

Human rights litigation in Zimbabwe: Past, present and future

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Summary

This article examines the progress and difficulties experienced in litigating human rights in Zimbabwe, from independence in 1980 to the present day. The article begins by discussing the constitutional basis for human rights litigation and explains the various avenues to pursue issues relating to the Declaration of Rights in the Supreme Court. The article identifies certain time frames that influenced the development of human rights litigation in Zimbabwe and briefly outlines various cases that set precedents for future litigation. During the first five years after Zimbabwe had gained independence, the ability of the Supreme Court to hear litigation on human rights issues was severely limited due to a constitutional provision that determined that existing laws could not be challenged under the Declaration of Rights. Thereafter followed what has been described as the 'golden era of human rights litigation', from 1985–2001. Decisions were taken in almost every field of human rights specified in the Declaration of Rights and the vast majority of these decisions favoured the citizen. Post-2001 human rights litigation, however, has by March 2003 yielded only two Supreme Court decisions where the citizens' rights prevailed. The problems currently experienced by the judiciary in Zimbabwe are identified and it is argued that the future of the judiciary is intertwined with the future of the government of Zimbabwe.

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1 Introduction

This contribution examines the situation of litigation lawyers in Zimbabwe. Lawyers in Zimbabwe have been in the news headlines for all the wrong reasons over the last couple of years, and to a great extent the real work that is being done by lawyers in Zimbabwe, whether in the field of human rights or not, has gone unnoticed. However, there is a large group of lawyers in Zimbabwe totally committed to the advancement of human rights, even in the face of the current difficulties imposed by both the executive and the judiciary. Human rights are very much alive in Zimbabwe, and the legal profession is doing its best in very difficult circumstances to ensure that a culture of human rights pervades the whole country.

Although there were technically justiciable Bills of Rights in both the 1961 Constitution of Southern Rhodesia and the 1979 Constitution of Zimbabwe-Rhodesia, no one would disagree that fundamental human rights became an issue in Zimbabwe only once independence was attained in 1980. The rights set out in the Declaration of Rights of the Constitution of Zimbabwe 1980 came to the forefront at that time.

2 Legal background: Constitutional basis for human rights litigation in Zimbabwe

The 1980 Constitution was agreed to by all parties following the Lancaster House conference at the end of 1979. It sets out a justiciable Declaration of Rights in chapter III. The Declaration of Rights includes many basic human rights, but nearly every right is subject to extensive derogations. The balance of the Constitution deals with the organs of state, and other matters that are not directly related to human rights. However, litigation in the field of human rights cannot ignore the other provisions of the Constitution, and they have been used on occasions as a basis of establishing the rights of persons in Zimbabwe.

The Declaration of Rights can only be amended by a two-thirds affirmative vote in parliament on its final reading.¹ Since 1980 there have been a great number of such amendments,² many of which sought to reduce or further restrict the rights of the individual. At present, the government does not have sufficient votes in parliament to further amend the Constitution, and therefore no amendments have been made since April 2000.

¹ Sec 52(2)(a) Constitution of Zimbabwe 1980.

² There have been 16 Acts of parliament between 1983 and 2000 which amended the Constitution.

It is worth mentioning that there is a safeguard which is meant to enforce the Declaration of Rights outside of the courts. Section 40A of the Constitution establishes the Parliamentary Legal Committee which is required to examine all legislation, both primary and subsidiary, to determine whether or not it offends against the Declaration of Rights. In practice, since it is the Speaker of parliament who appoints the Parliamentary Legal Committee, it has been dominated by ruling party members, and has not been effective in preventing legislative intrusion into the basic fundamental rights set out in the Declaration of Rights.

Although technically human rights can be litigated in any court, including the High Court and the various levels of the magistrate's court, decisions of importance relating to human rights, as opposed to the application of those decisions, are in reality made by the Supreme Court of Zimbabwe, either on appeal or sitting as a court of first instance (with no appeal from the court) for certain constitutional applications.

Section 24(1) of the Constitution of Zimbabwe provides as follows:

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

Zimbabwe does not have a Constitutional Court as such, but section 24(1) of the Constitution gives the right of direct access to the Supreme Court on issues relating to the Declaration of Rights. Furthermore, in section 24(3) the Constitution allows constitutional issues to be raised in an appeal, rather than by way of direct application. Section 24(4) permits the Supreme Court to dismiss any application, without a hearing, which it considers to be merely frivolous or vexatious.

There is yet another way of getting issues relating to the Declaration of Rights decided by the Supreme Court. Section 24(2) of the Constitution provides:

If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

This provision gives every court in Zimbabwe the power to refer matters involving alleged breaches of the Declaration of Rights to the Supreme Court, unless the raising of the issue is considered frivolous or vexatious. The Supreme Court has held that where a lower court refuses to refer a matter to the Supreme Court under section 24(2), that in itself can be

a breach of the Declaration of Rights. In delivering the decision of the Court in *Martin v Attorney-General & Another*,³ Gubbay CJ said:⁴

Suppose that a judicial officer, solely due to animosity towards an accused, in bad faith and without any warrant, were to rule that the question raised by him was frivolous or vexatious and so order his remand in custody pending trial. Could it then be said that the accused was only entitled to approach the Supreme Court for relief under section 24(3)? I think not. Such action by the judicial officer concerned would, as mentioned before, itself constitute an infringement of the accused's entitlement to the protection of the law. Moreover, and most importantly, since at the conclusion of any remand proceedings there is no right of appeal, no remedy under section 24(3) would be available to that accused.

However, in some instances the Supreme Court has declined to exercise its jurisdiction under section 24(2) of the Constitution, on the basis that the referring court should first determine other issues.⁵

In effect, the Supreme Court has held that a referral under section 24(2) should not take place unless an answer is material to the decision that the lower court has to make. The Court has also held that the question must be raised in the lower court so that referral can be done.⁶ A referral cannot be done after the lower court has reached its decision; the avenue for dealing with the constitutional issue is then through the appeal process.⁷ In reality, the vast majority of matters taken to the Supreme Court are taken either as an appeal from a lower court, or by direct application under section 24(1).

The power of the Supreme Court in making an order where there has been a breach of the Declaration of Rights is contained in section 24(4) of the Constitution. The Supreme Court may '... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights'. The Court has said:⁸ 'It is difficult to imagine language which would give this court a wider and less fettered discretion.'

This has led the Supreme Court to make a whole range of orders in relation to constitutional matters. It has used its power to invalidate laws,⁹ to set aside sentences and substitute lesser sentences,¹⁰ and to

³ 1993 1 ZLR 153 (SC).

⁴ At 158.

⁵ *Mandinwhe v Minister of State* 1986 1 ZLR 1 (A); 1981 1 SA 59 (ZA); *Zinyemba v Minister of the Public Service & Another* 1989 3 ZLR 351 (SC).

⁶ *S v Mbire* 1997 1 ZLR 579 (SC); *Jesse v Attorney-General* 1999 1 ZLR 121 (SC).

