisions of the proposed PVO Bill against international standards. From this analysis, the paper concludes that Zimbabwe is hiding behind the FATF finger, as the actual intention of the PVO Bill is to close civic space. The PVO Bill is inconsistent with international standards, let alone satisfying FATF recommendations.

1 The concept of civic space

The concept of civic space is contested and cannot be sufficiently canvassed in this paper. Biekart *et al.* define civic spaces as the legal, bureaucratic, and political environment that enables, constrains, controls, and guides the kinds of civil society actors functioning and practices taking place within the civic space.¹ The International Centre for Not for Profit Law (ICNL), and United Nations Development Programme (UNDP) describe civic space as encompassing multiple factors, such as legal, policy, administrative, economic, customary, and cultural factors determining the extent to which members of society are able – either individually or collectively – to engage in civic action.² The ICNL, UNDP, and Biekart *et al.* definitions suggest that civic space is shaped by the nature of political regimes. Therefore, civic space is related or connected to the politics of democratisation and development.³ Countries characterised

1 Biekart K, Kontinen T, & Millstein M. (2023). Introduction: Civil Society Responses to Changing Civic Spaces. In: Biekart, K., Kontinen, T., Millstein, M (eds) Civil Society Responses to Changing Civic Spaces. Palgrave Macmillan, Cham.

2 ICNL and UNDP Legal Frameworks for Civic Space: A Practical Toolkit (2021)

3 Oosterom, M. (2019) 'The Implications of Closing Civic Space for Sustainable Development in Zimbabwe', mimeo, IDS and ACT Alliance notes that at the macro level, there are several indications that the restrictions on civic space helped allow the state to become increasingly predatory, with devastating effects on overall economic development (SDG 8), and poverty, hunger and nutrition levels (SDG 1, SDG 2).

as autocratic, or hybrid regimes have consistently undermined civil society from participating in public affairs by restricting the civic space necessary for democratic development.⁴ The major enabler of civil society participation in the democratic development agenda is access to funding. Autocratic and hybrid regimes are restricting civil society from accessing foreign funding.⁵ This, among other trends, is reflected in the categorisation of civic space as open, narrowed, obstructed, repressed, or closed.⁶ This categorisation is anchored on the degree to which individuals can enjoy freedoms of assembly, expression, association, and political participation. The closing of civic space through legal means is prevalent and is part of the legal autocratisation trend in many other countries.⁷ Civic space in Zimbabwe has been characterised as repressed by the CIVICUS monitor.⁸

2 History of the PVO Act

2.1 Operating Context for NGOs

Building on the conceptual understanding of civic space and use of law to close civic space above, the colonial Rhodesian regime enacted the law regulating NGOs in 1967.⁹ The colonial regime was preoccupied with curtailing citizen activities of organising and mobilising for political and economic independence. In addition to the NGO law, a repertoire of laws enabled the legalisation of repression, including the Law and Order Maintenance Act (LOMA) of 1960, whose far-reaching provisions created a wide range of political offences and imposed strict limitations on all forms of African political activity and organisation.¹⁰ Other laws, such as the Unlawful Organisations Act of 1959, banned majority-based political parties.¹¹

In 1980, the independent government refined most of the repressive legislative arsenal, further restricting the enjoyment of fundamental rights.¹² The formation of the trade union and civil society-backed opposition, the Movement for Democratic Change (MDC), in 1999 spurred the justification for restrictive laws against civil society as dabbling in politics.¹³ At the turn of the millennium, the Access to Information and Protection of Privacy (AIPPA)¹⁴ and the Public Order and Security Act (POSA)¹⁵ were enacted, further stifling civil society, media, and opposition political parties. For instance, the former justice minister, Dr Eddison Zvobgo, described AIPPA as ‘the most calculated and determined assault on our (constitutional) liberties in the 20 years.’¹⁶ These laws were pernicious. They altered the civil society and media landscape.¹⁷ AIPPA, for example, enabled the closure of independent newspapers and the arrest and prosecution of journalists and media practitioners. The inconsistency of AIPPA with international and regional standards was challenged through the regional human rights mechanism—the African Commission on Human and Peoples’ Rights (African Commission).¹⁸ The African Commission found some of the provisions of AIPPA to be in

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- 4 Regime classification is complex, and the paper takes note of the classification adopted by International IDEA of democratic, hybrid and autocratic. See International IDEA Global State of Democracy Report 2019. In recent times, the linkage of civic space to development cooperation and humanitarian assistance has gained considerable traction. See for instance OECD, DAC Recommendation on Enabling Civil Society in Development Co-operation and Humanitarian Assistance, OECD/LEGAL/5021.
 - 5 Carothers, T. (2016). Closing space for international democracy and human rights support. *Journal of Human Rights Practice*, 8(3), 358–377.
 - 6 CIVICUS Monitor <https://www.civicus.org/index.php/what-we-do/innovate/civics-monitor>
 - 7 Marja Hinfelaar, Lise Rakner, Sishuwa Sishuwa & Nicolas van de Walle (2022) Legal autocratisation ahead of the 2021 Zambian elections, *Journal of Eastern African Studies*, 16:4, 558–575
 - 8 CIVICUS Press Release: Zimbabwe added to human rights watch list as President Emmerson Mnangagwa targets NGOs and members of the opposition ahead of next year’s election, 22 September 2022. <https://monitor.civicus.org/watchlist/zimbabwe/>.
 - 9 Since then, the law; the PVO Act has been amended more than 5 times. The Private Voluntary Organisations Act was amended in 1976; 1981; 1995; 2000 and 2001.
 - 10 Amnesty International Briefing: Rhodesia/Zimbabwe A Journal of Opinion, Winter, 1976, Vol. 6, No. 4 (Winter, 1976), pp. 3437.
 - 11 Nelson T Sambureni (1996) The emergence of independent African trade unions in Salisbury, Southern Rhodesia, 1920s to 1950s: Toward mass nationalism? *African Historical Review*, 28:1.
 - 12 The laws include Law and Order Maintenance Act (LOMA) of 1960, the Miscellaneous Offences Act of 1962 among others.
 - 13 The civil society groups involved were under the banner of the National Constitutional Assembly (NCA) which brought together various civil society organisations, women, students, human rights organisations, professional groups, farmers and social movements.
 - 14 Access to Information and Protection of Privacy Act Chapter 10:27 was repealed by the Freedom of Information Act Chapter 10:33
 - 15 The Public Order and Security Act repealed the Law-and-Order Maintenance Act. POSA was then repealed by Maintenance of Peace and Order Act Chapter 11:23.
 - 16 Article 19 & MISA Zimbabwe ‘The Access to Information and Protection of Privacy Act: Two Years On’. September 2004
 - 17 Mpofu, J & Chimhenga S (2013) The impact of Zimbabwean Media Laws on the work of Journalists and Media organizations. *IOSR Journal of Research & Method in Education* 2 82–87.
 - 18 Article 55 of the African Charter on Human and People Rights.

violation of freedom of expression and equal protection of the law, as protected by the African Charter on Human and Peoples' Rights (African Charter).¹⁹

Prior to this, an African Commission fact-finding mission to Zimbabwe (conducted in June 2002) had observed 'a flurry of new legislation and the revival of the old laws used under the Smith Rhodesian regime to control, manipulate public opinion, and that limited civil liberties, and that all these, of course, would have a chilling effect on freedom of expression and introduce a cloud of fear in media circles. The PVO Act has been revived to legislate for the registration of NGOs and for the disclosure of their activities and funding sources'.²⁰ The African Commission recommended repealing the PVO Act to create an environment conducive for democracy and human rights, and consistent with the African Charter and international law obligations.²¹

Before the African Commission recommended repealing the PVO Act, the Supreme Court had struck down Section 21 of the PVO Act in *Holland & Others vs. the Ministry of Labour, Social Welfare and Public Service*.²² The Supreme Court ruled Section 21 of the PVO Act as unconstitutional, as it gave wide and unfettered powers to the Minister of Labour and Social Welfare to remove executive committee of a private voluntary organisation.²³

2.2 Accusations of lack of compliance with the law

The Zimbabwe authorities consistently accuse NGOs of violating their registration requirements under the law. A few incidents demonstrate the unending interest of the government to amend existing laws, alleging non-compliance by NGOs with the law.

In 2000, the Information and Publicity Minister declared that local and international NGOs would not be allowed to distribute emergency food requested from foreign donors and conducting voter education activities in the run-up to the 2002 presidential poll.²⁴ Between October and November 2002, the justice minister published a list of NGOs "threatening national security in cahoots with the British government".²⁵ In November 2002, the Labour and Social Welfare Minister informed Parliament of groups operating illegally and/or without registration as PVOs.²⁶ In February 2005, Labour and Social Welfare Minister alleged, without producing any evidence, that 30 NGOs had misused USD \$87 million received from international donors. The funds were allegedly part of the USD \$210 million the government requested from foreign funders for community projects.²⁷ In April 2007, the Minister of Information and Publicity indicated that NGOs' registration had been annulled in an attempt to weed out 'pro-opposition and Western organisations masquerading as relief agencies'.²⁸

19 The author was lead counsel in two communications to the African Commission which found AIPPA provisions in violation of the African Charter on Human and Peoples Rights. See 284/03 Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe; 294/04 Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) / Zimbabwe

20 African Commission on Human and Peoples Rights 'Zimbabwe Report of the Fact-Finding Mission' DOC/OS (XXXIV)/346a June 2002

21 African Commission ZIMABWE Fact Finding Mission Report page 30-31.

22 *Holland & Others vs. Minister of Labour and Social Welfare* 1997 (1) ZLR 186 (SC).

23 The impugned provision allowed for the suspension of an NGO executive committee without hearing. The PVO s21(1) provided that 'if it appears to the Minister on information supplied to him in respect of any registered private voluntary organization that—(a) the organization has ceased to operate in furtherance of the objects specified in its constitution; or (b) the maladministration of the organization is adversely affecting the activities of the organization; or (c) the organization is involved in any illegal activities; or (d) it is necessary or desirable to do so in the public interest the Minister may, by notice in the Gazette - (i) suspend all or any of the members of the executive committee of a registered private voluntary organisation from exercising all or any of their functions in running the affairs of the organisation; (ii) amend or revoke any suspension effected in terms of subparagraph (i).

24 Zimbabwe: NGOs fear being targeted as violence escalates <https://reliefweb.int/report/zimbabwe/zimbabwe-ngos-fear-being-targeted-violence-escalates>

25 The government referenced a House of Commons debate in which British Prime Minister Tony Blair Stated that he was working with the MDC opposition and others in South Africa to effect regime change. This debate was reported in The Herald, I'm Working With MDC, Admits Blair 24 June 2004 <https://allafrica.com/stories/200406240336.html>

26 The Herald Amani Trust illegal, 14 November 2002, <https://allafrica.com/stories/200211140104.html>

27 <https://reliefweb.int/report/zimbabwe/zimbabwe-threatens-crackdown-ngos-over-unaccounted-donor-funds>

28 Reuters Zimbabwe targets aid groups as crackdown expands, <https://www.reuters.com/article/idUSL17383666>

In May 2009, the Minister of Labour and Social Welfare and the Minister of Justice issued a joint memorandum proposing that NGOs registered as trusts with the Deeds Registry and falling within the definition of a PVO (per the PVO Act) be required to register as PVOs.²⁹ In February 2012, the Provincial Minister of Masvingo banned 29 NGOs from operating in the province.³⁰ This decision was set aside by the courts. The government directives, while clothed in legality, were unlawful, furthering the legal autocratisation agenda and intention to restrict foreign funding, as demonstrated by a restatement of some provisions of the Non-Governmental Organisations Bill (NGO Bill) of 2004.

2.3 The NGO Bill of 2004 and receipt of foreign funding

Since 1980, ZANU PF has maintained its majority in parliament, allowing it to pass repressive legislation, reversing and frustrating progressive court decisions.³¹ In 1998, the International Covenant on Civil and Political Rights Human Rights Committee (ICCPR HRC) noticed this 'increasing trend to enact Parliamentary legislation and constitutional amendments to frustrate decisions of the Supreme Court that uphold rights protected under the Covenant and overturn certain laws incompatible with it.'³²

While delivering his presidential address in Parliament on 20 July 2004, President Robert Mugabe said, 'Non-Governmental Organisations must be instruments for the betterment of the country and not against it. We cannot allow them to be conduits of foreign interference in our national efforts.'³³ Subsequent to this address, the NGO Bill was introduced in August 2004. The Bill had provisions that sought to reverse the Holland decision and allow the NGO Board to dismiss executives without hearing and just cause,³⁴ and further criminalise the receipt of foreign funding for governance and human rights work.

The Preamble section of the NGO Bill of 2004 boldly declared purpose of the Bill as 'to provide for an enabling environment for the operations, monitoring, and regulations of all non-governmental organisations.'³⁵ However, its provisions had a different intent. Section 24 of the Bill provided for the suspension of the NGO executive committee in the public interest.³⁶ Furthermore, section 17 of the Bill provided that 'no local non-governmental organisation shall receive any foreign funding or donation to carry out activities involving or including issues of governance'. Foreign NGOs involved in issues of governance would not be registered as section 9(4) of the Bill provided that 'no foreign non-governmental organisation shall be registered if its sole or principal objects involve or include issues of governance.' The government was concerned with perceived interference with domestic political processes through foreign funding.

The Parliamentary Legal committee issued an adverse report and was of the 'view that the Bill does not seek to regulate but seeks to control, to silence, to render ineffective and ultimately to shut down NGOs.'³⁷ The Bill was eventually not signed into law by the then President Mugabe, even though it was passed by parliament. Despite this temporary legal reprieve, the relationship between the State and NGOs remained acrimonious.

3 International and regional standards

There is unanimous recognition of the role of NGOs by the African Union and the United Nations as essential institutions in public affairs.³⁸ Zimbabwe has an obligation under international and regional laws to create an

29 Otto Saki 'Laws Regulating NGOs in Zimbabwe' *The International Journal of Not-for-Profit Law* Volume 22, Number 2 February 2010

30 See <https://www.reuters.com/article/ozatp-zimbabwe-ngos-20120215-idAFJ0E81E06A20120215>

31 In 2008 ZANU PF lost its majority in Parliament for the first time, but regained majority in 2013, 2018, and 2023 elections.

32 UN Human Rights Committee, Initial Report on Zimbabwe (CCPR/C/SR. 1664), paragraph 4.

33 Report of the Parliamentary Legal Committee on the Non-Governmental Organisations Bill, [HB 13, 2004] page 5 available http://archive.kubatana.net/docs/legisl/ngobill_plc_041115.pdf

34 See footnote 23.

35 Non-Governmental Organisations Bill 2004 preamble.

36 Non-Governmental Organisations Bill 2004 section 24. This provision was a reincarnation of s21 of the PVO which had been declared unconstitutional in the Holland case.

37 Report of the Parliamentary Legal Committee on the Non-Governmental Organisations Bill, [HB 13, 2004] page 6.

38 African Commission's "Guidelines on Freedom of Association and Assembly" page 9. United Nations Human Rights Council General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), adopted 12 July 1996 para 26.

environment that permits formal and informal, registered, and unregistered NGOs to exist and flourish.³⁹ Zimbabwe has ratified international and regional human rights instruments enshrining freedoms of expression, assembly, association, and participation in public affairs. These instruments include the ICCPR⁴⁰ and the African Charter.⁴¹ It is common cause that these rights are subject to limitations. However, any limitations to these rights must conform to minimum standards of legality, necessity, and proportionality.