⁷ *Muchero & Another v Attorney-General* 2000 2 ZLR 286 (SC).

⁸ *In re Mlambo* 1991 2 ZLR 339 (SC) 355C; 1992 4 SA 144 (ZS) 155J.

⁹ *Eg Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1995 2 ZLR 422 (SC).

¹⁰ *Eg Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

direct the executive as to how to deal with matters.¹¹ It has also used its power to postpone the enforcement of its orders to enable the executive to comply with the Declaration of Rights.¹² Usually it simply issues a declarator and lets the executive implement the decision.¹³ The Court held that the wide provisions of section 24(4) do not give it power to grant punitive damages.¹⁴

The approach of the Supreme Court as to the interpretation of the Constitution, and in particular with regard to the Declaration of Rights, has been founded on the judgment of the Privy Council in *Minister of Home Affairs (Bermuda) & Another v Fisher & Another*¹⁵ and the observations of Lord Wilberforce where he said:¹⁶

A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

In developing this approach, the Supreme Court said in *Smyth v Ushewokunze & Another*:¹⁷

In arriving at the proper meaning and content of the right guaranteed by (the Declaration of Rights), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.

The Supreme Court has always had regard to international instruments relating to human rights,¹⁸ as well as to decisions throughout the world, including Commonwealth countries, the European Court of Human

¹¹ Eg *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Another* 1991 1 ZLR 105 (SC); 1992 (2) SA 56 (ZS).

¹² *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

¹³ As in *Holland & Others v Minister of the Public Service, Labour and Social Welfare* 1997 1 ZLR 186 (SC); 1998 1 SA 389 (ZS).

¹⁴ *Movement for Democratic Change & Others v Commissioner of Police & Others* 2001 1 ZLR 8 (SC).

¹⁵ [1980] AC 319 (PC); [1979] 3 All ER 21 (PC).

¹⁶ At 328–329 (AC).

¹⁷ 1997 2 ZLR 544 (SC); 1998 3 SA 1125 (ZS) 553 (ZLR); 1134 (SA).

¹⁸ Eg *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

Rights and the United States Supreme Court. Whether this trend will continue under the present Supreme Court remains to be seen, and there is at present very little evidence that this will be the case.

The question of *locus standi* in constitutional cases has arisen on a number of occasions before the Supreme Court. The Court has granted *locus standi* to human rights organisations¹⁹ as well as to the Law Society.²⁰ The Court has said:²¹ 'It would be wrong . . . for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief . . .' It has denied *locus standi* to a political party where it was not the political party itself but its members whose rights stood to be infringed.²²

On the other hand, in a leading judgment on the issue, the Court held that a company that wished to provide cellular telephone services had the requisite *locus standi*, and commercial self-interest and advantage were held to be irrelevant to the issue of *locus standi*.²³

The Supreme Court, as presently composed, denied *locus standi* to challenge laws relating to the presidential election to the leading opposition candidate in that election in a majority judgment.²⁴ In his dissenting judgment, Sandura JA put the matter thus:²⁵

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Constitution, embraces the right to require the legislature, which in terms of section 32(1) of the Constitution consists of the President and parliament, to pass laws which are consistent with the Constitution.

If, therefore, the legislature passes a law which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this Court in terms of section 24(1) of the Constitution.

Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the *locus standi* to file the application.

¹⁹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

²⁰ *Law Society of Zimbabwe & Others v Minister of Finance (Attorney-General Intervening)* 1999 2 ZLR 231 (SC).

²¹ *Catholic Commission case* (n 19 above) 250.

²² *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 2 ZLR 254 (SC); 1998 3 SA 85 (ZS).

²³ *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Another* 1995 2 ZLR 199 (SC); 1996 1 SA 847 (ZS); 1995 9 BCLR 1262 (ZS).

²⁴ *Tsvangirai v Registrar-General of Elections & Others* SC 20/2002 (not yet reported).

²⁵ At 15 of the cyclostyled judgment.

It is my view that the approach of the majority in the case to deny a candidate in the election the right to challenge laws which directly affected the manner in which the election was conducted, cannot be justified. The approach is too narrow and makes a mockery of the right of direct access to the Supreme Court by persons claiming equality under the law and the protection of the Declaration of Rights.

The question of the vertical or horizontal application of constitutional rights has not been dealt with in any detail by the Supreme Court. The existence of the argument has been recognised in two judgments, but in neither was it necessary for the Court to decide the issue.²⁶

On many occasions, the attitude of the executive towards the Supreme Court has been far from favourable. In one celebrated case a representative of the executive stated publicly that the executive would not comply with a ruling of the Supreme Court.²⁷ In many other cases the reaction of the executive has been to amend legislation which was being examined by the Supreme Court. In a recent case where the Attorney-General challenged the right of the courts to hold him in contempt of court,²⁸ the same person, now promoted to Minister of Justice, caused to be included in a General Laws Amendment Act a provision that prohibited the continuation of any contempt of court proceedings without the leave of the Attorney-General.²⁹ In other words, before the Attorney-General can be held guilty of contempt, he must give permission for such proceedings.

There have also been a number of occasions, particularly in relation to the mobile telephone litigation³⁰ and the private broadcasting litigation,³¹ where the executive has resorted to using emergency legislation to prevent the enforcement of the orders of the Supreme Court, thereby frustrating the rights of litigants.

3 The past: History of human rights litigation in Zimbabwe (1980–2001)

When looking at the history of human rights litigation in Zimbabwe, it is necessary to mention section 26(3) of the Zimbabwe Constitution. That provision, which has since been repealed, specifically provided that laws

²⁶ *Munyuki v City of Gweru* 1998 1 ZLR 182 (SC); *Chaduka NO & Another v Mandizvidza* SC 114/2001 (not yet reported).

²⁷ See the public statement of the Supreme Court judges published in 1989 3 ZLR 218–221.

²⁸ *In re Chinamasa* 2000 2 ZLR 322 (SC); 2001 2 SA 902 (ZS).

²⁹ Sec 14 General Laws Amendment (No 2) Act 2002 (Act 14/2002).

³⁰ See *TS Masiyiwa Holdings (Pvt) Ltd & Another v Minister of Information* 1996 2 ZLR 754 (SC); 1998 2 SA 755 (ZS).

³¹ *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 2 ZLR 243 (SC).

that were in existence at the date of independence on 18 April 1980, could not be challenged under the Declaration of Rights for a period of five years. Thus, all repressive legislation introduced during the Rhodesian era was immune from challenge until April 1985. This savings provision severely limited the ability of the Supreme Court, in particular, to foster a sense of judicially enforced human rights in the early years after independence.

Bearing this in mind, and bearing in mind also the situation that pertained in Zimbabwe, the human rights position in Zimbabwe may be divided into three broad time frames. Firstly, there is the period between independence and roughly mid-1985, covering in the main the period when Chief Justices Fieldsend and Georges presided over the Supreme Court. The second period, which to my mind was the golden era of human rights in Zimbabwe, covers the period from mid-1985 to mid-2001 when the Supreme Court was headed by Chief Justices Dumbutshena and Gubbay. The third and current period commenced in mid-2001 when the Supreme Court fell to be headed by Chief Justice Chidyausiku.

3.1 Immediate post-independence era: 1980–1985

The first five or so years after independence offered very limited opportunities to apply the Declaration of Rights in enforcing human rights in Zimbabwe.

The very first case that was heard by the Supreme Court under the Constitution of Zimbabwe got the whole subject of human rights off to a bad start. A man named Mandirwhe had been arrested by state security officers and surrendered to officials in Mozambique without any formal extradition proceedings. He in fact spent 21 months in all in custody in Mozambique.³² A writ of *habeas corpus* was sought, and the trial judge referred to the Supreme Court asking it to determine what measures should be taken to secure the enforcement of the Declaration of Rights with regard to Mandirwhe. The Supreme Court declined to exercise its jurisdiction on the grounds that the High Court could still make an effective order without having any constitutional issue determined.³³

The next case that confronted the Supreme Court concerned the obligation of an army doctor to repay sums due under a cadetship upon his retirement from the army. The case was not concerned with the Declaration of Rights, but with other provisions of the Constitution. The Court decided in favour of the individual.³⁴

³² See *Makomboredze v Minister of State (Security)* 1986 1 ZLR 73 (HC), where his claim for damages was decided by the High Court.

³³ *Mandirwhe v Minister of State* 1986 1 ZLR 1 (A); 1981 1 SA 759 (ZA).

³⁴ *Pretorius v Minister of Defence (2)* 1980 ZLR 395 (A).

Similar considerations were applied by the Supreme Court in relation to a police officer who had signed a 'blood chit' before accepting promotion. It was held that his rights to his pension were not affected and the provisions of the Constitution prevailed.³⁵

In 1981, the Supreme Court had its first opportunity to deal with the constitutional guarantee against expropriation. It had to consider the issue of the repeal of a right to compensation, the state contending that the right had not been acquired, but merely extinguished. The decision in *Hewlett v Minister of Finance*³⁶ remains a controversial decision by the Supreme Court. The Court found in favour of the government that a distinction had to be drawn between the acquisition of rights and the extinction of rights. The Court held that since parliament had merely extinguished rights, the applicant had no right to be treated in terms of the compulsory acquisition procedures in terms of the Constitution.

There was extreme disappointment in Zimbabwe at the narrow approach taken by the Supreme Court in the *Hewlett* case. The decision was not favourably received in academic circles,³⁷ but was thereafter consistently applied by the Supreme Court. In particular, when dealing with the designation of rural land, the Court confirmed the distinction to be drawn between acquisition of rights and other acts relating to rights.³⁸

In 1982 the Supreme Court had occasion to deal with the application of the Emergency Powers Regulations that still existed in Zimbabwe, and in particular the right of persons detained without trial to have access to their lawyers. Prominent members of ZAPU had been arrested and tried for treason. They were acquitted of the charge of treason, but immediately detained in terms of emergency legislation. They were denied access to their lawyers, and sought an order from the High Court that such access was their right. This order was granted by McNally J, as he then was, after which the government appealed. The Supreme Court sat on a Saturday morning to hear the appeal, and immediately dismissed the appeal.³⁹ The government had argued that the legislation in question was pre-existing legislation, and therefore was saved by section 26(3) of the Constitution. The Supreme Court held that Schedule 2 to the Constitution, which sets out the powers of the executive to deal with an emergency, did not form part of the Declaration of Rights, and therefore afforded separate rights that were enforceable outside the provisions of section 26 of the Constitution.

³⁵ *Commissioner of Police v Wilson* 1981 ZLR 451(A); 1981 4 SA 726 (ZA).

³⁶ 1981 ZLR 571 (SC); 1982 1 SA 490 (ZS).

³⁷ G Linnington *Constitutional law of Zimbabwe* (2001) para 1142 456; M Chaskalson *et al Constitutional law of South Africa* (1996) 31-18.

³⁸ *Davies & Others v Minister of Lands, Agriculture and Water Development* 1996 1 ZLR 681 (SC); 1997 1 SA 228 (ZS).

³⁹ *Minister of Home Affairs & Others v Dabengwa & Another* 1982 1 ZLR 236 (SC); 1982 4 SA 301 (ZS).

This decision was the first major success in human rights litigation in Zimbabwe, but despite the clear pronouncements of the Supreme Court relating to the rights of access to lawyers, the executive regrettably chose, in a series of well reported cases, to ignore the rights of arrested persons.⁴⁰ The *Dabengwa* decision, in my view, was a landmark, in that it was the very first important human rights case decided in favour of the citizen over the state. Bearing in mind the personalities involved, and bearing in mind that the decision was taken at a time when the repression in Matabeleland was at its height, it was a significant decision for the Supreme Court to take. It became the hallmark by which other human rights decisions in Zimbabwe would be tested.

1982 saw the arrest of the two York brothers, and their detention under the Emergency Powers Regulations. Various applications were made to the High Court and the Supreme Court to secure their release. In the end the Supreme Court held that the executive had not acted in terms of the law, and the detentions were held to be illegal.⁴¹ In concluding the judgment, Fieldsend CJ said:⁴²

... [I]t is important to draw lessons from what has occurred in this case. It is vitally important that the greatest care be taken in the exercise of powers of detention in times of emergency. It has been stressed in every jurisdiction that has similar provisions how much power they give to the executive; that is why they are carefully hedged about to ensure that the freedom of the individual is preserved so far as is consistent with the national good. The other reason why great care is required is that a failure to observe the requirements of the law may result in the courts having to order the release of persons who may be a danger to the state.

In 1984, the first of the land invasions took place. This phenomenon came to be considered by the Supreme Court in the case of *Commissioner of Police v Rensford & Another*.⁴³ In that matter, Rensford had secured an order from the High Court directing the Commissioner of Police to provide such aid as was necessary to enable the messenger of the court to effect service and enforcement of a warrant of ejection and a warrant of execution against squatters. The police refused to assist, and the High Court directed the Commissioner of Police to give such assistance. The Commissioner of Police challenged the right of the High Court to direct him on how to conduct his duties. In fact, it was even argued on his behalf that the Constitution placed the Commissioner of Police above the law. This attitude was firmly rejected by the Supreme Court, and the appeal was dismissed. As a result, the Court upheld the rights of the individual to protection of their property, even though the matter was not argued as a protection of property case.

⁴⁰ See by way of example *Attorney-General v Slatter & Others* 1984 1 ZLR 306 (SC); *S v Slatter & Others* 1984 3 SA 798 (ZS).

⁴¹ *Minister of Home Affairs v York & Another* 1982 2 ZLR 48 (SC).

⁴² At 58–59.

⁴³ 1984 1 ZLR 202 (SC).