The State is required to demonstrate that the restrictions are strictly necessary and proportionate to the threats posed to a legitimate purpose.⁴² The State cannot impose restrictions other than those prescribed by law, and they must be necessary and reasonable in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The mandatory registration of NGOs can be considered a limitation of a right. The UN Special Rapporteur on Freedom of Assembly has noted that ‘where a registration regime exists, requirements should be framed such that no one is disadvantaged in the formation of her or his association, either by burdensome procedural requirements or unjustifiable limitations to substantive activities of associations.’⁴³

The African Commission Guidelines on Freedom of Association and Assembly (Guidelines) reaffirm the UN Special rapporteur’s recommendation to remove burdensome mandatory registration. The Guidelines observe that one of the obligations under the African Charter is that ‘States shall not compel associations to register in order to be allowed to exist and to operate freely. Informal (de facto) associations shall not be punished or criminalised under the law or in practice on the basis of their lack of formal (de jure) status.’⁴⁴ The Guidelines’ interpretation is consistent with the decision in *Monim Elgak, Osman Hummeida & Amir Suliman v. Sudan*,⁴⁵ in which the African Commission interpreted article 10 of the African Charter on freedom of association to imply that persons who wish to form NGOs are only required to notify the regulatory authorities as opposed to applying for permission to register. Even where registration is required, NGOs should be given a choice to select a type of registration or legal status which best suits their mandates, interests, and purposes. The Guidelines clarify the various State obligations when undertaking legal and policy measures to regulate NGOs, essentially the principles of necessity and proportionality.⁴⁶ The Constitution of Zimbabwe requires that the interpretation of any legislation and the Declaration of Rights must be ‘consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.’⁴⁷

4 The constitutional framework

The Constitution of Zimbabwe is the supreme law of the land, and any law that is inconsistent with the constitution is void to the extent of the inconsistency.⁴⁸ The Constitution guarantees the right to assembly, association,⁴⁹ and participation in public affairs.⁵⁰ Section 86 of the Constitution provides for limitation of the rights, which must be justifiable in a democratic society. The Constitutional Court of Zimbabwe in *Democratic Assembly for Restoration and Empowerment & 3 Others v Saunyama*⁵¹ ruled that any limitation must be tested on four grounds: whether the ‘law is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality,

39 Guidelines on Freedom of Association and Assembly para 1-2.

40 Articles 21, 22 and 25

41 Articles 10, 11 and 13.

42 United Nations General comment No. 37 (2020) on the right of peaceful assembly (article 21), 17 September 2020.

43 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association A/HRC/26/29 14 April 2014 para 56.

44 Guidelines on Freedom of Association and Assembly para 11

45 *Monim Elgak, Osman Hummeida & Amir Suliman* (represented by International Federation for Human Rights & World Organisation Against Torture) v. Sudan, Comm. No. 379/09 (2014), paras. 118.

46 Foreword of “Guidelines on Freedom of Association and Assembly,” at page 4.

47 Constitution of Zimbabwe s327 (6)

48 Constitution of Zimbabwe Act 20 of 2013 s2.

49 Constitution of Zimbabwe s58 (1)

50 Constitution of Zimbabwe s59, right to petition and demonstrate; Constitution of Zimbabwe s 67(2) right to form or join political activities.

51 *Democratic Assembly for Restoration and Empowerment & 3 Others v Saunyama N.O & 3 Others* (CCZ 9/18, Civil Appeal No. CCZ 5/18)

and freedom. In testing the law against these specific yardsticks, the court is enjoined to take into account all relevant factors.’

In the same case, the Constitutional Court held that ‘the attainment of the right to demonstrate and to present petitions was among those civil liberties for which the war of liberation in this country was waged,’ which means that such expression and ability to associate and the ‘right to demonstrate creates space for individuals to coalesce around an issue and speak with a voice that is louder than the individual voices of the demonstrators’. It follows that the right to freely associate and operate NGOs was one of the rights fought for during the liberation struggle. Therefore, if the State intends to limit this right, it must satisfy the four-pronged test, failure of which, the limitation stands impugned as unconstitutional.

5 Justification for a PVO Amendment Act

The Mnangagwa administration is touted as reformed and different from the Mugabe administration.⁵² On 22 October 2020, during the State of the Nation Address, President Mnangagwa⁵³ indicated that ‘the conduct of some non-governmental organisations and private voluntary organisations who operate outside their mandate and out of sync with the government’s humanitarian priority programmes, remain a cause for concern.’ President Mnangagwa’s statement is not different from President Mugabe statement in 2004 that paved way for the NGO Bill. Soon after President Mnangagwa’s 2020 statement, Parliament commenced discussions on amending the PVO Act to address NGOs operating outside their mandates and out of sync with government’s humanitarian priorities.

This argument of being out of sync with the government is preposterous and shows the government views NGOs as limited to humanitarian work only. The arguments for synchronicity are devoid of constitutional justifications, as the Constitution allows anyone to peacefully differ or challenge government policy. The second republic is consistent in viewing civil society as an enemy of the State, as was under the first republic.

On 30 June 2021, the Harare Provincial Development Coordinator required all NGOs operating in Harare province to submit operational details to confirm that they are operating in sync with the government and consistent with their mandates. Out of fear of persecution, a number of NGOs complied.⁵⁴ This directive was set aside by the courts on the grounds of being unlawful.⁵⁵ Pursuant to President Mnangagwa’s statement, on 5 November 2021, the government gazetted the PVO Amendment Bill HB 10 of 2021.

The PVO Bill preamble states three purposes. First, it suggested that the PVO Bill is intended to ‘comply with the FATF recommendations made to Zimbabwe’. The FATF is an intergovernmental organisation founded in 1989 to develop AML and CFT policies. Zimbabwe, as a state party, must address any technical deficiencies in CFT and AML policies identified through mutual assessments. Following assessments in 2007 and 2016, the FATF regional body, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), found Zimbabwe to be partially compliant in measures to protect NGOs from being used as cover for terrorist or money laundering activities.

The second objective is to ‘streamline administrative procedures for private voluntary organisations to allow for efficient regulation and registration.’ In Zimbabwe, NGOs are recognised under three legal regimes: 1) universities under common law; 2) trusts registered under the Deeds Registries Act, and 3) PVOs registered under the PVO Act. The PVO Bill intends to consolidate these legal regimes and not allow for multiple forms of registration or existence. The third objective of the PVO Bill intends to ensure that ‘private voluntary organisations do not undertake political lobbying.’ There was domestic and global protestation on the gazetting of the PVO Bill, and as expected through usually

52 This despite President Mnangagwa himself being a member of the executive since 1980 in various powerful ministries including as Speaker of Parliament and justice minister. See Itai Kabonga & Kwashirai Zvokumba (2021) State–Civil Society Relations in Zimbabwe’s “Second Republic”, *International Journal of African Renaissance Studies - Multi-, Inter and Trans disciplinarity* wherein they concluded that ‘the First Republic treated CSOs as enemies rather than partners....the Second Republic is obsessed with curtailing civil activism, and this is achieved by threats against CSOs, restrictive laws, and cosmetic reforms.’

53 State of the Nation address, <https://www.veritaszim.net/node/4530>.

54 Interview with directors of international NGO and women rights organisation that complied 5 July 2021.

55 <https://www.newzimbabwe.com/high-court-reverses-govts-threats-to-shutdown-ngos/>

bravado, one government official and provincial minister said NGOs who are reluctant to comply with PVO law must go to Ukraine where their services are needed, and further stated that the government no longer needed NGOs due to involvement in politics.⁵⁶ The difference with the Mugabe regime continued to be illusive.

5.1 Compliance with FATF Recommendation

The FATF was formed in 1989 by Group of 7 (G7) countries to protect the integrity of the international financial system against transnational criminality.⁵⁷ After the terrorists attacks of 11 September 2001, the FATF extended its mandate on CFT and AML, making additional recommendations on NPOs. According to FATE, an NPO is a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social, or fraternal purposes, or for the carrying out of other types of good works. Under the Zimbabwean law, the equivalent of NPOs are PVOs registered under the PVO Act.⁵⁸

FATF Recommendation 8 requires countries to review the ‘adequacy of laws and regulations that relate to NPOs which the country has identified as being vulnerable to terrorist financing abuse’. The Intermediate Outcome 10.2 is for assessing whether ‘terrorists, terrorist organisations and terrorist financiers are prevented from raising, moving, and using funds, and from abusing the NPO sector.’ As per its process, FATF ESAAMLG conducted mutual assessments in 2007⁵⁹ and 2016.⁶⁰ These assessments concluded that Zimbabwe was non-compliant with FATF recommendation 8. In 2019, Zimbabwe was placed on FATF grey list,⁶¹ as the country committed to swiftly resolve the identified strategic deficiencies within agreed timeframes.⁶² In 2021, the government proposed the PVO Bill as intended to comply with the FATF Recommendation 8, and removal from the grey list.⁶³ The preamble, memorandum and in particular Clause 22 of the PVO Bill purport to introduce provisions aligned with FATF recommendations.

Yet, an analysis of some of the provisions of the Bill would reveal that the justification provided by the government for proposing this Bill was just a cover for something else. The Bill was not designed to counter the financing of terrorism (CFT) and anti-money laundering (AML) concerns within the NPO sector. Since time immemorial, the government has accused NGOs and civil society of terrorist activities and being enemies of the State.⁶⁴ Civil society had consistently indicated that they were not conducting terrorist activities, even court decisions had exonerated NGO leaders arrested on allegations of terrorist conduct.⁶⁵ Based on the FATF mutual assessments, NPOs were never identified as being at risk of financing terrorism (FT) or money laundering (ML). In fact, the FATF reports had identified the high-risk areas as banking, real estate, motor vehicle dealers, mining, and mobile money dealers.⁶⁶

As if to confirm the low risk of NPOs, Zimbabwe was removed from the FATF grey list in January 2022 as the PVO Bill was being deliberated. In removing Zimbabwe from the grey list, FAFT cited progress made in stamping out illicit deals and anti-money laundering systems. The FATF noted ‘Zimbabwe should continue to work with ESAAMLG to improve further its AML/CFT system, including by ensuring its oversight of NPOs is risk-based and in line with the FATF Standards.’⁶⁷ If the PVO Bill was motivated by intention to comply with the FATF recommendations, how was the country removed from the grey list?

56 <https://www.msn.com/en-xl/africa/zimbabwe/go-to-war-torn-ukraine-govt-tells-ngos/ar-AAUIk5g>

57 France, Germany, Italy, Japan, the United Kingdom, the United States, Canada

58 See section 2 of the Zimbabwe Private Voluntary Organisation Act and Clause 2 of the PVO Amendment Bill.

59 Mutual Evaluation and Assessment Anti-money laundering and counterterrorist financing measures, Zimbabwe (2007).

60 ESAAMLG (2016), Zimbabwe Anti-money laundering and counterterrorist financing measures Round Mutual Evaluation Report, ESAAMLG, Dar es Salaam.

61 The Grey List means that the country is under increased monitoring and is working with FATF to remedy deficiencies in their laws and policies on CFT and AML.

62 <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html>

63 PVO Bill Memorandum

64 <https://web.archive.org/web/20230624003038/https://www.herald.co.zw/reprieve-for-maldives-activists/>

65 Jestina Mukoko vs. Attorney General of Zimbabwe SC 11/12.

66 Various reports have shown how mining dealers are allegedly involved in such money laundering and also government complained of mobile money operators like Ecocash failure to put mechanisms to stem money laundering. See Zimbabwe Central Bank charges Ecocash CEO, Cassava Smartech CEO over anti-money laundering failures <https://financialcrimewatch.com/ecocash-cassava-smartech-ceo-money-laundering-235201836/>

67 <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html>

It is abundantly clear that the absence of the PVO Bill to regulate NGO activities on suspicion or allegations of FT or ML was not the justification for placing Zimbabwe on grey list. By removing Zimbabwe from the grey list before the PVO Bill was enacted as law, FATF was explicitly distancing itself from the PVO Bill as inconsistent with FATF recommendations and for legitimate purposes being used as a justification to close civic space.

In terms of FATF standards, any measures that should be undertaken to comply with FATF recommendations (including proposed laws such as the PVO Bill) must be evidence-based, proportionate, and in compliance human rights obligations.⁶⁸ Clause 22 of the PVO Bill is inconsistent with FATF recommendations as it excludes PVOs from participating in the conducting of assessments. The Minister and the Reserve Bank of Zimbabwe's Financial Intelligence Unit (FIU) will conduct the assessments. It should be recalled that FATF recommendations are intended to protect NPOs from potential terrorism financing and concurrently not disrupting or discouraging legitimate activities. Through this PVO Bill, the Zimbabwe government is seeking to deliberately disrupt and discourage legitimate activities under the guise of complying with FATF recommendations. This is despite the fact that FATF clearly articulated that governments must adopt *proportionate measures* using *risk-based approaches*.⁶⁹ Recognising the proclivity of governments to use FATF as pretext to close NGOs, in February 2021, FATF launched a project to study 'the unintended consequences resulting from the incorrect implementation of the FATF standards'.⁷⁰ One of the major unintended consequences of FATF recommendations was the targeting of NPOs. The removal of Zimbabwe from the grey list before the PVO Bill was enacted into law clearly shows that FATF was aware of the unintended consequences, and unequivocally demonstrates that Zimbabwe was pursuing other agendas and hiding behind FATF.

5.2 Streamlining of registration and regulation

Another purported justification for the PVO Bill was the streamlining of registration of NGOs in Zimbabwe. As earlier highlighted, Zimbabwe recognises trusts, PVOs, and *universitas* as legal status for NPOs or NGOs. However, those operating as *universitas* or trusts are not under the purview of PVO Act.⁷¹ The government authorities wanted this changed. The definition of PVO under the PVO Bill would expand to include trusts, any legal person, or any legal arrangement.⁷² The use of legal person or legal arrangement means that every possible and imagined form of existence would fall under the PVO law. This is certainly not consistent with FATF recommendations of targeted approach. The PVO Bill, clause 2(5), seeks to introduce mandatory government registration for all PVOs and empowers the relevant minister to designate persons, legal arrangements, bodies, associations, or institutions deemed vulnerable to misuse by terrorist organisations, or at high risk of being misused by terrorist organisations. Once designated, that person, or legal arrangement would be required to comply with the PVO Act, and any additional requirements as the minister declares.

With all forms of existence under the PVO law, the government will have overarching supervision powers, including the suspension of the executive committee (boards) of the NGOs. These powers are a direct affront to the Supreme Court decision in the *Sekai Holland* case. These powers are espoused in Clause 7 of PVO Bill. Even though the proposed provision requires the minister to seek a High Court order before suspending the board members, it still does not cure the intrusive nature of the provisions. The application to the High Court is based on whether it appears to the Minister that 'the PVO has ceased to operate in furtherance of its objectives; there is maladministration adversely affecting the PVO's activities; the PVO is involved in illegal activities, or it is necessary or desirable in the public interest to suspend the committee'. These vaguely framed provisions remove presumption of innocence and can be weaponised and enforced before a conviction.⁷³ Again, the proclivity of public officials to interfere with PVOs operations through

68 It has said "measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach. It is also important for such measures to be implemented in a manner which respects countries' obligations under the Charter of the United Nations and international human rights law" See "High-Level Synopsis of the Stock take of the Unintended Consequences of the FATF Standards" 27 October 2021, <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf>

69 See "FATF Best Practices for Combating the Abuse of Non-Profit Organisations (Recommendation 8)" accessible at <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>

70 Mitigating the Unintended Consequences of the FATF Standards, <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Unintended-consequences-project.html>

71 One might stretch the argument and posit that the organisations operating as trusts are not under the auspices of the FATF recommendations if they are not under the PVO Act, hence the streamlining of regulatory powers.

72 Clause 2 of the PVO Bill

73 Examples of vaguely framed provisions include framing such as 'it is necessary or desirable', 'in the public interest'.

choosing the organisation officials or the appointment or removal of trustees or board officials is a violation of constitutional and international law.⁷⁴

The PVO Bill proposes the establishment of a powerful Registrar of PVOs as a replacement of the current PVO Board constituted by government and civil society representatives.⁷⁵ While the current PVO Board was somewhat representative, the PVO Bill proposal eliminates any form of civil society representation. The proposed Registrar will be subject to ministerial directives in the national interest, and the 'Registrar shall take all necessary steps to comply with any direction given' and can detail these directives in their annual report, rendering any remedial action illusory.⁷⁶ The other proposed functions of the Registrar under Clause 3 of the PVO Bill include considering and determining applications, hearing representations, advising the minister, and promoting and encouraging coordination of the activities of registered PVOs, among others. It is, therefore, a reasonable conclusion that the purported streamlining of the registration processes intends to concentrate powers in an individual. The concentration of this power in an individual removes accountability, encourages abuse of power, and increases prospects of certain NPOs being denied registration.