In July 1982 there was an attack on the Zimbabwe Air Force Base near Gweru. Nine aircraft were destroyed and other damage was caused. This resulted in the arrest of a number of Air Force officers who were charged with complicity in the attack. On their arrest they were subjected to torture and were refused access to their lawyers. Their lawyers called a press conference complaining about the manner in which their clients had been treated, and this led to the lawyers being prosecuted for contempt of court. They were duly convicted by a magistrate, and they appealed the decision to the Supreme Court.⁴⁴ Amongst other issues, the Supreme Court held that the right of freedom of expression set out in section 20 of the Constitution applied, and that the derogation to maintain the authority and independence of the courts did not arise because there was no real risk that a fair trial would be prejudiced. The appeal by the two lawyers was accordingly allowed. In due course, the Air Force officers were tried before Dumbutshena J, as he then was, and he held the confessions they had made to be inadmissible, *inter alia*, because they were refused access to their lawyers, and acquitted them in the absence of any other evidence.⁴⁵ The Attorney-General appealed the decision. The Supreme Court held that the manner in which the accused had been denied access to their legal advisors was a breach of rights to a fair trial given by the Constitution.⁴⁶

Another important case of that era concerned a lawyer who had been taking photographs of a motor accident scene, and who was accused of photographing a vehicle belonging to the intelligence agency. He was arrested and assaulted, and he then sued for damages for the unlawful arrest. The state sought to justify what had occurred on the basis of the existence of a state of emergency, and in particular an indemnity that was given in emergency legislation. The Supreme Court held that the indemnity contravened the rights set out in section 13(5) of the Constitution for a person who had been unlawfully arrested and detained to claim compensation, and that the provisions of the Constitution allowing measures to be taken during an emergency did not entitle the executive to grant that form of indemnity.⁴⁷ It is perhaps worth noting that the lawyer was never actually paid his compensation, and he had to resort to setting-off his claim against taxes that were due. Fortunately, the government did not challenge the set-off claimed by him.⁴⁸

⁴⁴ *S v Hartmann & Another* 1988 2 ZLR 186 (SC); 1984 1 SA 305 (ZS).

⁴⁵ The trial judgment is reported as *S v Slatter & Others* 1983 2 ZLR 144 (HC).

⁴⁶ *Attorney-General v Slatter & Others* 1984 1 ZLR 306 (SC); *S v Slatter & Others* 1984 3 SA 798 (ZS).

⁴⁷ *Granger v Minister of State* 1984 2 ZLR 92 (SC); 1984 4 SA 908 (ZS).

⁴⁸ Contrast the decision in *Commissioner of Taxes v First Merchant Bank Ltd* 1997 1 ZLR 350 (SC); 1998 1 SA 27 (ZS).

The decision of the Supreme Court in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd*⁴⁹ is of great importance to constitutional litigation in Zimbabwe. The judgment established that the onus is upon the litigant alleging unconstitutionality, including proof that legislation is not reasonably justifiable in a democratic society. The Supreme Court affirmed the principle of a presumption of constitutionality in the following terms:⁵⁰

In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere.

This somewhat restrictive approach to constitutional interpretation has coloured the approach of the Supreme Court in human rights litigation. It undoubtedly makes it more difficult for a litigant to establish his rights, and even more difficult to defeat a derogation from a right by showing that the derogation is not reasonably justified in a democratic society.

Generally speaking, the Supreme Court emerged with credit during the period of five years when its hands were tied by section 26(3) of the Constitution, using what limited powers it had to enforce human rights. But the comment must be made that there was a reluctance during that time to litigate human rights matters. Whether that was due to the state of emergency, or lack of experience in human rights matters, is hard to say. But in the main the government got away with many abuses of human rights, particularly in Matabeleland.

3.2 The golden era of human rights litigation: 1985–2001

Litigating human rights during the 16 years between 1985 and 2001 was a great pleasure and privilege. The court did not always find for the ordinary litigant, but one knew that whatever point was being raised was carefully considered, and one knew even when the court found for the government that the judgment represented the honest view of the judges who heard the matter. In that time, huge advances were made in the field of human rights in Zimbabwe, and I will deal with the major developments in the field of human rights litigation.

This era started while Zimbabwe was still under a state of emergency and the early cases were concerned with arrest and detention without trial.

⁴⁹ 1983 2 ZLR 376 (SC); 1984 2 SA 778 (ZS).

⁵⁰ At 383.

Starting in early 1986, two customs officers were arrested and charged with allegations of corruption. They were detained in terms of the Emergency Powers Regulations, and various cases came before the courts to secure their release. In particular, the Supreme Court held that their detention was unlawful. In *Bull v Attorney-General & Another*,⁵¹ the Supreme Court held that an arrest had to be justified by the presentation of facts from which the reasonable suspicion, that the person had committed or was about to commit an offence, could objectively be tested in order to conform with section 13(2)(e) of the Constitution. However, the customs officers remained in custody, leading eventually to the Supreme Court giving consideration to whether or not the manner in which the Detainees Review Tribunal operated conformed with the Constitution.⁵² The customs officers were eventually released without charges being laid against them, on condition they left the country.

The state of emergency expired in June 1990. During the state of emergency the Supreme Court had done what it could to protect detainees, but the Court recognised that in a state of emergency detention without trial was a necessary evil. Although the Emergency Powers Act remains on the statute books in Zimbabwe,⁵³ it has been replaced by the Presidential Powers (Temporary Measures) Act (Chapter 10:20). This Act has been used repeatedly to legislate in Zimbabwe, without the intervention of parliament, and in many instances to take away rights given by the Supreme Court. On at least three occasions the validity of the Presidential Powers (Temporary Measures) Act has been challenged as an improper delegation of the legislative power.⁵⁴ However, on each occasion the Supreme Court has avoided dealing with the issue, usually on the grounds that a decision could be reached on some other basis, or on one occasion on the ground that the applicant did not have *locus standi*.

It would take simply too long to give a summary of each major decision of the Supreme Court relating to human rights in Zimbabwe during this period. It would be of some use to look at the various provisions of the Declaration of Rights, and then to comment on the

⁵¹ *Bull v Attorney-General & Another* 1986 1 ZLR 117 (SC); 1986 3 SA 886 (ZS); *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (SC); 1986 3 SA 870 (ZS).

⁵² See *Austin & Another v Chairman, Detainees' Review Tribunal & Another* 1988 1 ZLR 21 (SC).

⁵³ Emergency Powers Act [Chapter 11:04].

⁵⁴ *Forum Party of Zimbabwe & Others v Minister of Local Government, Rural and Urban Development & Others* 1997 2 ZLR 194 (SC); *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS); *Tsvangirai & Others v Registrar-General of Elections* SC 93/2002 (not yet reported).

major points that have been made through litigation in relation to each provision.

Section 11 was initially enacted under the heading 'Fundamental Rights and Freedoms of the Individual'. In an early judgment, the Supreme Court held section 11 to be merely a preamble, which did not confer any substantive rights.⁵⁵ However, the Supreme Court changed this approach, and, following the lead set by the Botswana Court of Appeal in *Dow v Attorney-General*,⁵⁶ decided that the section did indeed confer substantive rights.⁵⁷ This approach by the Supreme Court caused the government to re-enact section 11 in 1996 to make it a true preamble.⁵⁸

Section 12 gives protection to the right of life. Zimbabwe still maintains a death sentence, and we have yet to tackle the vexed issue of the right of the police to kill in order to effect an arrest.⁵⁹ This provision has not been the subject of any important decisions by the Supreme Court.