Clause 6 of the PVO Bill requires re-registration of a PVO if there is material change in the operational or governance framework for the PVO. Material change is defined as '(a) any change in the constitution of the PVO upon the PVO's termination for any reason concerning the disposal of its assets on the date of its termination; (b) any change in the ownership or control of the PVO; or (c) any variation of the capacity of the organisation to operate as a PVO'. There are several problematic implications on civic space arising from this proposed provision. First, material change, as any changes in the PVO constitution, means that PVOs will be re-registering after every amendment to their constitutions. This places a disproportionate burden on voluntary organisations contrary to international law and best practices. Secondly, PVOs are not 'owned' by the founders or the boards or the management team exercising daily oversight of the organisation. This provision suggests that if there are executive changes in the PVO composition, such change is material to warrant re-registration. Similarly, a variation in the capacity to operate does not mean that the PVO is not operating. The variation in capacity is influenced by many external factors such as reduction in funding or government policy directives, such as the proposed PVO Bill. International law and best practices do not support the re-registration of NGOs because of changes in their constitutions or composition of their boards or management.⁷⁷ The cumulative effect of this provision is to suffocate PVOs through administrative red tape. This is streamlining repression.

The PVO Bill, under Clause 6E, introduces principles governing PVOs. One principle requires PVOs to 'refuse donations from illegitimate or immoral sources and to report to the Registrar'. The definition of illegitimate or immoral sources is not provided. The application of these principles will be subjective based on arbitrary political considerations. For instance, under this provision, donations from a foreign government funder for human rights work will be considered illegitimate, while food aid or medical donations from the same foreign government funder will be deemed legitimate. Another principle includes barring 'any politically partisan manner' or anything sensitive to 'cultural values and norms.' For instance, victims of organised violence and torture in Zimbabwe are largely opposition political party members, and if an NGO provides services such as counselling or rehabilitation to these political activists, that NGO is potentially in violation of this principle. The interpretation of partisan NGOs has been selective and will continue to be selective, as groups that have openly embraced ZANU PF positions are viewed as patriotic and not partisan.⁷⁸ The closing of any form of alternative narratives, to propagate patriotic history and narratives on governance and democracy issues in Zimbabwe is the intended consequence of the PVO Bill.

74 ACHPR Guidelines para. 24. However if there are legitimate reasons for not allowing such as history of criminal conduct or other established reasons at law, the public officials will interfere for enforcement of that provision.

75 The PVO Board under s3(2) of the PVO Act consists of (a) five representatives from private voluntary organizations or organizations which the Minister considers are representative of private voluntary organizations; and (b) one representative from such private voluntary organization, association, institution or other organization as the Minister may determine, from each of the provinces into which Zimbabwe is for the time being divided; and (c) one representative from each of the following Ministries— (i) the Ministry for which the Minister is responsible; (ii) the Ministry responsible for health and child welfare; (iii) the Ministry responsible for justice; (iv) the Ministry responsible for finance; (v) the Ministry responsible for co-operatives; and (vi) the Ministry responsible for foreign affairs; (d) the Registrar, ex officio.

76 Clause 9A of PVO Bill.

77 ACHPR Guidelines para. 17 provide that organisations should not be required to register more than once, available at <http://www.achpr.org/instruments/freedom-associationassembly>

78 Several NGOs, and civil society groups have in the past openly affirmed their support for ZANU PF, but these are never castigated as partisan. Some of the groups though not regulated as PVOs, are still civil society for instance, Zimbabwe Congress of Students Union (ZICOSU) or the Zimbabwe Federation of Trade Unions (ZFTU) or the Zimbabwe Lawyers for Justice (ZLJ).

5.3 Prohibiting lobbying purposes and partisan activities.

The allegation of partisan or political involvement or political lobbying by NGOs is a swan song of the first and second republics. The third objective of the PVO Bill, reflected in Clause 5, is ‘to ensure that private voluntary organisations do not undertake political lobbying.’ This clause justifies criminalising NGOs conduct seen as partisan behaviour, which is interpreted to mean an NGO that is seen as opposing ZANU PF and government. As if to complete the legislative assault on civic space and civil society, an amendment to the Criminal Code Amendment⁷⁹ criminalises ‘unpatriotic’ acts or conduct that wilfully ‘damage the sovereignty and national interests of Zimbabwe.’ The Criminal Code Amendment omits a precise definition of patriotic conduct,⁸⁰ as does the PVO Bill with political lobbying. The amendment to the Criminal Code Amendment was introduced in Parliament in 2021, though Cabinet mooted its provisions in 2020.⁸¹ During debate in the House of Assembly, a ZANU PF member of Parliament (MP) said ‘some civic societies and some in the media have gone out there to say negative things deliberately, for the purpose of just opposing’ The ZANU PF MP went on to say that ‘we also have civic organisations that, in their activities, deviate from their core business and start advancing activities that destabilise the people of Zimbabwe.’⁸² The ZANU PF MP went on record to suggest that such people must be barred from running for public office. This was intended to justify denying legitimate opposition opportunities to contest for public office. Sovereignty, national interest and political lobbying are terms loosely used to justify legal means to resist or respond to perceived external interference in domestic matters, and close on civic and political space. The combined effect of the PVO Bill and Criminal Code Amendment, is suffocating any form of criticism.⁸³

The PVO Bill proposes to create an offence if a PVO supports or opposes a political party or candidate.⁸⁴ The provision is vague as it fails to define what constitutes supporting or opposing political parties, even though it exempts groups supporting disadvantaged communities, provided that such assistance is ‘afforded in a strictly non-partisan manner’.⁸⁵ Considering that most NGOs have championed human rights causes, such as ending torture or organised violence, this might be interpreted as supporting the opposition candidates who have denounced these acts and have largely been victims and survivors of organised violence and torture. The PVO Bill provisions that criminalise political lobbying are, in fact, limiting political participation and may be selectively applied to target NGOs perceived to be aligned to the opposition or pursuing governance and accountability agendas. In any case, international human rights law recognises the right of individuals to form NGOs and express their opinions as part of participating in public life, including political affairs.⁸⁶ The PVO Bill blatantly contravenes domestic and international human rights law by permitting limitation of freedom of association for a non-legitimate purpose.

79 These amendments are commonly referred to as the Patriotic Act.

80 The conduct is defined to include conduct “considering or suggesting the consideration, implementation, and or extension of sanctions or trade boycotts against Zimbabwe or an individual or official if it affects a substantial section of the people of Zimbabwe.

81 According to the permanent secretary in the Justice, Legal and Parliamentary Affairs ministry Virginia Mabhiza, as quoted in The Sunday Mail on October 4, 2020. The ministry drafted principles of the Bill in August 2020. <https://www.newsday.co.zw/news/article/33533/mnangagwas-proposed-patriotic-bill-whither-zimbabwe-at-41>

82 Hansard 9 March 2021 Hon Ppurai Togarepi Member of Parliament for Gutu South and ZANU PF chief whip in the National Assembly seconding motion to introduce the Patriotic Bill.

83 The amendment to the Criminal Code was signed into law and came into force on 14 July 2023.

84 Proposed amendment PVO s10 (e1) “ when any private voluntary organisation that supports or opposes any political party or candidate in a presidential, parliamentary or local government election or is a party to any breach of section 7 under Part III of the Political Parties (Finance) Act [Chapter 2:12] as a contributor of funds to a political party or candidate or otherwise shall be guilty of an offence and liable to a fine of level twelve or to imprisonment for a period not exceeding one year, or both such fine or such imprisonment.” During Parliament debates, this provision was revised but its import carried forward in Clause 6E s20(g) which required PVOs “not to conduct themselves in any politically partisan manner whether by using its resources to benefit members of a particular affiliation or making any test of the political allegiance of its beneficiaries”.

85 Again, non-partisan manner might be likely to be defined as anything acceptable to ZANU PF.

86 OSCE/ODHIR – Venice Commission – Council of Europe Para 18 of *Guidelines on Freedom of Association* ‘freedom of association must also be guaranteed as a tool to ensure that all citizens are able to fully enjoy their rights to freedom of expression and opinion, whether practiced collectively or individually.’

6 Conclusion

The regulation of NGOs in Zimbabwe is marked by sustained efforts to contain the ability of PVOs to hold government accountable. The use of law gives a veneer of legality to these autocratic tendencies. The net impact of these laws is to silence alternative and critical views. Since the commencement of the second republic in 2017, the Mnangagwa administration has asphyxiated civic space, and the generality of civil society is becoming unwilling and reluctant to challenge government excesses for fear of arrests and prosecution. The PVO Bill coupled with Criminal Code Amendment are classic examples of disrupting legitimate NGO activities under the guise of addressing legitimate public purposes. The introduction of these laws suggests a clear pattern of assault on freedoms of association, assembly, and expression, and the right to political participation. The PVO Bill is far from being an instrument for compliance with the FATF recommendations or for lawfully regulating NGOs. Several groups have outlined the needed changes to this atrocious proposal.⁸⁷ The Bill is patently unconstitutional and unequivocally inconsistent with international human rights standards.

⁸⁷ Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. 17 December 2021

Shackles to Liberty: The Maintenance of Peace and Order Act [Chapter 11:23] and Inconstancies with International Standards for Limiting Assembly Rights.

By Darlington Marange

Key Words: Maintenance of Peace and Order Act, gatherings, civil society, civic space, freedom to assemble, human rights

Abstract

The Maintenance of Peace and Order Act [Chapter 11:23] (MOPA) was enacted in 2019 to repeal the Public Order and Security Act [Chapter 11:17], a centrepiece for state-sanctioned repression. Section 7(5) of MOPA criminalises failure to give notice of convening public gatherings to the police. Section 8(3) of the same Act gives wide discretionary powers to the police to cancel proposed meetings. Section 8(9) empowers the police to issue a prohibition order, effectively to ban proposed meetings, and section 8(11) criminalises failure to obey police orders and directives. This paper analyses the textual meaning and import of the aforesaid provisions and argues that they retard civic participation, are inconsistent with international standards for limiting freedom of assembly and are unconstitutional as they unjustifiably limit freedom of assembly. The criminalisation of public gatherings “as an end in itself,” regardless of whether the subsequent gathering is violent, invariably falls foul of legitimacy. The wide discretion given to the police to prohibit proposed meetings amounts to severe limitation of freedom to assemble. The author recommends that the identified provisions be amended or repealed to align with constitutional and international human rights standards.

1 Resurrecting the ghosts of repression: Examining the historical continuity of POSA and the neoteric disguise of colonial and draconian law under the veil of the new moniker, MOPA

The Maintenance of Peace and Order Act [Chapter 11:23] (MOPA) was promulgated in 2019 as a new law that repealed the Public Order and Security Act [Chapter 11:17] (POSA). As demonstrated in this paper, POSA was a centrepiece of state-sanctioned repression. A closer analysis of MOPA shows that it is hardly different from POSA. MOPA is a continuity of the colonial and repressive law, the Law and Order Maintenance Act [Chapter 11:07] (LOMA), which was replaced by POSA. LOMA was a colonial law that was enacted in 1960 before the country’s independence from white minority rule. It was a law promulgated to consolidate power to the white minority government by denying the black majority their freedom of association, assembly, movement, and expression. After independence in 1980, the ruling ZANU PF party inherited LOMA until 2002, when POSA was enacted.

POSA was enacted when the opposition party, the Movement for Democratic Change (MDC) party, was gaining popularity and challenged ZANU PF’s hegemonic dominance of Zimbabwean politics. POSA incorporated many provisions of LOMA and introduced even more repressive measures. The legislation became the centrepiece for state-sanctioned repression and was widely condemned by the international community for infringing on freedom of assembly. Members of the opposition and civil society became targets of a broad scheme to restrict the capacity to coalesce, organise, and engage in mass action. In doing so, POSA significantly increased asymmetries of power, as well as the spatial distance between the general public and their constitutionally guaranteed right to assemble.

Two critical factors led the government to reconsider POSA and replace it with MOPA. Firstly, the Western governments imposed economic sanctions on Zimbabwe under the leadership of former President, Robert Mugabe in 2022 for

violating human rights. As a result, the country suffered isolation from the international community and was not able to access funds from international financial institutions. Among other demands, the Western governments demanded that repressive laws, including POSA, be repealed or amended as a precondition for international reengagement.

In 2017, President Emmerson Mnangagwa overthrew former President Robert Mugabe through a coup. After assuming power through unconstitutional means, President Emmerson Mnangagwa desperately needed legitimacy. He sought public support and made appearances as a reformist leader. A central part of his promises was to pursue a re-engagement policy with Western governments. As part of this show of political will to reform, POSA was repealed, and in its stead, MOPA was enacted. It appears that circumstances, not virtue, pushed for the repeal of POSA.

Secondly, the Constitution of Zimbabwe Amendment (No. 20) Act was enacted in 2013. It has an expansive Declaration of Rights which the State is required to protect, promote and fulfil. POSA infringed at least six of the rights contained therein in direct and manifest ways: the freedom of expression, freedom of movement, freedom of association and assembly, the right to personal liberty, the right to peaceful political activity, and the right to demonstrate and petition. None of these rights are absolute. They are subject to the general limitation clause in the Constitution. However, these rights are civil and political or first-generation rights. Such rights do not bear the financial burden immanent in socio-economic rights and for that reason, they are not subject to progressive realisation. They create an immediate obligation for realisation and fulfilment, claimable against the state. Thus, POSA needed to be aligned with the Constitution, and hence the repeal.

This historical context reveals that MOPA did not arise from the Government's genuine intent to reform and align POSA with the Constitution. Instead, it was a politically expedient move for re-engagement with Western powers. It served as one of the measures devised by the government to sanitise the coup and secure financial support from international funding institutions through re-engagement with Western governments. In effect however, POSA was retained under the new moniker MOPA. MOPA can be seen as an embodiment of POSA; it inherited and added more severe provisions that unjustifiably limit freedom to assembly.

2 The liberating essence of assemblage

The essence of freedom of assembly to democracy is beyond reproach. The former Chief Justice of South Africa, Mogoeng CJ, expressed this as follows:

*"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights."*¹

Democracy flourishes where the freedom to assemble is effectively protected. It is through the freedom of assembly that members of the public are able to air out their concerns to the government of the day. It allows the weak, marginalised, and minority groups to express their concerns, gain visibility and participate directly in democratic processes. It must be emphasised that effective protection of this right fosters a culture of open democracy, and enables non-violent participation in public affairs.² Public assemblies can help ensure the accountability of corporate entities, public bodies, and government officials thereby promoting good governance through the rule of law.³ Freedom of assembly is vital in

1 SATAWU v Garvas [2012] ZACC 13; 2013 (1) SA 83 (CC) (Garvas) at paras 52-3.

2 "Report on factors that impede equal political participation and steps to overcome those challenges", UN Doc. A/HRC/27/29, Office of the United Nations High Commissioner for Human Rights, (OHCHR), 30 June 2014, para. 22.

3 European Commission for Democracy through Law (Venice Commission), *Guidelines on Freedom of Peaceful Assembly*, para. 2.

realising other rights, like freedom of expression, association, the right to participate in public affairs, the right to vote, and the right to religion. The restrictive limitation of the freedom of assembly retards the enjoyment of these rights.

The tapestry between freedom of assembly, democracy, and civic participation cannot be overstated and needs not be undermined. Freedom of assembly is vital towards civic participation. The importance of this right to the work of civil society organisations (CSOs) was captured by Justice Jafta J⁴ as follows:

“In democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important. It is through the exercise of each of these rights that civil society and other similar groups in our country can influence the political process, labour or business decisions and even matters of governance and service delivery. Freedom of assembly by its nature can only be exercised collectively and the strength to exert influence lies in the number of participants in the assembly. These rights lie at the heart of democracy.”

It follows that freedom of assembly is a catalyst to allow civic participation. This relationship can be understood in the main broad roles of CSOs on human rights. CSOs complement government obligations to protect and fulfil human rights. CSOs also hold the government accountable for human rights through their lobbying and advocacy initiatives. In all respects, freedom of assembly is a vehicle for CSOs to fulfil these roles. For example, it is the freedom to assemble that allows the CSO actors to organise protests to hold the government accountable for human rights violations. CSO actors need to associate with others through their numbers to influence change and exert pressure on the government to act on human rights violations. As a natural part of their work, CSOs also need to organise meetings with beneficiaries and other stakeholders, for example, to raise awareness of human rights. They need to assemble with different stakeholders to influence government policies on human rights issues. It follows that the more severe the limitation of freedom of assembly in any democratic country, the more the restricted civic space becomes. Further, the existence of an enabling and safe environment for CSOs is regarded as an indicator of the existence of the freedom of assembly.⁵ In this regard, it is not conceivable to discuss civic space without considering the right to peaceful assembly.

3 International standards for balancing freedom of assembly and public interest

Freedom of assembly is one of the rights under the International Bill of Rights, and Zimbabwe is a party to several international and regional human rights instruments that recognise freedom of assembly. Article 21 of the International Covenant on Civil and Political Rights (ICCPR) recognises the right to peaceful assembly.⁶ Article 7(c) of the Convention on the Elimination of All Forms of Discrimination against Women obliges the government to take appropriate practical measures to eliminate gender discrimination in the political and public life of the country and to give equal rights to participate in non-governmental organisations and associations concerned with the public and political life of the country. The same right is recognised by Article 11 of the African Charter on Human and Peoples' Rights. It is apparent in these instruments that the right to peaceful assembly is not absolute but subject to limitations. These rights can be limited in consideration of either public interest or the need to protect the rights and freedoms of others. Public interest grounds for limiting this right include national security, public safety, public order (*ordre public*), and the protection of public health or morals.⁷ Restrictions should follow standards of the law as opposed to the discretion of the responsible authorities.⁸ This is in line with the norm of *legality*, requiring that there should be a law in place that regulates the limitation of the freedom of assembly – as with other rights. If the right is restricted by the discretion of the authorities, such discretion should be clearly articulated by the law. Such discretion should not be unfettered; otherwise, it defeats the whole purpose of having such a right.

4 SATABU v Garvas [2012] ZACC 13; 2013 (1) SA 83 (CC) para 120.

5 UN Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, A/HRC/31/66, available at: <https://www.refworld.org/docid/575135464.html> (accessed 6 July 2023), para 7.

6 See also Article 20 of the *Universal Declaration on Human and People's Rights*, article 15 of the *Convention on the Rights of the Child*, article 29 of the *Convention on the Rights of Persons with Disabilities* and Article 8 of the *African Charter on the Rights and Welfare of the Child*.

7 n 11, article 21.

8 Ibid.

There is an obligation on the State to protect everyone exercising this right peacefully. The African Commission on Human and Peoples' Rights and the Human Rights Committee of the UN have developed useful general comments⁹ on the scope and standards for restricting this right.¹⁰ According to Human Rights Committee General Comment Number 37, determining whether or not someone's participation in an assembly is protected under Article 21 of the ICCPR entails a two-stage process.

A first step is always to ascertain whether the conduct of the participant amounts to a peaceful assembly. If this enquiry is answered in the affirmative, the State is obliged to respect and protect the rights of the participants.¹¹ As long as the assembly is peaceful, it should be protected, and the responsible authorities are not allowed to interfere, for example, by dispersing or arresting the participants because they failed to comply with laws relating to planning requirements like notifying the responsible authorities. What determines a peaceful assembly is the absence of widespread and serious violence.¹² Violence denotes physical harm imposed by the participants resulting in either injury, death, or damage to property.¹³ Mere pushing or disruption of vehicular or pedestrian movement or disruption of daily activities, for example, does not amount to violence.¹⁴ It follows that the exercise of this right requires some form of tolerance by the authorities or third parties to allow the participants to enjoy this right. This right should not be restricted by the authorities on the need to protect vehicular or pedestrian movement or to minimise noise for neighbours, for instance. All assemblies are presumed peaceful, subject to the limitations imposed to pursue legitimate grounds.¹⁵

If there are restrictions imposed on an assembly, an inquiry is necessary into whether such restrictions are legitimate. These restrictions must conform to international standards. Various standards were developed by international and regional human rights treaties and bodies. This paper concentrates on those principles that are germane to this analysis, and these are explored below.

3.1 Restriction of the right to assembly should be treated as an exception rather than a rule

The right to assembly is not a privilege. As such, laws regulating the exercise of this right should be primarily designed to facilitate the enjoyment of this right rather than to restrict it.¹⁶ Assemblies should be allowed to proceed as a rule and restricted as an exception.¹⁷ In the same vein, restrictions must not impair the essence of the right.¹⁸ As was rightly observed by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsoi Voule,¹⁹ the primary purpose of MOPA is to maintain law and order rather than to facilitate the exercise of this right. The preamble of the MOPA makes it clear that it seeks to maintain peace, order, and security. The need to restrict this right takes centre stage in this Act, and this is not in line with this international standard.

3.2 Cancellation of specific assemblies should be done as a last resort

The responsible authorities must not cancel the proposed meeting without considering all other less intrusive measures that can be imposed to allow the assembly to proceed.²⁰ The authorities should not attempt to exterminate all the risks

9 Guidelines on Freedom of Association and Assembly in Africa.

10 UN Human Rights Committee (HRC), General Comment No. 37 (2020) on the right of peaceful assembly, adopted by the Committee at its 129th session (29 June–24 July 2020). available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement> (accessed 6 July 2023) para 7.

11 See article 2 (1) of the ICCPR.

12 n 2, para 15.

13 European Commission for Democracy through Law (Venice Commission), *Guidelines on Freedom of Peaceful Assembly*, para. 51.

14 n 2, para 15.

15 n 1, para 18.

16 African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, (21 September 2017) <https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa> (accessed 6 July 2023) para 66.

17 Ibid.

18 UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 28 April 2015, A/HRC/29/25, available at: <https://www.refworld.org/docid/5571758b4.html> (accessed 6 July 2023), para 16.

19 UN Human Rights Council, Visit to Zimbabwe – Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/44/50/Add.2) (24 June 2020) <https://reliefweb.int/report/zimbabwe/visit-zimbabwe-report-special-rapporteur-rights-freedom-peaceful-assembly-and> (accessed 6 July 2023) para 37.

20 n 17, para 39.

by cancelling the assembly.²¹ In this regard, assemblies should, as much as possible, be protected to proceed. In any way, the risk of violence is always available in the exercise of this right, particularly in a polarised environment.

3.3 Restriction of the right to assembly must be supported by the law

Any restriction to the right to assembly should be supported by the law. It follows also that administrative decisions restricting this right must also be supported by the law. That law must not grant unfettered or sweeping discretion for the authorities to impose restrictions.²² In this regard, any law that grants discretion for the authorities to impose restrictions on assemblies should jealously guard that power to cushion it against abuse.

3.4 Notification procedures should not be used as *de facto* authorisation of assemblies

In other jurisdictions, laws require the participants, organisers, or conveners of the proposed meetings to notify the responsible authorities about the proposed gathering. Such notifications should be designed solely to notify the responsible authorities to police the gathering and to protect the rights of others. They should not be used as a way of requesting permission to proceed with the assembly, which amounts to *de facto* authorisation. The right to assembly is a right, and no one should seek permission to exercise this right.²³ It follows that failure to adhere to this notification procedure should not be used as a ground for interfere with the exercise of the right. As long as the assembly is peaceful, the responsible authorities are obliged to respect, protect, and facilitate that assembly.

3.5 Non-compliance with notification procedures should not be used as a basis to interfere with the exercise of the right to assembly

Non-compliance with notification procedures itself should not be used as grounds to interfere with the exercise of this right as long as the assembly is peaceful. Every 'peaceful' assembly is protected. Participants forfeit this right if they become violent.

3.6 Spontaneous gatherings must be exempted from the notification requirements

Spontaneous gatherings are sudden assemblies usually convened to respond to a sudden public interest concern. It is not practical for the participants to give notice to the responsible authorities about these meetings. As a standard, they should be exempted from the notification procedure requirements.²⁴ In many cases, it is also difficult to identify the organisers and conveners of these meetings. These meetings are protected under the right to assembly.²⁵ In other jurisdictions that criminalise failure to comply with notification procedures, the spontaneity of the gathering is a defence.²⁶

3.7 The possibility that a peaceful assembly may provoke adverse or violent reactions from other members of the public should not be grounds to restrict or interfere with the exercise of the right to assembly

The peacefulness of the assembly should be determined from the conduct of the participants, not from other hostile groups.²⁷ Equally important, the possibility that a peaceful assembly may provoke adverse or violent reactions from other members of the public should not be grounds to restrict or interfere with the exercise of the right to assembly. This stems from the State's obligation to facilitate the right to peaceful assembly.²⁸ The participants in the assembly have the same rights as any other members of the public. It is only in exceptional circumstances that the responsible

21 n 6, para 2020-222.

22 UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/3, <https://www.refworld.org/docid/4ed34b562.html> (accessed 6 July 2023) para. 25.

23 n 3, para 70-72.

24 *Popova v. Russian Federation*, para. 7.5. See also European Court of Human Rights, *Éva Molnár v. Hungary*, para. 38.

25 n 17, para 14.

26 See section 11(2) of the South African Regulation of Gatherings Act, 1993 [No. 205 of 1993].

27 n 17 para 18.

28 n 9, para 70 (a).

authorities are allowed to interfere and impose restrictions or cancel the proposed meeting. The authority may impose less intrusive means like relocating or postponing the gathering before cancelling it. The only exceptional ground for this is the inability of the authorities to protect the participants. This decision should be based on concrete risk assessment.²⁹ It follows that there should be no repercussions on the participants or organisers to convene spontaneous gatherings.

3.8 Restrictions must be necessary and proportionate

Article 21 of the ICCPR articulates that the restrictions on the right to assembly must be necessary for a democratic society. These restrictions must be necessary and proportionate in a democratic space based on the rule of law, political pluralism, and human rights.³⁰ The proportionality principle requires that the restrictions be designed to archive the legitimate grounds for restricting these rights as articulated in Article 21 of the ICCPR. Less intrusive restrictions should be pursued in this regard as opposed to more intrusive means of restricting the exercise of this right. This principle should not be incorporated only by the law but by responsible authorities and judicial officers implementing and interpreting the law, respectively.³¹ The concept of necessity and proportionality places a higher threshold for limiting the right to assembly. It goes beyond the reasonability or expediency threshold for limiting this right.

4 Constitutional framework on freedom of assembly

Section 58(1) of the Constitution of Zimbabwe grants every person the right to assembly and association and to not assemble or associate with others. This right is accorded to ‘everyone’ as opposed to citizens only. In interpreting the scope of this right, binding international human rights instruments should be considered.³² The parts above have already articulated the international framework applicable in ascertaining the scope and standards for limiting this right.

The right to assembly is not absolute but is subject to limitation under section 86.³³ In terms of this provision, rights can be limited only in terms of general application. The yardsticks for limiting a right are ‘fairness’, ‘reasonableness’, ‘necessity’, and ‘justifiability’.³⁴ Section 86(2)(a)-(f) of the Constitution provides a list of factors that guide the court in deciding on these yardsticks. These factors will be examined to assess the justification of limitations imposed by sections 7(5), 8(3), 8(6), and 8(11) of MOPA.

5 Examining the unjustifiable limitations imposed on freedom of assembly under sections 7(5), 8 (3), 8(9), and 8(11) of MOPA

It is vital to evaluate sections 7(5), 8(3), 8(6), and 8 (11) of MOPA with the international human rights standards articulated above and the Constitution of Zimbabwe (No.20) Act, 2013. The international human rights treaties are very important; they set the international standards upon which domestic laws are evaluated and reformed. The international human rights treaties that are binding on Zimbabwe are not part of our law unless they are domesticated by an Act of Parliament.³⁵ Nevertheless, in all cases international law must guide the interpretation of the Declaration of Rights in Zimbabwe. In terms of the Constitution of Zimbabwe, the courts are bound to consider international law, treaties, and conventions in interpreting the rights in the Bill of Rights, including the right to assembly.³⁶

The Constitution is the supreme law of the land, and any law, conduct, or practice must be subsidiary to it.³⁷ All arms of

²⁹ n 3, para 52.

³⁰ n 3, para 40.

³¹ n 20 para 34.

³² Ibid section 46(1)(c).

³³ Section 86 of the Constitution of Zimbabwe.

³⁴ *Democratic Assembly for Restoration and Empowerment & 3 Ors v Saunyama N.O. & 3 Ors* CCZ- 9- 2018

³⁵ Section of the Constitution of Zimbabwe Amendment (No.20) Act, 2013

³⁶ Ibid section 46(1)(c).

³⁷ Ibid section 2(1).

the State, including the executive, legislature, and judiciary, are bound to fulfil obligations imposed by the Declaration of Rights.³⁸

5.1. Sections 7(5) of MOPA - The criminalisation of failure to give convening notice to the police

In terms of section 7(5) of MOPA, it is a criminal offence for any person who knowingly fails, either to give notice of a public gathering or give notice of the delay of a gathering in terms of subsection 7(1) and (3) of that Act, respectively. Public meetings are defined in section 2 of that Act. These are public meetings comprised of more than 15 people but do not cover political meetings held in private spaces by the organ or structure of the political party. Meetings of less than 15 people and those convened by political organs or structures are exempted from notifying the police about their meetings.³⁹

Section 7(1)(b) of the Act requires a convener to give a five-day notice in writing to the Regulating Authority of the intention to convene a public meeting that is not exempted by the Act. This notice is identified as a convening notice and it should include all the information required under section 7(2) of the Act. Section 7(3) of the Act requires the convener to notify the Regulating Authority of either the delay or postponement of the proposed meeting. The Regulating Authority is defined as a Police Officer in command of a police district subject to the venue of the proposed meeting. It will suffice to notify the Officer-In-Charge (OIC) of the nearest police station to the proposed venue.

This provision enforces compliance with sections 7(1) and (3) of the Act, which requires conveners to notify the OIC about the proposed public meetings, postponements, and delays thereof. The rationale for this provision is to incentivise compliance in sections 7(1) and (3) of the Act, such that non-compliance will result in prosecution, and those found guilty are liable to 12 months in prison with an option of a fine or both.

The limitation of the right to assemble with a criminal sanction is inconsistent with the international standards for restricting this right. This provision is against international standards of necessity and proportionality in restricting the right to assembly. There is no necessity to limit this foundational right with criminal sanction where there are other available less intrusive measures, as shall be demonstrated in this paper, that can be used to realise the same objective. Under MOPA, as long as the conveners and the participants fail to notify the police about their meetings, they are liable for prosecution. This provision is also inconsistent with standards that require the responsible authorities to respect and protect all assemblies as long as they are peaceful. This is so regardless of whether conveners complied with the notification procedures. Under MOPA, spontaneous meetings are not exempted from prosecution. There is no defence for attending spontaneous gatherings.

Preserving the pillar: South Africa's firm stance on protecting freedom of assembly and rejecting excessive limitations through criminal sanctions

South African Constitutional Court and Supreme Court cases⁴⁰ have held that limitations of freedom of assembly with criminal sanctions amount to unjustifiable limitation of this right. In the case of *Mlungwana & Others v The State & Another* CCT 32/18, the Constitutional Court of South Africa held that section 12(1)(a) of the Regulation of Gatherings Act, 1993, that criminalised the failure to notify law enforcement of assemblies of more than 15 people, was an unjustifiable limitation on the right to freedom of assembly. In this case, 10 activists were convicted under that provision following their involvement in a 2013 protest for improved municipal services for which they had not notified the authorities as per that law. After observing that criminal sanctions of failure to give notice resulted in a limitation of freedom of assembly, the court went on with an inquiry in terms of section 36 of the Constitution of South Africa, 1996. Section 36 of the South African Constitution requires the court to analyse the justification of the limitation of constitutional rights based on five factors that are outlined in that provision.

³⁸ Ibid sections 44 and 45.

³⁹ See also schedule to the Act that exempts other gatherings.

⁴⁰ *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC) (*African National Congress*) at paras 124-5; *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA) at para 62.