On the other hand, the right to personal liberty guaranteed by section 13 of the Declaration of Rights has been the subject of considerable litigation. In *Attorney-General v Blumears & Another*,⁶⁰ the Court held that the constitutional protection under section 13 was a necessary accommodation between the individual's fundamental right to personal liberty and the state's duty to control crime. It stated that the criterion of reasonable suspicion was a practical, non-technical concept which afforded the best compromise for reconciling those opposing interests.

The Court upheld the right of the Minister to issue a certificate denying bail.⁶¹

The Court has continued to emphasise the right of legal representation at the stage of the arrest.⁶² The Court has set aside a conviction where an accused was taken to court without informing his lawyer, who was also denied access to his client.⁶³

⁵⁵ *Austin & Another v Chairman, Detainees Review Tribunal & Another* 1988 1 ZLR 21 (SC) 39–40.

⁵⁶ 1994 6 BCLR 1; [1992] LRC (Const) 623 (Botswana).

⁵⁷ *In re Munhumeso & Others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS). See also *Rattigan & Others v Chief Immigration Officer & Others* 1994 2 ZLR 54 (SC); 1995 2 SA 182 (ZS); 1995 1 BCLR 1 (ZS).

⁵⁸ Constitution of Zimbabwe Amendment (No 14) Act 1996 (Act 14/96), sec 6, in force on 6 December 1996.

⁵⁹ See *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 4 SA 613 (CC).

⁶⁰ 1991 1 ZLR 118 (SC).

⁶¹ See *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (SC).

⁶² *S v Chaerera* 1988 2 ZLR 226 (SC); *S v Woods* 1993 2 ZLR 288 (SC).

⁶³ *S v Sibanda* 1989 2 ZLR 329 (SC).

In a quite unrelated matter, the Court has held that civil imprisonment for failing to pay a judgment debt does not contravene section 13.⁶⁴

Section 14 gives protection from slavery and forced labour, but to the best of my knowledge has not received judicial consideration.

Torture and inhuman or degrading punishment or treatment is prohibited by section 15 of the Constitution. Torture is a common occurrence in Zimbabwe, and Zimbabwe has neither signed nor ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, nor has it enacted the Convention into domestic law, despite a resolution of parliament calling upon the government to do so.

Various forms of punishment have been outlawed. Solitary confinement and reduced diet, as punishments imposed by the courts, are no longer permissible.⁶⁵ Adult whipping was declared unconstitutional.⁶⁶ The finding by a majority of the Supreme Court that juvenile whipping was unconstitutional⁶⁷ was overruled by an amendment to the Constitution.⁶⁸ Minimum terms of imprisonment are not unconstitutional, especially where legislation allows a court to impose another or lesser punishment where special circumstances exist.⁶⁹

The rights of unconvicted prisoners not to be held in solitary confinement, in a cell with the light on all the time and not to be deprived of their own clothing, were held by the Court to be constitutional rights.⁷⁰ The deprivation of exercise was held to constitute inhuman and degrading punishment.⁷¹

The delay in carrying out sentences of death was held to be unconstitutional,⁷² but once again the government changed the Constitution to overrule the Court.⁷³ At present, the courts are precluded from issuing a stay, or altering a sentence or giving any remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of 15(1) of the Constitution.⁷⁴ In two subsequent decisions, the Supreme Court held that changes to

⁶⁴ *Chinamora v Angwa Furnishers (Pvt) Ltd & Others* 1996 2 ZLR 664 (SC); 1998 2 SA 432 (ZS); 1997 2 BCLR 189 (ZS).

⁶⁵ *S v Masitere* 1990 2 ZLR 289 (SC); 1991 1 SA 821 (ZS).

⁶⁶ *S v Ncube & Others* 1987 2 ZLR 246 (SC); 1988 2 SA 702 (ZS).

⁶⁷ *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

⁶⁸ Sec 5 Constitution of Zimbabwe Amendment Act (No 11) 1990 (Act 30/90).

⁶⁹ *S v Anand* 1988 2 ZLR 414 (SC); *S v Arab* 1990 1 ZLR 253 (SC).

⁷⁰ *Blanchard & Others v Minister of Justice* 1999 2 ZLR 24 (SC); 1999 4 SA 1108 (ZS).

⁷¹ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Another* 1991 1 ZLR 105 (SC); 1992 2 SA 56 (ZS).

⁷² *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

⁷³ Constitution of Zimbabwe Amendment (No 13) Act 1993 (Act 9/93), sec 2, with effect from 5 November 1993.

⁷⁴ Sec 15(6) Constitution of Zimbabwe.

the Constitution did not have retrospective effect, and therefore did not impinge on existing rights of condemned prisoners,⁷⁵ and the sentences of death were commuted to life imprisonment.

The provision in the criminal procedure law that allowed a 'mute confession' to be used, even if it was not obtained voluntarily, was held to be unconstitutional where such a 'mute confession' took place after the accused had been tortured.⁷⁶

Section 15 of the Constitution was amended by the government to ensure that the death sentence can be carried out by hanging. This amendment⁷⁷ arose because of an intended challenge in the Supreme Court to hanging as a method of carrying out capital punishment as being a cruel and unusual act. The challenge was pre-empted by the amendment to the Constitution.

One of the most contentious provisions in the Constitution is section 16, which, together with section 16A, deals with the protection from deprivation of property. This provision has been amended on many occasions to make it easier for the government to acquire land. Even then, the amendments have not always brought about the desired result, and the Constitution now has a number of deficiencies in the wording of section 16 due to hastily drafted amendments.

There have been surprisingly few decisions of great note in relation to the expropriation provision. The Court has held that a compulsory national pension scheme did not constitute expropriation of property.⁷⁸ The Court followed the *Hewlett*⁷⁹ approach set in 1981. However, in the *Law Society* case the Court would have held that it constituted a breach of section 16 to require a conveyancer to retain funds from the purchase price for the purposes of capital gains tax.⁸⁰ However, by the time the decision was made, the law had been amended.

In *Commissioner of Taxes v CW*,⁸¹ the Court held that a statutory provision that exempted from capital gains tax those persons who had not objected to the compulsory acquisition of their shares, but taxed those who had objected, offended the Constitution because it unfairly discriminated against those who had exercised their constitutional right to challenge the acquisition of their shares.

⁷⁵ *Nkomo & Another v Attorney-General & Others* 1993 2 ZLR 422 (SC); 1994 3 SA 34 (ZS); *Woods & Others v Minister of Justice, Legal and Parliamentary Affairs & Others* 1993 2 ZLR 443 (SC).

⁷⁶ *S v Nkomo* 1989 3 ZLR 117 (SC).

⁷⁷ Sec 5 Constitution of Zimbabwe Amendment Act (No 11) 1990 (Act 30/90).

⁷⁸ *Nyambirai v National Social Security Authority & Another* 1995 2 ZLR 1 (SC); 1996 1 SA 636 (ZS); 1995 9 BCLR 1221 (ZS).

⁷⁹ *Hewlett v Minister of Finance & Another* 1981 ZLR 571 (SC); 1982 1 SA 490 (ZS).

⁸⁰ *Law Society of Zimbabwe & Others v Minister of Finance (Attorney-General Intervening)* 1999 2 ZLR 231 (SC).

⁸¹ 1989 3 ZLR 361 (SC); 1990 2 SA 245 (ZS).

A fine imposed on a civil servant as a disciplinary measure by the Public Service Commission does not constitute expropriation of his property.⁸²

In a major decision relating to the ongoing land acquisition exercise, the Court held that the law offended the Constitution,⁸³ but subsequently the reconstituted Court under Chief Justice Chidyausiku reversed this decision to hold that the exercise was in accordance with the Constitution.⁸⁴

Section 17 protects persons against arbitrary search or entry. The right against arbitrary search or entry was considered by the Supreme Court in *MDC v Commissioner of Police*.⁸⁵ The Court maintained the position that before there could be a valid search, there had to be reasonable suspicion that the search was needed for the detection of crime.

The protection of the law, equality before the law and the basic requirements for fair criminal and civil trials are set out in section 18. This provision of the Constitution has attracted a great deal of litigation.

The Court has recognised that it is of fundamental importance to a democratic society that every person has the protection of the law, and the equal application of the law. In *Chavanduka & Another v Commissioner of Police & Another*,⁸⁶ Gubbay CJ said:⁸⁷

The entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator (provided the investigation so warrants) and the bringing of him or her to trial before a court of competent jurisdiction . . . [M]embers of the Police Force may not refuse to perform a duty imposed upon them by the law of the land.

The right to a fair hearing was underscored in *Smyth v Ushewokunze & Another*,⁸⁸ where it was held that if the prosecutor is not independent and impartial, then no fair trial can take place.

Several cases have emphasised the right of accused persons to call witnesses, subject to their evidence being material and favourable to the defence, and not unnecessarily prolonging the trial.⁸⁹

⁸² *Chairman, Public Service Commission & Another v Hall* 1992 2 ZLR 271 (SC).

⁸³ *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

⁸⁴ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

⁸⁵ 2001 1 ZLR 8 (SC).

⁸⁶ 2000 1 ZLR 418 (SC).

⁸⁷ At 421–422.

⁸⁸ 1997 2 ZLR 544 (SC); 1998 3 SA 1125 (ZS); 1998 2 BCLR 170 (ZS).

⁸⁹ *Eg S v Beahan* 1989 2 ZLR 20 (SC); 1990 3 SA 18 (ZS).

The right to legal representation has been recognised,⁹⁰ and in one case, the Supreme Court rightly held that for an accused person to have a defence lawyer from the Attorney-General's office did not guarantee him a fair trial.⁹¹ The Supreme Court also considered the right of an unrepresented accused facing a mandatory minimum sentence for poaching to have legal representation. The Court held that section 18 of the Constitution might be infringed if an accused is unrepresented at his trial, but declined to go so far as to lay down a rule that every such accused person was entitled to legal aid.⁹²

Where additional charges were brought against an accused shortly before the trial was due to commence, the Supreme Court held that it was a breach of the right to a fair trial not to give the defence adequate time to prepare.⁹³

The Supreme Court has on several occasions examined the question of whether the delay in bringing a criminal matter to trial is a breach of the fundamental rights of an accused person.⁹⁴ The Court has adopted the American approach⁹⁵ that it is necessary to show:

- the length of the delay, which is treated as a trigger mechanism;
- the reason the government assigns to the delay;
- the accused's responsibility to assert his rights; and
- any prejudice to the defence.

Delay can amount to a contravention of section 18(2) of the Constitution. However, the Court has also held that a delay by a magistrate in handing down a judgment did not of itself infringe the Constitution, since other administrative remedies were available to the accused.⁹⁶ The Court has held that the time can only be calculated from the moment when the accused is formally charged, and not simply from when investigations commence.⁹⁷

The criminal procedure law in Zimbabwe recognises the right of an accused person not to give evidence. However, if he declines to give evidence he can still be questioned by the court and by the prosecutor, and an adverse inference can be drawn from his failure to answer those

⁹⁰ *S v Chaerera* 1988 2 ZLR 226 (SC); *S v Mushayandebvu* 1992 2 ZLR 62 (SC).

⁹¹ *S v Marutsi* 1990 2 ZLR 370 (SC).

⁹² *S v Chaerera* 1988 2 ZLR 226 (SC).

⁹³ *Wheeler & Others v Attorney-General* 1998 2 ZLR 305 (SC).

⁹⁴ *Fikilini v Attorney-General* 1990 1 ZLR 105 (SC); *In re Mlambo* 1991 2 ZLR 339 (SC); 1992 4 SA 144; 1992 2 SACR 245 (ZS); *Mlauzi v Attorney-General* 1992 1 ZLR 260 (SC); 1993 1 SA 207 (ZS); *In re Masendeke* 1992 2 ZLR 5 (SC); *S v Bourne* 1997 1 ZLR 514 (SC).

⁹⁵ *Barker v Wingo* 407 US 514 (1972).

⁹⁶ *S v Morrisby* 1995 2 ZLR 270 (SC).

⁹⁷ *Shumba v Attorney-General* 1997 1 ZLR 589 (SC).

questions. This procedure was held to be permitted in terms of the Constitution.⁹⁸

The right against self-incrimination in section 18(8) of the Constitution led to two decisions of the Supreme Court. The Court held that the constitutional right against self-incrimination was not violated by a requirement under exchange control laws to produce information to the exchange control authorities.⁹⁹ In another case, the Supreme Court held that the reverse onus imposed on the accused by statute was not prohibited by the Constitution.¹⁰⁰

In the field of civil litigation, the Court has held that the right to a fair hearing is both a constitutional right and a common law right. This right therefore applied where a minister sought to suspend the executive of a private voluntary organisation without giving any form of hearing¹⁰¹ and applied to disciplinary hearings both within the public service and at the university.¹⁰²

Another aspect of the right to a fair hearing was considered in *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd*¹⁰³ in which it was held that a private company had a constitutional right to be represented in court by its alter ego, and did not have to engage the services of a legal practitioner.

The question of a right to a fair hearing so far as parliament was concerned was dealt with in *Mutasa v Makombe*.¹⁰⁴ The Court held that the power of parliament to punish persons for contempt was a *sui generis* power, and therefore not subject to section 18(9) of the Constitution.

Freedom of conscience is provided for in section 19, and includes freedom of religion and freedom to establish and maintain schools. The Supreme Court had to consider the question of freedom of conscience and belief in regard to Rastafarianism.¹⁰⁵ An aspiring lawyer had been refused admission on the grounds that his dreadlocks made him unkempt, and he appealed that decision. Two members of the Supreme Court held that Rastafarianism was a religion, whilst the other held that it was a genuine philosophical and cultural belief, but all agreed that it was protected by section 19 of the Constitution. The Supreme Court

⁹⁸ *S v Mukungatu* 1998 2 ZLR 244 (SC).