In that analysis, the court reasoned as follows:

- (a) South Africa places a high premium on freedom of assembly since this right played a prominent role in ending apartheid in that country. It was reasoned that freedom of assembly is central to any democratic state and plays a crucial role in the fulfilment of other rights. It follows that there should be stronger justification to limit this right.
- (b) There is no link between the criminalisation of failure to give notice and the purpose of limitation. In that case, the state explained that the purpose of the limitation (criminalising failure to give notice) is designed to notify the authorities in advance so that police provide adequate officers to prevent violent cases that were prevalent during the protests. The Court acknowledged that there was a prevalence of violent crimes committed during the protest but reasoned that an alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.⁴¹
- (c) The limitation of freedom of assembly with criminal sanctions amounts to severe limitations. It is severe in the sense that it categorically criminalises failure to give notice regardless of the effect of that on public order. This means that it criminalises convening peaceful protests as long as notice was not given. The court observed that criminal sanctions have a 'calamitous' effect on those caught on the wrong side of this law. The arrests, even without conviction, will result in moral stigma and, where there is conviction, a criminal record. All these have deleterious consequences that severely discourage the enjoyment of this right. Further, the court held that criminal sanctions have a chilling effect, which deters people from exercising this right. It has a calamitous effect on those caught within its wide net. The possibility of arrest and its aftermath, even without a conviction, is a real spectre for those seeking to exercise their right to assembly. Those concerned face punishment, moral stigma, and a criminal record if convicted. All these deleterious consequences of criminalisation severely discourage the exercise of this right.
- (d) There was no causal link between the purpose sought to be achieved and the limitation. In that case, the State justified the criminal provision on the grounds that the police needed to control violence in protests and, therefore they needed to be notified to monitor the intended gatherings. The court disagreed and reasoned that the link between the criminalisation of not giving notice and preventing violent protests through police presence is not a "tight fit". In the court's reasoning, someone could be criminalised for failing to give notice, and yet police presence to prevent violence at the gathering was not necessary. Also, sometimes notice may not even be required, but police presence to prevent violence will be. Resultantly, the court held that the limitation in question (the criminalisation of a failure to give notice) is neither sufficient nor necessary for achieving the ultimate purpose of that limitation (peaceful protests through police presence).
- (e) Where there are less restrictive means of limiting a right, but more severe means are adopted, the adopted means are unlikely to become proportional. This is in line with the international standards that articulate that less restrictive means of limiting freedom of assembly should be adopted rather than more restrictive means. In this case, the Court correctly observed that the availability of less restrictive means does not necessarily render the provision unconstitutional, but it is one of the considerations in weighing up the proportionality of that provision. The Court correctly observed that there were less restrictive means to limit freedom of association in that Act besides criminal sanction that is more severe. These include;
 - i. Civil liability for riot damage, that follows from a failure to take reasonable steps to prevent the damage (which includes giving notice);
 - ii. Existing common law and statutory crimes regarding public disruption and violence;
 - iii. Administrative fines, and
 - iv. Amending the definition of gathering such that criminal sanction will be imposed if the proposed meeting results in violence by the conveners or participants.

As a result, the court reasoned that criminal sanctions in limiting freedom of assembly are not proportional to the purpose of the limitation. In concluding his judgment in that case, Justice Petse held that "section 12(1)(a) [of the Act] is not 'appropriately tailored' to facilitate peaceful protests and prevent disruptive assemblies". He found that "the right

41 S v Dlamini; S v Dladla; S v Joubert; S v Schietekat [1999] ZACC 8; 1999 (4) SA 623 (CC) at para 68.

entrenched in section 17 [of the Constitution] is simply too important to countenance the sort of limitation introduced by section 12(1)(a) [of the Act]” and that the “nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) [of the Act] and any conceivable legitimate purpose is too tenuous to render section 12(1)(a) [of the Act] constitutional”.

Section 12(1)(a) of the South African Regulation of Gatherings Act, 1993 was similar to section 7(5) of MOPA. The only difference was that the former criminalised ‘everyone’ who attended a public gathering without notification to the police whilst the latter limits the scope of liability to those who attend the gathering with ‘knowledge’ of failure to comply with notification requirements. This judgment is persuasive to reconsider section 7(5) of MOPA. Section 36 of the South African Constitution is similar to section 86(2) of the Zimbabwean Constitution. Section 86(2) outlines factors that should be considered by the courts in assessing the justification for the limitation of rights and these factors are similar to those under section 36 of the South African Constitution. With the same reasoning in *Mlungwana & Others v The State & Another supra*, section 7(5) must be declared unconstitutional.

5.2. Section 8 (3) of MOPA - Discretion by the police to cancel public meetings

Section 8(3) of MOPA gives the Officer-in-Charge (OIC) the discretion to call for a consultative meeting after receiving a notice in terms of section 7(1)(b) and (2) of the Act. This meeting will be comprised of conveners, interested public authorities, and interested civil society organisations. This consultative meeting will be called only after the police receive credible information on oath that there is a threat to serious disruption of vehicular or pedestrian traffic, injury to participants in the procession, public demonstration, or public meeting or other persons, or extensive damage to property or other public disorder if the proposed meeting is allowed to proceed.

A closer analysis of sections 8(3) and 8(9) of the Act shows that the OIC can use these two provisions to cancel proposed meetings. In terms of section 8(3) of the Act, the OIC is not bound to call for a consultative meeting inclusive of other interested stakeholders like CSOs; he/she is only bound to convene a meeting with the convener to find ways to prevent the perceived threat. At this meeting, the convener is allowed to make written or verbal representations. The OIC is not bound by those representations. The OIC is allowed to either cancel the proposed meeting or change the time and venue of the proposed meeting where he/she fails to reach a consensus agreement with a convener. Section 8(9) seemingly requires the OIC to consider other available less restrictive means to be imposed on the assembly before cancelling it. He/she should be convinced on reasonable grounds that no amendment or condition can be imposed to prevent the occurrence of serious disruption of vehicular or pedestrian traffic, injury to people, extensive damage to property, or other public disorder. In those circumstances, the OIC is allowed to issue a prohibition order to ban the proposed meeting. In either case, the power given to the OIC to issue a prohibition order without first approaching the court of law is contestable. This point will be exhausted separately.

The import of section 8(3) of the Act is to give the OIC the discretion to cancel proposed meetings. As long there are threats of serious disruption of vehicular or pedestrian traffic, injury to participants in the public meeting or other persons, or extensive damage to property or other public disorder, the OIC is allowed to cancel the proposed meeting. The yardstick to cancel the proposed meeting is the availability of ‘real threat’ and this is a fluid and subjective term. It means the OIC has unfettered discretion to cancel proposed meetings. He/she is not bound by the opinion of the parties invited to the consultative meeting.

International standards for restricting the right to assembly require the responsible authorities to allow a certain degree of tolerance for exercising the right to assembly. For example, the exercise of this right results in disturbance to daily activities like vehicular and pedestrian traffic. This should not be used as a valid reason to restrict the exercise of this right. To the extent that section 8(3) of the Act allows the OIC to summarily cancel the proposed meetings without considering any other measures that can be imposed to eliminate the identifiable risks, as required by section 8(9) of the same Act, then this provision is inconsistent with international standards.

Nevertheless, the threshold adopted by section 8(9) of the Act to prohibit proposed gatherings is not in line with international standards. The presence of whatever risks associated with the gathering is not a ground to cancel or

prohibit the proposed gatherings. The only ground for cancelling specific assemblies is the inability of the police to protect the participants or other persons. Police should not cancel proposed meeting as a way of terminating all associated risks. In terms of section 8(9) of the Act, the OIC is allowed to prohibit proposed assemblies based on real threats regardless of whether those threats emanated from the proposed participants. In other words, a threat by the hostile group will suffice for the OIC to cancel the proposed meeting. This falls short of international standards; participants forfeit their right to assembly if they become violent themselves.

Constitutionally, the discretion given to the OIC is not fair, reasonable, and justifiable in any democratic society, as required by section 86(2) of the Constitution. In a democratic society, citizens should not enjoy political rights at the mercy of an OIC. The power given to the OIC to cancel proposed public meetings amounts to *de facto* authorisation, a scenario where citizens and CSOs obtain authorisation from the police to exercise the right to assemble. In so doing, sections 8(3) and (9) of the Act create a prior restraint and a hinderance⁴² on the rights of the citizen under sections 58(1) and 67(2) of the Constitution. It is not justifiable under any democratic society.

5.3. Section 8(9) of MOPA - Prohibition orders

Prohibition orders are issued by the OIC in terms of section 8(9) of the Act. The import of section 8(9) of the Act is to give discretion to the responsible OIC to issue a prohibition order banning the intended gathering if there is a real threat of serious disruption of vehicular or pedestrian traffic, injury to participants in the public meeting or other persons, or extensive damage to property or other public disorder if the proposed meeting is allowed to proceed. This provision is unconstitutional. A prohibition order issued by the OIC to ban any meeting amounts to complete taking away of the convener and prospective participants' rights. This alone is against section 86(2) of the Constitution, which allows limitations of rights and not the complete removal. On this ground alone, this provision is unconstitutional.

The discretion given to the OIC to prohibit the proposed meetings is also unconstitutional. It subjects the enjoyment of political rights and freedom of association to *de facto* authorisation. No person should seek approval from the OIC to exercise these rights. It follows that there is an obligation created by the spirit and objective of section 86(2) of the Constitution to any person seeking to limit these rights to justify the limitations of rights in the Bill of Rights. If the law is subject to constitutional challenge based on the unjustifiable limitation of rights, it is the government, through the responsible Ministry, that should justify the limitation thereof.⁴³ Administrative authorities that impose severe restrictions, such as prohibition orders, should justify their restrictions. They should, therefore, approach the courts, seeking these orders to allow the court to assess their decisions against abuse of power. This approach is firmly supported by the Constitution. The Constitution entrenches values and principles of the rule of law, observance of separation of powers, and accountability under sections 3(1)(b), 2(e), and (g). These are the foundational notions upon which the people of Zimbabwe wish to be governed.

The rule of law requires that people's rights and obligations must be determined by laws rather than by individuals or groups of individuals exercising arbitrary discretion. The fundamental concept of the principle of legality is also derived from this. It guards against the deprivation of rights and freedoms through the exercise of wide discretionary powers by the executive arm of government. Prohibition orders are a result of discretionary power by the OIC. Such power is arbitrary and must be exercised after confirmation by the court, similar to warrants of arrest.

The separation of powers demands checks and balances between the three branches of government: the executive, the legislature, and the judiciary. Allowing the OIC to cancel constitutionally entrenched rights without court orders offends this principle. Section 8(3) grants the OIC quasi-judicial role to preside over requests for proposed meetings, and section 8(11) of the same Act gives him the ultimate power to prohibit the gathering. With this approach, the OIC becomes the judge and the jury at the same time, exercising executive power to policy the gatherings and judicial power to determine requests for these meetings by the conveners.

The principle of accountability guards against the abuse of power by public authorities. Section 8(6) of the Act allows abuse of power by the OIC. By permitting the OIC to issue prohibition orders without proper safeguards and oversight,

42 *New Patriotic Party v Inspector General of Police* 1992-93 GLR 585 - (2000) 2 HRLRA 1.

43 *Moise v Greater Germiston Transitional Local Council* 2001 (8) BCLR 765 (CC).

the police may use this power to suppress dissent or silence political opposition. For example, the police have cancelled several meetings by the opposition parties during the election period, while those for the ruling party are allowed to proceed. This amounts to a violation of the principles of democracy and human rights.

5.4. Section 8(11) of MOPA - Criminal sanction for failure to comply with the conditions, directions and prohibition notice by the police

In terms of section 8(9) of the Act, it is an offence for any person who knowingly fails to comply with police orders. These orders can be in the form of conditions imposed by the police on the proposed meeting, any directives given by the police, or prohibition orders. Limitations of rights by criminal sanctions amount to unjustifiable limitation of freedom of assembly. The case of *Mlungwana & Others v The State & Another Supra*, as indicated above, is also relevant in challenging this provision.

6 Conclusion and recommendations

Sections 7(5), 8(3), 8(9), and 8(11) of MOPA are used as weapons by the Zimbabwe Republic Police to close the operational civic space. Section 7(5) is employed to persecute human rights defenders and civic actors through prosecution. It is being used to raid and disrupt CSOs meetings. It has a chilling effect and deters CSO actors from convening public assemblies for fear of arrest and prosecution. Sections 8(3) and (9) of the same Act are abused by the police to cancel meetings not only of CSOs but also political and social actors. Section 9(11) of the same Act serves as a tool to ensure compliance with police orders, deploying criminal sanctions for failure to comply with police orders. These provisions are not only unconstitutional, but they are also inconsistent with international standards, as demonstrated in this paper.

In the premise, the following recommendations are made:

- i. Repeal of section 7(5) of the MOPA, guided by international and constitutional standards. The decision in the case of *Mlungwana & Others v The State & Another supra*, provides useful insights into this position.
- ii. Amend section 8(3) of MOPA by removing the power given to the OIC to cancel proposed meetings. The presence of any risks should not be used as a ground to cancel proposed meetings. The applicable international standards articulated in this paper provide useful guidelines on this aspect.
- iii. Repeal section 8(9) of MOPA. The police should only be allowed to issue prohibition orders after approaching the courts of law. The grounds for such prohibition should not be mere consideration of associated risks.
- iv. Repeal section 8(11) of MOPA by removing the criminal sanctions in that provision.
- v. There are good grounds for challenging sections 7(5), 8(3), 8(9) and 8(11) of MOPA in the courts of law. CSOs acting on public interest are therefore strongly urged to mount a constitutional application to test the constitutionality of these provisions.

The selective application of the right to bail in Zimbabwe

By Bianca Mahere

Key Words: Civic space, civil society, pre-trial, bail, human rights

Abstract

Civic space in Zimbabwe has continued to shrink, despite the presence of regional and international mechanisms in support of democracy. It can be observed that the criminal justice system is a mechanism used by the government to restrict freedom of expression, freedom of association, the right to a fair hearing, and the rights of accused persons, amongst other rights. The paper analyses the theory of the rule of law and the application of the principle in Zimbabwe at pre-trial stage. It will also critically assess whether the rule of law is being upheld in the country. The paper will further compare the situation in Zimbabwe with regional and international standards. A finding will be reached on whether there is a uniform application of the law amongst the people of Zimbabwe and whether the courts of law are not being used as a mechanism to mutilate and erode the rights of accused persons, especially those who apply for bail.

1 Introduction

The rule of law is broadly defined but includes three main principles: the supremacy of the law, equality before the law, and the inherent rights of individuals. The principles form the foundation of any democratic society. This paper critically analyses whether the rule of law is being upheld in Zimbabwe, focusing specifically on criminal law, in particular at pre-trial stage.

The paper demonstrates how human rights defenders, political activists, and dissenting voices are targeted through the use of the existing criminal laws. Notable examples of this victimisation include Job Sikhala of the Citizens Coalition for Change (CCC), an opposition party in Zimbabwe. Since June 2022, Job Sikhala has been denied bail multiple times in both lower and higher courts of Zimbabwe. At the time of writing this paper, he has been incarcerated for over a year pre-trial. There are several other cases that will be noted, but the question that this paper will attempt to address is whether such pre-trial detention is in accordance with the standards of the established laws of Zimbabwe.

The paper will demonstrate how the Zimbabwe Republic Police (police) selectively arrests individuals, particularly those who dissent from the government and ruling party's positions, on vague criminal charges that are inimical to the law. Despite the duty of the courts to uphold the rule of law, judicial precedence suggests differential treatment of targeted individuals compared to the rest of the citizens. What is obtaining in Zimbabwe can be characterised as lawfare, and the paper proffers some recommendations in the hope to assist in putting an end to the weaponisation of law in Zimbabwe.

2 The rule of law

The selective application of the law may appear to be a common practice, not unique to Zimbabwe alone. However, for the legal system to be considered effective and orderly, there are established principles that any democratic society must adhere to. One such fundamental principle is the rule of law, which serves as a bedrock to measure the efficacy of the justice system in a democratic society.

The concept of the rule of law has been noted to be a notoriously difficult concept to define and measure, but certain

scholars, including Professor A.V. Dicey and F.A. Hayek have attempted to explain the concept and advance the principles that underlie it in a more meaningful way. Dicey defines the rule of law as the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or even of wide discretionary authority on the part of the government.¹

F.A. Hayek defined the concept stripped of all technicalities, as meaning that the government, in all its actions, is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.²

The German concept of *Rechtsstaat* defines the rule of law under two aspects: the formal aspect and the material aspect.³ The formal aspect demands adherence to certain formal criteria, such as the separation of powers, legal certainty, and due process of law. The material aspect transcends the formal and ensures that state authority is also bound by higher legal values enshrined in the constitution.⁴

Dicey states that there are three main qualities that depict the rule of law. They are the supremacy of the law (as opposed to selective application of the law), the separation of powers (as opposed to wide discretionary, arbitrary executive power), and equality before the law (accompanied by the right of audience in courts of law), along with a judge-made constitution.