⁹⁹ *Poli v Minister of Finance and Economic Development & Another* 1987 2 ZLR 302 (SC); 1990 1 SA 598 (ZS).

¹⁰⁰ *S v Chogugudza* 1996 1 ZLR 28 (SC).

¹⁰¹ *Holland & Others v Minister of the Public Service, Labour and Social Welfare* 1997 1 ZLR 186 (SC); 1998 1 SA 389 (ZS); 1997 6 BCLR 809 (ZS).

¹⁰² *Jiah & Others v Public Service Commission & Another* 1999 1 ZLR 17 (SC); *Vice-Chancellor, University of Zimbabwe & Another v Mutasah & Another* 1993 1 ZLR 162 (SC).

¹⁰³ 1999 2 ZLR 36 (SC); 1999 4 SA 1119 (ZS).

¹⁰⁴ 1997 1 ZLR 330 (SC); 1998 1 SA 397 (ZS); 1997 6 BCLR 841 (ZS).

¹⁰⁵ *In re Chikweche* 1995 1 ZLR 235 (SC).

accordingly ordered his admission as a legal practitioner. He later became a member of parliament for the MDC opposition, but has since been expelled from that party and his seat is vacant.

The right to freedom of expression in section 20 of the Constitution has been emphasised by the Supreme Court in a series of cases to be one of the most fundamentally important rights. The Court said:¹⁰⁶

The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man'.

The Court has held that it has four broad special purposes, namely:¹⁰⁷

- It helps an individual to attain self-fulfilment.
- It assists in the discovery of the truth.
- It strengthens the capacity of an individual to participate in decision making.
- It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Freedom of expression has led to decisions allowing prisoners to write and receive letters,¹⁰⁸ requiring the setting up of a private mobile telephone service¹⁰⁹ and banning the monopoly on state broadcasting.¹¹⁰

The Court used this provision to set aside legislation which dealt with the public funding of political parties on the basis that the way in which the law applied the funds was unfair, and required parliament to enact a fairer law.¹¹¹

Freedom of assembly and association is guaranteed by section 21 of the Constitution. The Supreme Court recognised the right of persons to assemble for the purposes of a procession in the case of *In re Munhumeso*.¹¹² The law prohibiting such processions was declared unconstitutional. In the *CFU* case¹¹³ it was held to be contrary to section 21 to force farmers and farm workers to attend political meetings.

¹⁰⁶ *In re Munhumeso & Others* 1994 1 ZLR 49 (SC) 56; 1995 1 SA 551 (ZS) 557.

¹⁰⁷ *Retrofit (Pvt) Ltd v PTC & Another* 1995 2 ZLR 199 (SC) 212–213.

¹⁰⁸ *Woods & Others v Min of Justice & Others* 1994 2 ZLR 195 (SC); 1995 1 SA 703 (ZS); 1995 1 BCLR 56 (ZS).

¹⁰⁹ *Retrofit (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1995 2 ZLR 422 (SC); *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Another* 1995 2 ZLR 199 (SC); 1996 1 SA 847 (ZS); 1995 9 BCLR 1262 (ZS); *T S Masiyiwa Holdings (Pvt) Ltd & Another v Minister of Information* 1996 2 ZLR 754 (SC); 1998 2 SA 755 (ZS); 1997 2 BCLR 275 (ZS).

¹¹⁰ *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 2 ZLR 243 (SC).

¹¹¹ *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 2 ZLR 254 (SC); 1998 3 SA 85 (ZS).

¹¹² *In re Munhumeso & Others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS).

¹¹³ *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

Freedom of movement, including the right to reside in any part of Zimbabwe, and the right to enter and leave Zimbabwe, together with immunity from expulsion, is guaranteed by section 22 of the Constitution, but subject to many exceptions.

The obligation to carry a national identity card and the right of any police officer to stop and arrest a person not carrying such a card were held to be unconstitutional in the *Elliott* case.¹¹⁴ In another case, a passport was held to be an essential element of the right of freedom of movement.¹¹⁵

The right of freedom of movement and the right to reside in Zimbabwe have also fallen to be decided in relation to marriages between a citizen and a non-citizen. In a series of judgments, the Supreme Court held that the citizen spouse has a constitutional right to have his or her spouse reside with him and for that spouse to earn a living.¹¹⁶ However, that right does not extend where the non-citizen spouse has been declared to be a prohibited person.¹¹⁷

In an attempt by a non-citizen mother to remain in Zimbabwe, she claimed that her child had been born in Zimbabwe and therefore the child had a right for his mother to remain with him in Zimbabwe. The Supreme Court rejected this contention as the mother was seeking to promote her own interests under the guise of seeking to enforce the rights of the child, but since the child was under seven years of age, the child could not independently assert its rights.¹¹⁸

Section 23 of the Constitution gives protection from discrimination. It does not prohibit discrimination in general terms, but only discrimination that arises from the provisions of a law or from the application of a law.

I have already mentioned that the Supreme Court found in *Commissioner of Taxes v CW*¹¹⁹ that it was discriminatory to charge capital gains tax against persons who had challenged the acquisition of their shares, but to exempt from capital gains tax those who did not challenge the actions of the government. The decision was not founded on section 23, but it was a clear discrimination case.

¹¹⁴ *Elliott v Commissioner of Police* 1997 1 ZLR 315 (SC); 1998 1 SA 21 (ZS); 1997 5 BCLR 670 (ZS).

¹¹⁵ *Martin v Attorney-General & Another* 1993 1 ZLR 153 (SC).

¹¹⁶ *Rattigan & Others v Chief Immigration Officer & Others* 1994 2 ZLR 54 (SC); 1995 2 SA 182 (ZS); 1995 1 BCLR 1 (ZS); *Salem v Chief Immigration Officer & Another* 1994 2 ZLR 287 (SC); 1995 4 SA 280 (ZS); 1995 1 BCLR 78 (ZS); *Kohlhass v Chief Immigration Officer & Another* 1997 2 ZLR 441 (SC); 1998 3 SA 1142 (ZS); 1998 6 BCLR 757 (ZS); *Hambly v Chief Immigration Officer (3)* 1998 2 ZLR 285 (SC).

¹¹⁷ *Kenderjian v Chief Immigration Officer* 2000 1 ZLR 697 (SC); *Edwards v Chief Immigration Officer* 2000 1 ZLR 485 (SC).

¹¹⁸ *Ruwodo NO v Minister of Home Affairs & Others* 1995 1 ZLR 227 (SC); 1995 7 BCLR 903 (ZS).

¹¹⁹ *Commissioner of Taxes v CW (Pvt) Ltd* 1989 3 ZLR 361 (SC); 1990 2 SA 245 (ZS).