The quality of supremacy of the law entails that the law is supreme, and no individual can act arbitrarily or outside the boundaries set by the law. The principle means that all actions must be based on legal authority, and any exercise of power must be justified by law.

The second principle, equality before the law, provides that any person should be subject to the same laws and have equal access to justice. This principle ensures that no one is privileged or discriminated against based on their status or position.

The last principle, individual rights, means that individuals have certain inherent rights, such as freedom of speech, freedom of assembly, and freedom from arbitrary arrest or detention. These rights are not granted by the state but are recognised and protected by the law.

In summary, Dicey's definition of the rule of law means no one is above the law, and the law must be applied equally. It is important to understand this concept because in essence, the law is not just a fact of life. The law is a form of social organisation which should be used properly and for the proper ends. Joseph Raz⁵ further states that:

"The law can be likened to a tool in the hands of men differing from many others in being versatile and capable of being used for a large variety of proper purposes. As with some other tools, machines, and instruments a thing is not of the kind unless it has at least some ability to perform its function. A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour, however inefficiently. Like other instruments, the law has a special virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus, the rule of law is an inherent virtue of the law, but not a moral virtue as such."

When it comes to the criminal processes and the rule of law, there are general widespread practices that ensure that the rule of law is observed.⁶ The presumption of innocence is one such principle that is established and provides that an accused person must be presumed innocent until proven guilty. The burden will only shift once certain facts creating a contrary presumption have been established.

1 See Raz J, *The Rule of Law and the Judiciary*, Oxford Hart Publishing 2009.

2 *The Road to Serfdom*, page 54.

3 *Rule of Law, Respect for the Constitution and Other Laws*, Fungayi Jessie Majome, Konrad-Adenauer-Stiftung e.V, 6 May 2010, page 1.

4 Ibid.

5 Joseph Raz "The Rule of Law and its Virtue", page 226 in Joseph Raz, *The authority of law: Essays on law and morality*, 1979.

6 See NR Madhava Menon (ed), *The Rule of Law in a Free Society*, 2008, page 8.

Another practice involves detention pending trial. It is a generally accepted rule that a person should not have their liberty deprived, and they have a right to apply for bail pending trial unless there are compelling circumstances. These circumstances include public security, exceptionally serious cases, and propensity to commit other offenses, as will be discussed later in this paper. There are regional and international instruments providing for these two principles.

3 Regional and international law

The international laws and standards call upon democratic societies to apply the law equally and without discrimination. The rights include freedom of opinion and expression, and legitimate exercise of these rights must not be a basis for a criminal offence. There are also provisions for accused persons to be entitled to a fair trial, where they are deemed innocent until proven guilty.

It can be noted that in Zimbabwe, most criminal charges against politically exposed persons, human rights defenders, or alleged dissenting voices involve the freedom of speech and expression. Once the victims give their opinion on public platforms regarding the economy or political status of the country, they are immediately held to be contravening section 36 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the Code), which is committing or inciting public violence, or section 22 of the Code, which is subverting constitutional government, among other charges.

In the case of arrests after an alleged offence has been committed, the arrested persons have a right to be presumed innocent until proven guilty. This is in terms of several instruments including Article 7(1) of the African Charter on Human and Peoples' Rights. The right is also detailed in the International Covenant on Civil and Political Rights (ICCPR).⁷ Article 9(3) provides as follows:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment".

The issue of bail then comes into play. Bail is meant to be an undertaking, or cognisance, by an accused person that they will stand trial. This notion goes hand in hand with the principle that everyone must be presumed innocent until proven guilty.⁸ The reasoning behind this is that since individuals have a right to liberty and free movement, this cannot be taken from them unless the individual is convicted of an offence. Conviction comes after one goes through a full trial, and the commission of an offence must be proved in that trial. Only then may it become justifiable to deprive the convicted person of some of their rights and freedoms.

4 Zimbabwean law regarding bail

Worldwide, it can be noted that there is a general appreciation of a person's right to be presumed innocent until proven guilty and to be granted bail pending trial, with bail generally guaranteed as a right.

In Uganda, there is a constitutional provision that enjoins a court to release on bail a person who has been awaiting trial in custody for a specified number of days, and the arrested person is entitled to apply to court for bail.⁹

In Zambia, there is the concept known as police bond. Police bond is a guarantee at a police station that a crime suspect will appear at the police station or court whenever required to do so by the police. Upon providing such a guarantee, the suspect may be released from custody. The practice is that the relative or friend of a suspect who has been arrested may, on the suspect's behalf, request for police bond from the police. The relatives or friends may undertake to be sureties,

⁷ Zimbabwe signed and ratified this Convention.

⁸ Article 14 (2) of the ICCPR.

⁹ See Article 23 (6)(a), (b) and (c) of the Constitution of Uganda (1995).

for purposes of ensuring that the suspect or accused person, once he or she has been taken to court, appears before such court or police station. The surety also explains to a court or police officer why the suspect has failed or accused person is unable to appear before court or a police station, where applicable.¹⁰

The same position regarding bail is provided on paper in Zimbabwe. Persons accused of committing criminal offences in Zimbabwe have several rights outlined in the Constitution of Zimbabwe Amendment (No.20) Act 2013 (the Constitution). There are also criminal statutes in place which are concerned with the criminal procedure and substantive law of Zimbabwe. Provisions of the Criminal Procedure and Evidence Act [Chapter 9:27] are critical in appreciating the rights of accused persons in Zimbabwe, and relevant provisions will be identified.

The starting point in identifying the rights of arrested and detained persons is section 50 of the Constitution. The provision outlines several rights of people who are being accused of committing an offence. The Constitution is clear under section 50(2) that any person who is arrested or detained must be brought before a court as soon as possible and not later than 48- hours after the arrest took place. Further to this in section 50(3), a violation of the 48- hour period will deem the arrest unlawful, and the arrested person must be released immediately unless their detention has earlier been extended by a competent court.

The issue of bail arises when an arrested person has been placed on remand by a competent court. The Constitution is clear on the issue of bail, and section 50(1)(d) states that:

“Any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention...”

The granting of bail is peremptory according to section 50 of the Constitution unless there are compelling reasons justifying the continued detention of an individual. The compelling reasons are stated under section 117 of the Criminal Procedure and Evidence Act, and these include situations where there is a likelihood that the person who is granted bail will:

- i. endanger the safety of the public or any particular person or commit an offence referred to in the First Schedule; or
 - ii. not stand trial or appear to receive sentence; or
 - iii. attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
 - iv. undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
- (b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

Judicial precedence on the question of bail is quite rich, especially in explaining the grounds for denying bail. In the case of *State v Kachigamba & Another*,¹¹ it was stated that:

“[W]here a litigant applies for bail the presumption is that he is entitled to bail unless the state had proven otherwise. The section, being a constitutional safeguard designed to protect the citizen’s fundamental right to justice, freedom and liberty overrides all other common law and subordinate statutory provisions to the contrary. The effect of this section is to relieve an arrested person of the burden to the state to prove that there are compelling reasons justifying the continued confinement of the detainee.”

10 <https://www.cof.org.zm/index.php/2022/12/02/how-to-access-police-bond-in-zambia-practice-and-procedure/>.

11 (B 215 of 2015) [2015] ZWHHC 358 (9 April 2015).

On the issue of the compelling reasons justifying the continued detention of an accused person, the case of *Edmore Shoshera & Others*¹² provides further clarity on this, and it was held that:

“It is not sufficient for the state to make bold assertions that particular grounds for refusing bail exist. The assertions made by the state must be well grounded on the facts. Simply alleging that the accused may abscond, that the matter is serious, and that the accused may endanger the public or will interfere with witnesses without substantiating such allegations does not meet the threshold of compelling reasons for the denial of bail...”

In most cases, bail is granted to accused persons since it is their constitutional right. The admission of bail is also common even in serious offences like rape and murder because the courts are guided by the Constitution and judicial precedence that has been set.¹³ The following high-profile cases involving political figures aligned with the ruling party are examples where bail was granted regardless of the gravity of the offence.

4.1. The State v Wadyajena and 4 Others

Mr. Wadyajena was the Zimbabwe African National Union-Patriotic Front (ZANU PF) legislator for Gokwe-Nembudziya constituency. He was arrested by the Zimbabwe Anti-Corruption Commission (ZACC) together with top executives at Cotton Company of Zimbabwe (COTTCO) on charges of fraud and were accused of embezzling funds of over US\$5 834 000. It was alleged that the funds were meant to acquire bale cables but instead, the accused persons acquired haulage trucks, fuel and an assortment of other purchases for personal use.

4.2. The State v Henrietta Rushwaya

Henrietta Rushwaya is a public figure who is the President of the Zimbabwe Miners’ Federation. She was apprehended in October 2020 for attempting to smuggle 6kg of gold worth about US\$330 000. She was granted bail after an appeal to the High Court in January 2021.

4.3. The State v Obadiah Moyo

Obadiah Moyo is a former health minister. He was arrested on charges of criminal abuse of office in June 2020 and it was alleged that he illegally approved tenders worth US\$60 million in the procurement of COVID-19 personal protective equipment and test kits. He was released a day after his arrest on bail amounting to ZWL\$50 000.

4.4. Ignatius Chombo v The State¹⁴

Ignatius Chombo was a former minister in Zimbabwe and he was facing several charges of criminal abuse of office, fraud, criminal nuisance and corruption. He was arrested in November 2017 and was granted bail by the High Court. Most of the charges that he faced were later withdrawn in March 2023.

4.5. David Chimukoko and Five Others

The accused persons were active members of the ZANU PF party, arrested for allegedly murdering Cephas Magura, an opposition party Movement for Democratic Change (MDC-T) Ward 1 Chairperson for Nyamapanda. At the time, David Chimukoko was a ZANU PF councillor. Each of the accused persons was granted bail of US\$100 each by High Court Judge Justice Hlekani Mwayera. There was an outcry over this, as some observers believed it exposed the overbearing influence of the ruling party over the judiciary.¹⁵

12 (103 of 2022) [2022] ZWBHC 103 (31 March 2022).

13 See *S v Ashton Mlilo* HB-49-18 where bail was granted in a case where a 9-year-old minor child was raped.

14 HH-196-18.

15 “Uproar over bail for murder suspects”, 14 November 2012, *The Zimbabwean*, <https://www.thezimbabwean.co/2012/11/uproar-over-bail-for-murder/>.

In the above-cited cases, there was a public outcry over the granting of bail, considering the circumstances of the cases. The offences were regarded as serious, involving embezzlement of public funds, with millions of dollars in question, exposing widespread corruption amongst the political elite of Zimbabwe. These cases illustrate that bail is a constitutional right, and should apply to all individuals, regardless of their political or other backgrounds.

5 The selective application of law

The right to equality before the law is recognised as an essential tenet in a democratic justice system. In Zimbabwe, as highlighted above, there are several laws and practices that exist as safeguards against any injustices. However, the situation on the ground is different. There seems to be victimisation of individuals to silent dissenting voices and shrink the civic space. This is seen by vague charges against opposition party activists, human rights defenders or any outspoken voice that can be regarded as dissenting. In most cases, the victims suffer arbitrary arrests, prolonged pre-trial detention, protracted trials, and the sentences imposed on them are usually harsh. This section will examine examples of several individuals who have been through the justice system and have been victims of the unjustified denial of bail.

5.1. Job Sikhala

At the time of arrest, Mr. Job Sikhala was a Member of Parliament for Zengeza West constituency in Chitungwiza. He is a legal practitioner and senior member of the main opposition party in Zimbabwe, the Citizens Coalition for Change (CCC). He was arrested on 12 June 2022 on charges of inciting public violence. The background¹⁶ leading to his arrest is that he was representing the family of a CCC active member Moreblessing Ali, who was murdered on the night of 24 May 2022, allegedly by a ZANU PF member, Pius Mukandi. Moreblessing's body was found in a decomposing state, cut into three pieces. The councillor for the constituency where Moreblessing resided is affiliated to ZANU PF and he publicly declared that he would not allow the burial of the deceased in that area because of her political affiliation. This gave rise to violence at the funeral and it is alleged ZANU PF youth attacked the mourners on 12 June 2022. Job Sikhala was engaged as the legal representative of the deceased's family and he approached the High Court on an urgent basis to interdict the ZANU PF supporters from assaulting the mourners and calling for the funeral to be dispensed. He was quoted to have said the following statement at the funeral:

"ZANU PF attacked everyone at Moreblessing Ali's funeral last night and hijacked the funeral ... we are going to court on an urgent basis now to interdict their MP, Councillor and Simba Chisango who are leading the funeral hijackers."

The above statement formed the basis for his arrest and the charge of inciting public violence. A month later, Job Sikhala was charged for obstruction of justice where it is alleged that he knew the Zimbabwe Republic Police (ZRP) were investigating the commission of a crime, or realised there was a real risk or possibility that they were investigating one, but caused their investigations to be defeated or obstructed by indicating that Ms Ali was murdered by ZANU PF members. Since then, Job Sikhala has been denied bail several times and he remains in custody as at November 2023. His trial has not been finalised for a period exceeding one year. The following table assists in summarising part of his case:¹⁷

16 Zimbabwe Human Rights NGO Forum and Southern African Human Rights Defenders Network, *Justice Delayed is Justice Denied: Persecution by Prosecution in the case of Zengeza West Opposition Member of Parliament Job Sikhala*, 2023.

16 "Justice Delayed is Justice Denied" *supra*, pages 14-14.

DATE	ACTIVITY
14 June 2022	Job Sikhala arrested on charges of public violence, which he vehemently denied.
17 June 2022	Job Sikhala made an application for bail.
22 June 2022	The bail application which he made on the 17th of June 2022 was dismissed.
27 June 2022	Job Sikhala appealed against the decision of the Magistrate Court to the High Court of Zimbabwe.
29 June 2022	The bail appeal at the High Court was struck off the court's roll on the basis that it was defective.
12 July 2022	Job Sikhala was charged on charges of obstruction of justice, in terms of section 184(1)(a) of the Criminal Law (Codification and Reform) Act. He was placed on remand and was denied bail on the ground that he had a "propensity to commit similar offences".
19 July 2022	Job Sikhala made an application challenging placing on further remand.
21 July 2022	Job Sikhala made a fresh bail application.
25 July 2022	Job Sikhala made another bail application on changed circumstances, which was dismissed.
4 August 2022	Job Sikhala made another bail application on changed circumstances.
15 August 2022	The bail application on changed circumstances was dismissed.
28 August 2022	Job Sikhala appealed against the decision of the Magistrates Court to the High Court of Zimbabwe.
9 September 2022	A citizens' petition raising concerns on the treatment of Job Sikhala's case was written and submitted to the President's office.
5 October 2022	An application for bail on changed circumstances was dismissed.
19 October 2022	An application for bail pending trial was dismissed.
26 October 2022	Job Sikhala made bail appeal to the High Court of Zimbabwe.
28 November 2022	Job Sikhala made an application for recusal of the magistrate citing conflict of interest.
6 December 2022	Job Sikhala was charged with obstructing the course of justice in terms of section 184(1)(a) of the Criminal Law (Codification and Reform) Act. The charge alleged that Mr. Sikhala knew the police were investigating the commission of a crime, or realised there was a real risk or possibility that they were investigating one, but nonetheless caused their investigations to be defeated or obstructed by indicating that Ms Ali was murdered by ZANU PF members. Job Sikhala's lawyers excepted (i.e., objected) to the charges.
13 December 2022	The exception raised on 6 December 2022 was rejected by the magistrate, Job Sikhala then pleaded not guilty.
4 January 2023	Job Sikhala made a request for medical attention but was denied access to his private doctor.
February 2023	Job Sikhala made an application challenging improper splitting of charges.
February 2023	Trial on the charge of obstruction of justice commences.
3 March 2023	State closed its case on the charges of obstruction of the course of justice, whereupon Job Sikhala's lawyers applied for discharge.
21 March 2023	The application for discharge was dismissed.
21 March 2023	Trial on the obstruction charge continued. On 3 April 2023, the court stated that it will deliver judgment on 28 April 2023.
April 2023	Job Sikhala was notified in April 2023 of a new charge of disorderly conduct as defined under section 41(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The summons calling him to appear in court on the 20th of April 2023 showed that the charge of disorderly conduct was recorded at St Marys Police Station in May 2022 but Job Sikhala only came to know about it in April 2023. It is alleged that on the 2nd of May 2022 at Zengeza 5 in Chitungwiza, Lovemore Maiko and Job Sikhala engaged in disorderly or riotous conduct by approaching a group of people who were gathered at a political rally and started stoning them which resulted in Shepherd Tawodzera sustaining a deep cut on his head.

Adding to the aforementioned incidents, the most recent development involves the finalisation of the trial for obstructing the course of justice. Mr. Sikhala was convicted and sentenced to pay a fine of US\$600 or serve 6 months imprisonment.

The above summary is evident that the courts in Zimbabwe are not acting impartially and with due regard of the rights of the accused person. Firstly, Job Sikhala has been denied bail several times both in the Magistrates Court and in the High Court. The most common reason that the courts have given in denying bail is that he has a propensity to commit other offences. This reason is absurd, considering that at the time of his arrest, Job Sikhala had never been convicted of a criminal offence. It is apparent that the courts are not applying the principle that one must be assumed to be innocent until proven guilty. That principle is the bedrock of any criminal justice system and an assumption that is otherwise constitutes an unfair treatment of an accused person.¹⁸

5.2. The Nyatsime 16

After the outbreak of violence at Moreblessing Ali's funeral in the Nyatsime area, additional incidents unfolded. Several CCC members experienced violence and claimed that their properties, including houses and shops, were burnt to ashes. Their families were assaulted and threatened, compelling them to flee for their lives. Some CCC members reported criminal offenses, including malicious damage to property and assault, committed by ZANU PF youth, to the police. Ironically, upon reporting, they were apprehended and charged with assault, malicious damage to property, and looting. Subsequently, they spent a total of 150 days in remand prison, making several attempts to obtain bail. Eventually, a High Court judge granted them bail, set at ZWL\$50,000 each.

The Nyatsime case is a case of victimisation based on political grounds. The accused persons were initially the complainants, but nothing was done about the cases they reported against the ZANU PF youth who continue to walk freely to this day. This is a good example of the selective application of the law. The police seem to have instructions to handle the complaints they receive from the general public differently, based on political affiliation. This is a clear violation of the right to equality and equal protection of the law.

The Nyatsime 16 spent 150 days behind bars, facing repeated denial of bail. This is a clear violation of their right to bail as guaranteed by the Constitution. As stated earlier in this paper, the right to bail is closely linked to the principle that anyone who is charged with an offence has the right to be presumed innocent until proven guilty.¹⁹

5.3. Hopewell Chin'ono

Hopewell Chin'ono is a renowned journalist who was arrested in July 2020 for contravening section 187(1)(a) as read with section 37(1)(a)(i) of the Code which is incitement to participate in public violence. He spent 45 days in pre-trial detention. Bail was denied in the Magistrates Court and it was granted on appeal in the High Court.

5.4. Jacob Ngarivhume

Jacob Ngarivhume is a leader of an opposition party known as Transform Zimbabwe. He was jointly charged with Hopewell Chin'ono. He was later convicted for inciting public violence and sentenced to 48 months' imprisonment, with 12 months suspended on condition of good behaviour. The allegations were that from the period extending from 1 March to July 2020, Jacob Ngarivhume sent messages on his Twitter handle calling for protests against the government. These protests aimed to address issues of corruption and the denial of socio-economic rights to the people of Zimbabwe. If successful, they would have constituted an exercise of freedom of expression and peaceful assembly. Mr. Ngarivhume pleaded not guilty to the offence, disowned the Twitter handle, and stated that it was a ghost account created in his name. Prior to his conviction, he had spent 45 days in pre-trial detention after having been denied bail in the Magistrates Court and was only released by the High Court after a successful appeal.

¹⁸ See Article 9(3) of the ICCPR.

¹⁹ Article 14(2) of the ICCPR.

5.5 Emmanuel Sitima and Three Others

Emmanuel Sitima, Comfort Mpofu, Tawanda Watadza, and Lionel Wadamombe are yet another good example of the selective application of law in Zimbabwe. The four are students at a local university in Zimbabwe and they are active participants in student politics. They were apprehended on 6 June 2023 on charges of malicious damage to property, as defined in section 140 of the Criminal Code. It is alleged that the four defaced several buildings which include churches, the court and the Parliament Building by spray painting. The graffiti was a protest and the words were a demand for the State to free Job Sikhala. The four applied for bail in the Magistrates Court but were denied. The basis for the denial was the concern that if granted bail, they might collaborate with others to commit a similar offence. This conclusion was made by the State and the Court despite the absence of real evidence linking the accused persons to the offences alleged.

5.6 Allan Moyo

Allan Moyo is another vocal youth who was arrested on 7 December 2020 on charges of inciting public violence. He remained in remand detention after bail was denied and was released 72- days later after a successful appeal.

Other notable cases which will not be discussed at length include those of Joana Mamombe and Cecilia Chimbiri who are members of the opposition CCC party and also Makomborero Haruzivishe. These individuals languished behind bars after bail was denied in the Magistrates Court on flimsy grounds and bail was later granted by the High Court.

One can safely conclude that the political environment in Zimbabwe is such that persons from the opposition and those with dissenting views do not exercise their freedom of speech and freedom of expression as other individuals. This situation is a direct hit on the rule of law. In a democratic society, the rule of law allows for criticism of government and criticism is taken as a positive and is encouraged.²⁰

The cited cases, both for the granting of bail and the refusal of bail, show that there is a notable difference in how persons of different political backgrounds are treated in the courts of Zimbabwe. This is contrary to the dictates of the rule of law, especially the principle on equality before the law. Dicey²¹ emphasised the importance of equality in the application of law. He argued that every person should be subject to the same laws and have access to justice. The principle ensures that no one is privileged or discriminated against based on their status or position. The principle of equality before the courts was also explained in a publication of the Office of the High Commissioner for Human Rights (OHCHR) as follows:

“The principle of equality before the courts means in the first place that, regardless of one’s gender, race, origin or financial status, for instance, every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned. Further, whether individuals are suspected of a minor offence or a serious crime, the rights have to be equally secured to everyone. Secondly, the principle of equality means that all persons must have equal access to the court.”²²

The Constitution, the supreme law of Zimbabwe, under section 56, provides for the right to equality and non-discrimination. Therefore, the violation of this provision, among others, is evident due to the differing treatment of individuals in the same courts of law.

²⁰ Ibid.

²¹ Ibid.

²² “The Right to a Fair Trial: Part I – From Investigation to Trial”, Chapter 6 in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, OHCHR and International Bar Association, 2003.

6 Conclusion and recommendations

The law is being used as a mechanism of State repression in several ways. Firstly, there are arbitrary arrests that are based on charges that are inimical to the law and susceptible to impugment. Most of the charges are a violation of the freedom of expression and freedom of association. Furthermore, the detention of persons with dissenting voices is usually prolonged or characterised by torture and inhuman treatment.

The judiciary is not without its own apparent flaws. The judicial officers exhibit trends of applying law selectively. Bail is at most times denied to government critics. They are subjected to long periods of remand whilst awaiting trial, and their sentences are too harsh and induce a sense of shock. The legal framework is in place in the form of clear statutory provisions on how the criminal delivery system can deliver justice. However, the practice is different and the law is used as a weapon against any dissenting voices.

The judiciary should be allowed to exercise its judicial function without interference from state or non-state entities or individuals. In Zimbabwe it is a general belief that judicial officers, especially in the lower court, handling political cases are instructed on how to proceed in such cases. The judiciary must be allowed the space to operate unhindered and independent, as guaranteed under section 164 of the Constitution.

The Constitution states that the independence, impartiality, and effectiveness of the courts are central to the rule of law and democratic governance and neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts. This position needs to be emphasised to judicial officers especially in the Magistrates Court. The Judicial Service Commission which oversees all judicial officers, can work on convening seminars to further educate the officers about their role in a democratic society and to reiterate the need to act fairly and impartially towards persons who are arraigned before the courts. Civil Society Organisations can provide support by taking part in advocacy initiatives. This may assist to understand what it means to have a right and what the implications of disregarding or abusing the rights will result in.

It is further recommended that players in the criminal justice system, as well as political leaders, should acknowledge the various human rights obligations and instruments that the country ratified. Examples include the African Charter on Human and Peoples' Rights, the ICCPR, and declarations like the UDHR. Some of the standards outlined in these instruments have been incorporated into the Constitution of Zimbabwe, and these laws must be respected. This ensures the protection of citizens' rights, including freedom of association, freedom of expression, the right to a fair trial, and other political rights. Additionally, the stakeholders in the criminal justice system are encouraged to adhere to established best practices, observed successfully in other jurisdictions. For instance, the police force can make use of police bail, as permitted by our law, similar to the practice in Zambia.

It is recommended that the legislative branch of the State must take an active role in ending weaponisation of the law in Zimbabwe. The legislature can create a committee that will investigate further into the victimisation of human rights defenders, political activists and any other group of persons that is regarded as dissenting. The committee can then come up with recommendations which can be used to create legislative interventions that will ensure equal treatment of individuals.

The last recommendation is directed to the regional and international community at large. The international community can provide assistance by intensifying efforts to engage the government of Zimbabwe, ensuring compliance with regional and international obligations that guarantee equal treatment of individuals before the law and foster an independent and impartial judiciary.

Political renditions, judicial constraints, and the exorcism of bailable rights in Zimbabwe

By Bright Thulani Chimedza

Key Words: Human Rights Defenders, Magistrates Courts, Political influence, Judicial independence

Abstract

Studies pertaining to judicial independence have somewhat not engaged with the allegations of the politicisation of magistrate's courts in Zimbabwe. In the same vein, efforts to understand the perpetual persecution of Human Rights Defenders (HRDs) at the magistrates' courts has propelled various contestations around bailable and nonbailable rights in Zimbabwe. In October 2022, anonymous magistrates scratched the surface, and alleged that the issue of 'capture' is no longer a perception but a reality.

This article builds up from that statement, and provides exclusive primary findings emanating from HRDs, serving and retired magistrates, with a particular focus on events that transpired in the Second Dispensation. The Second Dispensation is the post-Mugabe era in Zimbabwean politics, which emerged in November 2017. Be that as it may, this article reveals how magistrates were influenced by politicians or their superiors to render defective judgments or verdicts. The paper further criticises the unorthodox practices that were allegedly employed by the magistrates colluding with politicians seeking to persecute targeted HRDs in Zimbabwe. Supported by data, the paper concludes that in select cases, the political influence at the magistrate courts is not subtle or invisible but rather it is endemic, systematic and a pervasive practice.

1 Introduction

Since the emergence of the Second Dispensation in 2017, civil society organisations have argued that the incumbent regime has been systematically persecuting Human Rights Defenders (HRDs) through the courts and infringing their right to bail.¹ Bail is a human right, and the Constitution of Zimbabwe explicitly makes it clear that a 'person who has been arrested must be released unconditionally... unless there are compelling reasons justifying the continued detention.'² The compelling reasons in this instance are explicitly enshrined from section 115C up to section 135 of the Criminal Procedure and Evidence Act.³ Upon assessing these provisions, respondents maintained that the Act from section 115C to 135, relegates magistrates to positions of subordination and disables their discretion to impartially discharge their duties.⁴ Consciously disengaging from these legal technicalities and leaving them as areas for further research, this paper primarily focuses on the systematic political interference, where judicial processes at the magistrates were negatively influenced by senior magistrates working in cahoots with politicians to ensure that HRDs are not granted bail. Literature pertaining to political interference at magistrates' courts is quite limited, hence the author attempts to close that literature gap.

This paper draws on interviews conducted with 14 respondents, including six HRDs who were denied bail for a prolonged period and eight magistrates that were regional, provincial, ordinary, and retired magistrates. The interviews were conducted between 17 May 2023 and 29 June 2023. Therefore, the article includes triangulated views of diverse

1 Zimbabwe Human Rights NGO Forum, In Defense of Defenders <https://www.hrforumzim.org/in-defence-of-defenders/> (Accessed 05 July 2023).

2 See, section 50(1) of the Zimbabwean Constitution.

3 See, Criminal Procedure and Evidence Act [Chapter 9:07].

4 Tsabora, J. and Nzero, I., 2013. Changing the Game: Striking Down Section 121 of Zimbabwe's Criminal Procedure and Evidence Act. Available at SSRN 2368221. – fix this reference: author, title, year of publication and citation, name of journal/publication, URL is applicable. That is the sequence.

respondents whose responses were pivotal in coming up with reliable and credible findings. With respect to sampling, the author employed both purposive and snowball sampling methods. The former was crucial in soliciting lived realities experienced by HRDs and magistrates, while the latter was essential for getting access to magistrates who were not in the author's database. Adhering to ethical best practices, pseudonyms were used to maintain confidentiality of the respondents. Aiding views from respondents, the author also used grey literature and archival data to synthesise and make meaning of primary data gathered. Theoretically, the paper problematises the judicialisation of politics hypothesis proposed by Ran Hirschl and Charles Grove Haines theory on decisions of the judge. The former considers judicial officers as sacrificial pawns responsible for cleansing political contestations in instances whereby controversies between HRDs and politicians cannot be resolved politically.⁵ The latter contends that judicial decisions are often influenced by political experiences and political affiliations.⁶

To narrow down these theories the Zimbabwean context, the article is divided into six sections mainly looking at (1) conceptualisation of bail (2) Zimbabwe's history on judiciary capture and new trends and (3) statistics revealing the selective application of the law.

2 The right to bail under the Constitution of Zimbabwe

Bail is a legal arrangement where a person who has been arrested and charged with a crime is released from custody while awaiting trial. The accused may be required to pay a certain amount of money or provide some form of collateral to the court as a guarantee that they will appear in court for their trial. Bail is part and parcel of the right of the accused person to be presumed innocent until they have been found guilty of the offense which they are accused of. In Zimbabwe, the right to be presumed innocent is enshrined in section 70 of the Constitution, which provides that 'a person accused of committing an offence has the right to be presumed innocent until proven guilty'.⁷ Unless it undermines the interests of justice, an accused person must be granted bail as part of their right to be presumed innocent until they have been found guilty by a court of law. However, there seems to be a pattern signifying arbitrary denial of bail for HRDs accused of various crimes, suggesting the weaponisation of the courts of law to punish human rights defenders.

3 Comparative political contestations within the judiciary: A look into the old and the new order

Post independence to date, secondary literature in Zimbabwe has focused more on examining judicial independence for higher courts thus leaving a huge gap on understanding what appears to be political interferences at magistrates' courts (lower courts). This literature gap presents a challenge for one to determine the era in which political interference within the high and lower courts was more significant. However, studies have highlighted that during Mugabe's era, the prison was arguably perceived as a terrain for resolving political disputes and sending warning signals to activists challenging the political system.⁸ Post independence, particularly in the early 2000s, researchers argued that the Zanu PF-led government purged the judiciary, packed the courts with pro-ZANU-PF judges, and provided instructions to prosecutors on the treatment of opposition-linked accused persons.⁹ This environment was quite intense, to the extent that it compelled several judges, including Chief Justice Anthony Gubbay, Justice Michael Gillespie, Justice Ishmael Chatikobo, Justice Sandra Mungwira, Justices Ahmed Ibrahim, Justice James Devittie, Justice Nick McNally, and Justice Michael Majuru, to resign, with some fleeing the country.¹⁰

5 Ran Hirschl, "The Judicialization of Politics", in Gregory A Caldeira et al, eds, *The Oxford Handbook of Law and Politics* (2008), Oxford Handbooks Online

6 Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of the Judge*, 17 ILL. L. REV. 102 (1922).

7 See, Rights of accused persons in Section 70 of the Zimbabwean Constitution.

8 Ncube, W., 1997. *Lawyers against the law? Judges and the legal profession in Rhodesia and Zimbabwe*.

9 Human Rights Watch (Organization), 2008. *Our Hands are Tied: Erosion of the Rule of Law in Zimbabwe*. Human Rights Watch.

10 Ibid

Four decades into independence, the situation appears to have worsened, and the independence of magistrates' court has regressed significantly. This point is captured by one of the human rights defenders who was once denied bail for six months. He pointed out that:

*"The denial of bail has always been part of the system but what gets more pronounced now is the specific targeting of individuals who would be influential at specific times... The system has always been like that since time immemorial but back then we just had better qualified magistrates who would then moderate, point out that this is excessive, and you also had prosecutors who would even refuse some of the cases and recommend a fine. The difference between Mugabe's era and now is that the system is more sharpened and more deliberate."*¹¹

Affirming similar points, a political activist who was targeted with criminal charges for exercising his right to demonstrate and denied bail for 14 months claimed that:

*"Post 2017 judicial capture is more visible now as compared to [during] Robert Mugabe's (RG) regime. Under RG judicial capture existed but the possibility of getting bail was probable but under the current judicial system no matter the quality of your arguments ... getting bail is unthinkable. Under Mugabe there was some semblance of rule of law in selected cases but under ED its full-blown rule by law."*¹²

These perceptions appear to be corroborated by views proffered by some magistrates interviewed during this study. They concurred with HRDs and argued that judicial independence is now more constrained under the second dispensation administration than under Mugabe's administration.¹³ Similar concerns have been expressed by scholars.¹⁴

4 The statistics and the damning picture

It seems that the magistrates' court is prepared to grant bail to accused persons who are affiliated to the ruling party, ZANU PF, while reluctant to do the same for accused persons who are HRDs or who are opposition-affiliated political activists. This appears to be the pattern even though the nature of the charges is similar or in some cases, the ZANU PF-affiliated accused persons are facing criminal charges that are more serious and they are more likely to skip bail or interfere with witnesses if granted bail. The table below suggests a pattern, emerging out of the magistrate court, which shows reluctance to grant bail to opposition-affiliated activists or human rights defenders, while granting bail to accused persons who are affiliated to the ruling party, ZANU PF. This table is based on a sample of bail applications involving persons affiliated to ZANU PF and those who are HRDs and opposition-affiliated political activists, decided by the Magistrate court in the past four years.

11 Interview, Human Rights Defender 1, Harare, 27 June 2023

12 Interview, Human Rights Defender 2, Harare, 19 May 2023

13 Interview with a Magistrate 24 June 2023

14 Moyo, J. (2023). [Twitter] 13 June. Available at: <https://twitter.com/ProfJNMoyo/status/1668737366373068801?s=20> (Accessed: 09 July 2023). Also see Verheul, S., 2020. "Rotten Row is Rotten to the Core": The Material and Sensory Politics of Harare's Magistrates' Courts after 2000. *PoLAR: Political and Legal Anthropology Review*, 43(2), pp.262-279.

Table 3.1 Remand days and the distribution outlook

NAME OF ZANU PF /GOVERNMENT LINKED OFFICIAL	DAYS BETWEEN DATE OF ARREST AND DATE WHEN BAIL WAS GRANTED	CHARGES	NAME OF HRD/ OPPOSITION LINKED POLITICAL ACTIVIST	DAYS BETWEEN DATE OF ARREST AND DATE WHEN BAIL WAS GRANTED	CHARGES
Henrietta Rushwaya	179 days	Attempted to smuggle 6kg of gold worth US\$333 042.28.	Job Sikhala	516 days as of 31 October 2023 (Ongoing)	Sisorderly conduct and obstruction of justice.
Prisca Mupfumira	64 days	Corruption involving US\$95 million from the state pension fund.	Makomborero Haruzivishe	14 Months	Was charged for inciting public violence because he blew a whistle when ZRP officers were on an operation to round up informal traders.
Wicknell Chivhayo	15 Days	Fraud charges worth 5 million from the Gwanda Solar Power Project.	Pride Mkono	6 Months	Charged for posting a tweet condemning EDs misgovernance and was charged for subversion.
Energy Mutodi	10 Days	Wrote an article with a headline 'why choosing a successor is difficult'.	Allan Moyo	72 days	Charged for calling for a revolt against President Emmerson Mnangagwa's government.
Ignatius Chombo	4 Days	Illegal grab 125 commonage stands at Haydon Farm and allocated to himself low density residential stands in Harare.	Johanne Mamombe	62 days	Accused of fabricating a story about being abducted in 2020 but was acquitted in 2023.
Douglas Karoro	3 Days	Grabbing 700 bags of fertiliser, US\$18 000 worth of maize seed and \$5 000 worth of vegetable seed.	Hopewell Chin'ono	45 days	Allegations of incitement to participate in a gathering with intent to promote public violence, breaches of peace or bigotry.
Petronella Kagonye	2 Days	Looted US\$220 000 from NSSA to sponsor a football tournament in her constituency.	Jacob Ngarivhume	45 days	Facilitating and coordinating an anti-corruption protest.
Obadiah Moyo	1 Day	Awarding US\$60m contracts to Drax International without following tender process.	Obert Masaraure	42 Days	Accused of allegedly inciting teachers to demand the release of his colleague, Robson Chere, who was in remand prison in connection with the death of a fellow activist, Roy Issa.
Justice Wadyajena	1 Day	Fraud and money laundering charges involving US\$5 million.	Godfrey Kurauone	42 Days	Criminal nuisance, singing and insulting the president in Mutare.
Samuel Udenge	1 Day	Prejudicing the Zimbabwe Power Company of US\$12 650.	Takudzwa Ngadziore	30 Days	Charged of inciting violence and partaking in a demonstration calling for justice for T Muchehiwa.
Shungudzemoyo Kache	1 Day	Likened President Emmerson Mnangagwa to a used condom.	Jacob Mafume	1 Month	Allegations of attempting to bribe a key witness in another pending matter for which he had been granted bail.
Super Mandiwanzira	1 Day	Criminal abuse of office, single handedly awarded a US\$5 million tender contract for NetOne to a company linked to him.	Alice Kuvheya	22 Days	Calling upon residents to peacefully resist illegal evictions by the government.
Mike Chimombe	1 Day	Defrauding a stand buyer US\$16 900.	Sheila Chisirimhuru	18 days	Partaking in a salary protest.
Zanu PF 11	46 Days	Accused of public violence and murdering of Mbongeni Ncube during a CCC rally in Kwekwe.	Robson Chere	16 days	Calling up citizens to partake in a protest which was castigating fuel hikes in Zimbabwe.
Zanu PF 13	7 days	Accused of public violence and murdering CCC activist Tinashe Chitsunge in Glenview.	Tsitsi Dangarembdga	30 days	Charged for having a solo demonstration, holding a placard that read 'We want better reform our institutions'

Source 3.1 (Authors data drawn from archival research)

By simply looking at the table above, it appears that magistrates are sensitive to cases involving Zanu PF officials and less compassionate towards HRDs and opposition activists who are charged of similar offences. One notable indicator is the case of Zanu PF 13, who were charged with inciting public violence in an incident that resulted in the death of Tinashe Chitsunge. The deceased was a Citizen Coalition for Change activist (CCC) who was allegedly stoned to death by Zanu PF activists during a sanctioned CCC rally in Glen View 7, Harare.¹⁵ The perpetrators were arrested on the 4th of August 2023 and granted bail on the 13th of August 2023. On the other hand, Makomborero Haruzivishe, a human rights activist, was charged for a similar offence of inciting public violence, but he was denied bail and spent time in remand custody for 14 months. Looking at these two cases, it is concerning to note that a HRD who was merely exercising his right to demonstrate, an incident which did not result in the death of anyone, was granted bail after 14 months. In contrast, Zanu PF activists who were accused of inciting violence resulting in the death of a citizen were swiftly granted bail after a week. Similarly, the case of the Zanu PF 11, who were charged for public violence and murdering Mbongeni Ncube, seems to buttress these observations on selective application of the law in Zimbabwe. Mbongeni, a CCC supporter, was stabbed to death with a spear by suspected Zanu PF activists at a CCC rally in Kwekwe. The alleged perpetrators were charged with public violence and murder and granted bail in 46 days.¹⁶ On the flipside, Job Sikhala, a CCC legislator, was charged for inciting violence in an incident that did not result in the death of anyone, has, as of November 2023, clocked up to 516 days in prison.

Cognisant of the dynamics and patterns, it somewhat suffices to state that, in select political cases, magistrates seem to trivialise cases involving Zanu PF affiliates and go overboard to deny bail to HRDs. To buttress this point further, I correlate how the magistrates' court handled the case of Hopewell Chin'ono and the case of Obadiah Moyo. Hopewell was arrested for whistleblowing corrupt practices emerging within the Ministry of Health and Childcare and was denied bail for some 45 days. Obadiah Moyo, a former minister of Health and Childcare, was arrested and charged on allegations of illegally awarding a US\$60 million tender to Drax International and was granted bail on the following day.¹⁷ Juxtaposing the two cases, it is surprising to note that Hopewell's noble intention to expose corruption was seen as a more serious crime compared to Obadiah Moyo's alleged corruption scandal. The US\$60 million which Obadiah was alleged to have looted was equivalent to 20% of the money allocated to the Ministry of Health and Childcare in 2020 national budget.¹⁸ As such, it is surprising to note that an alleged perpetrator charged of a crime of this magnitude was granted bail swiftly, and the person who exposed the case was granted bail after 45 days. Discerning on this case, it fairly suffices to assert that verdicts handed down by some magistrates on matters relating to bail defy logic and paints a grim picture on their modus operandi. This view is substantiated by Justice Zhou, who was appalled by the conduct of Magistrate Nduna and disqualified him from Hopewell's case. According to his determination, Justice Zhou maintained that:

*"[J]ustice which should be objectively and be seen to be done will not be served if Magistrate Nduna is allowed to continue presiding over proceedings in Chin'ono's matter, hence Magistrate Nduna he should be disqualified from participating in the freelance journalist's criminal trial and ordered that a different Magistrate be assigned to preside over the media practitioner's criminal trial."*¹⁹

Seeking to understand what magistrates think about these dynamics and patterns, one of the respondents highlighted that:

"I am never comfortable handling cases that involve Zanu PF officials or cases that involves human rights activists. The climate does not allow me to exercise discretion freely and without fear. Having to rubberstamp decisions against all logical reasoning and having to justify the decision against my conscience and professional ethics has been one of worst experiences as a magistrate."

15 Amnesty International (organisation), 2022. Zimbabwe: Authorities must promptly investigate the death of opposition party activist.

16 '11 Zanu pf stalwarts who murdered CCC supporter released' Zimeye, 2 March 2022, <https://www.zimeye.net/2022/03/02/11-zanu-pf-stalwarts-who-murdered-ccc-supporter-released/> (Accessed 03 November)

17 'Zimbabwe's health minister granted bail in \$60m corruption case' Al Jazeera News, 20 June 2020, [Zimbabwe's health minister granted bail in \\$60m corruption case](https://www.aljazeera.com/news/2020/6/20/zimbabwe-health-minister-granted-bail-in-60m-corruption-case) | News | Al Jazeera (Accessed 5 November 2023)

18 2020 Health Budget Brief - UNICEF <https://www.unicef.org/esa/media/6501/file/UNICEF-Zimbabwe-2020-Health-Budget-Brief.pdf> (Accessed 05 November 2023)

19 Reprieve for Mtetwa and Chin'ono as Judge Annuls Unjustified Sanctions and Disqualifies Magistrate Nduna for Judicial Transgression | Kubatana (Accessed 24 May 2023)

Another magistrate equated political cases involving Zanu PF officials to hot potatoes. According to her she claimed that:

“[O]ver the past +15 years I have dealt with several political cases and whenever I preside over them, I always feel the need for protection, because I do not know what’s going to happen to me when I leave court.”²⁰

On the other hand, HRDs cited other reasons behind their prolonged bail predicaments. One of the reasons relates to the delay in accessing court records or altering of court records when they want to appeal to the High Court. One of the respondents claimed that, at one point, Magistrate Judith Taruvinga deliberately altered his court record to ensure that he will not get bail when he appealed to the High Court. He stated that:

“Magistrate Judith Taruvinga submitted a record that had gaps, whereby a sentence would begin in the middle, and it was so blatant to the extent that his lawyers applied to the court to sue the magistrate, and she denied the allegations and was latter compelled by the High Court provide the accurate court record.”²¹

Attempting to ascertain these claims, I scanned the full record of his case which was presided over by Justice Chikowero and Justice Zhou. In their ruling, both judges concurred that Magistrate Judith Taruvinga misdirected herself when she convicted the HRD for inciting public violence. According to their verdict they upheld that:

“The rectified record of proceedings also demonstrates that the trial court convicted based on defective record of proceedings...vital portions of evidence led at the trial but had initially been recorded in too summary a form of as not to reflect the actual testimony given... There was something grossly irregular in the proceedings ...the trial court relied on defective record of proceedings to render judgment.”²²

This opinion from the High Court reveals how some of the magistrates will-nilly criminalise HRDs at the pretext of the law without following due processes. Moreover, it’s quite alarming to note that some of these magistrates escape any disciplinary measures when they criminalise HRDs without adhering to laid-down procedures. Normally, when a magistrate acts in such a way, they are subjected to disciplinary hearings, or they are suspended. This is attested and depicted from cases that involved former Magistrate Jairus Mutseyekwa, who was suspended for doctoring a judgement, former Magistrate Stephen Mavuna, who was fired for misconduct related to 200 court records, and former Magistrate Victor Muhamadi as well.²⁴ As such, there appear to be untouchable magistrates who are adhering to the interest of some political players, hence the discrepancies and gross unreasonable patterns in how the law is applied differently on various charges discussed above.

5 Conclusions and recommendations

My interviews and data analyses prove that there are judicial transgressions practiced at magistrates’ courts, specifically targeting HRDs in Zimbabwe. These travesties threaten the rights to personal liberty conferred upon citizens and violate Section 164(1) of the Zimbabwean constitution, which states that courts are expected to be independent and expeditiously carry out their mandates without fear, favour, or prejudice. As a way forward, the following recommendations should be contemplated and considered:

20 Interview, Regional Magistrate 1, Harare, 29 June 2023

21 Interview, Provincial Magistrate 1, Harare, 27 June 2023

22 Interview, Human Rights Defender 2, Harare, 19 May 2023

23 Makomborero Haruzivishe Versus the State, <https://media.zimlil.org/files/judgments/zwhhc/2022/663/2022-zwhhc-663.pdf> (Accessed 09 July 2023)

24 Magistrate fired over ‘doctored’ ruling, <https://www.newsday.co.zw/news/article/44585/magistrate-fired-over-doctored-ruling> (Accessed, 05 July 2023). Also see, Ex-magistrate Mavuna fired over misconduct neglect of duty <https://www.chronicle.co.zw/ex-magistrate-mavuna-fired-over-misconduct-neglect-of-duty/> (Accessed 3 July 2023). Also see Gutu resident magistrate suspended, <https://zwnews.com/gutu-resident-magistrate-suspended/> (Accessed 07 July 2023)

The Law Society of Zimbabwe should petition the Judicial Service Commission of Zimbabwe to include anticipatory bail in the Criminal Procedure and Evidence Act. In developed countries, defendants may request this if they have reason to expect to be arrested on trumped-up charges. In Zimbabwe, lawyers over the years have argued that magistrates' courts are not treating bail applications as urgent applications, and anticipatory bail addresses these anomalies.

Judicial Service Commission (JSC) needs effective and robust measures to deal with unethical conduct of the magistrates who connive with external stakeholders on bail proceedings. Equally important is for the JSC to set up anonymous safeguarding pathways, allowing magistrates to report intimidation, victimisation, or duress with confidentiality. Furthermore, the JSC should ensure that magistrate courts not only have a rapporteur in court who will digitally type court proceedings as they unfold but also provide a specific timeline indicating the number of days required for a court record to be available. Over the years, this has been the discretion of the magistrate, and some of the magistrates have allegedly withheld these records whilst an accused is in remand for a prolonged period.

Civil Society Organisations should lobby Parliament and the Ministry of Justice and Parliamentary Affairs to amend the Criminal Procedure and Evidence Act, especially the third schedule, which focuses on crimes against the state. The framing of some of these crimes limits the independence of magistrates who indicated that they rarely wish to grant bail to HRDs accused of committing crimes against the state.

Academics should scrutinise decisions handed down in magistrate courts with the same intensity given to High Court decisions. This approach might compel magistrates to think twice and restrain them from going overboard.

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