*S v Banana*¹²⁰ concerned the constitutionality of the crime of sodomy which penalises consensual acts of sodomy. The majority of the Court held that the crime of sodomy did not contravene any constitutional right. Gubbay CJ and Ebrahim JA dissented. In their view, because certain sexual acts, including sodomy, between consenting males and females did not invite a criminal sanction, similar consensual acts between two males should not be subject to a criminal prohibition. The distinction was one based solely on gender, and was accordingly unconstitutional.

Section 24 of the Constitution sets out provisions for the enforcement of the Declaration of Rights, and these I have already dealt with.

Section 25 deals with savings that can be made in the case of public emergencies, and in particular refers to Schedule 2, as to the provisions of the Declaration of Rights that can be derogated from during a state of emergency. The Court has jealously restricted those provisions to ensure that only the stipulated provisions can be impinged during an emergency.

The final provision of the Declaration of Rights is section 26, which defines certain terms, and sets out various savings.

It is not possible to discuss all the cases that were decided whilst Chief Justices Dumbutshena and Gubbay presided over the Supreme Court. An examination of the law reports will reveal that in almost every field of human rights specified in the Declaration of Rights decisions were made, and that the vast majority favoured the citizen.

It is also worth noting that in other cases involving the Constitution, the Supreme Court favoured the application of rights of fairness to matters, even if they did not fall within the Declaration of Rights.¹²¹ In the *Rushwaya* case,¹²² the Court held that the High Court could review advice given to the President in relation to the appointment of a chief, notwithstanding a provision in the Constitution that mandated the President to act on the advice of the Cabinet, which advice could not be inquired into by any court. Where legislation relating to an election was not referred to the Electoral Supervisory Commission, but only to the Chairperson of the Commission, the Supreme Court held that legislation to be invalid.¹²³

Zimbabwe as a nation can be proud of the reputation that its Supreme Court achieved in this period throughout the Commonwealth. Judgments of the Court are regularly referred to in South Africa, and other countries, including by the Privy Council.¹²⁴

¹²⁰ 2000 1 ZLR 607 (SC); 2000 3 SA 885 (ZS).

¹²¹ See eg *Patriotic Front — Zimbabwe African Peoples' Union v Minister of Justice, Legal and Parliamentary Affairs* 1985 1 ZLR 305 (SC); 1986 1 SA 532 (ZS).

¹²² *Rushwaya v Minister of Local Government and Town Planning & Another* 1987 1 ZLR 15 (SC).

¹²³ *Zimbabwe Unity Movement v Mudede NO & Another* 1989 3 ZLR 62 (SC).

¹²⁴ See *Pratt v Attorney-General for Jamaica & Another* (1993) 4 All ER 769 (PC).

In a recent article, Mubangizi,¹²⁵ having analysed judgments of the Supreme Court on the issue of the rights of prisoners, said this of constitutional rights in Zimbabwe:

The decisions illustrate the approach taken by the Supreme Court of Zimbabwe in interpreting the constitutional rights of prisoners in that country. It can be said that the interpretation has been hampered by the various limitations imposed by the Constitution on the various rights. Although the courts upheld and protected the fundamental rights of prisoners, even sometimes applying international law, the limitations imposed by the Constitution ensure that such rights can be guaranteed only to a certain extent.

I believe that this statement applies to all human rights in Zimbabwe. Some of the greatest difficulties encountered in litigating human rights in Zimbabwe are the various limitations imposed by the Constitution itself. This, together with the onus placed on the person asserting a breach of the Declaration of Rights, makes it a real challenge to foster a true culture of human rights, and makes much greater the difficulties in litigation to persuade a court to find in favour of the existence of a fundamental human right.

4 The present: Human rights litigation after 2001

So what of the present? There can be no doubt that the present composition of the Supreme Court bodes ill for human rights in Zimbabwe. The impression created by the government propaganda machine is that human rights litigation is an anti-government activity, and that those who engage in it, whether as litigants or as lawyers, are disloyal to the country.

I am only aware of one decision, *S v Tsvangirai*, in which the Supreme Court has held, whilst Chidyausiku CJ was sitting, that the constitutional rights of a citizen have been infringed. In the case of *Biti & Another v Minister of Justice, Legal and Parliamentary Affairs & Another*,¹²⁶ the General Laws Amendment Act 2002 (Act 2/2002) was declared to be unconstitutional, as having not been properly enacted in terms of the Constitution. This was a majority decision. The dissenting judge, who was one of the new appointees to the Supreme Court, held the law valid on a basis that had never been suggested on behalf of the state during argument. Chidyausiku CJ was not one of the judges who sat on that occasion.

¹²⁵ J Mubangizi 'The constitutional rights of prisoners in selected African countries: A comparative review' (2002) 35 *Comparative and International Law Journal of Southern Africa* 269 275.

¹²⁶ SC 10/2002 (not yet reported).

The *Tsvangirai* and *Biti* cases just mentioned are the only two Supreme Court judgments given since mid-2001 in which the citizen prevailed. *Stevenson v Minister of Local Government*¹²⁷ was a case on appeal from the High Court, and not strictly a constitutional case. Here the Supreme Court, by a majority, found in favour of Mrs Stevenson relating to the delay in holding elections. Again, Chidyausiku CJ was not a member of that Court.

In a case involving the rights of a pregnant student, the Supreme Court held that this was discrimination, but not discrimination prohibited by the Constitution. Fortunately, the Court found on common law grounds that the provision in the contract allowing the expulsion was *contra bonos mores* and set aside the expulsion.¹²⁸

Towards the end of 2002, the rights of persons to associate in a trade union was the subject of the decision in *Ngulube v ZESA*.¹²⁹ In that matter, Chidyausiku CJ held that a managerial employee had failed to show that any constitutional right of his had been infringed by a law that prevented him from being a member of a trade union.

The attitude of the Supreme Court can best be seen in a statement made by the present Chief Justice when an application was made for him to recuse himself and to reconstitute the Supreme Court to afford a fairer hearing to the Commercial Farmers Union. The application for the recusal of the Chief Justice and the reconstitution of the Court was refused, and the Chief Justice said of the application:¹³⁰

The unbridled arrogance and insolence with which the application for the reconstitution of this Court was made in this case is simply astounding and, to say the least, unacceptable. This is the first and the last time when such contempt of this Court will go unpunished. Legal practitioners are reminded that this Court has an inherent disciplinary power over legal practitioners as officers of this Court in matters of misconduct or unprofessional conduct — see *De Villiers and Another v McIntyre NO* 1921 AD at 435. This Court will in future deal with contempt of this Court firmly and decisively. The only reason why stern action was not taken *in casu* is that this case is of extreme national importance and distraction from the main issue was to be avoided at all costs.

As a trial lawyer, I have great difficulty in accepting that it is arrogant or insolent to do one's best to get a fair hearing for one's clients. Counsel do not personally identify themselves with the case of their clients, and are there merely to represent the rights and interests of their clients. I fear that this distinction is not understood.

¹²⁷ SC 38/2002 (not yet reported).

¹²⁸ *Chaduka NO & Another v Mandizvidza* SC 114/2001 (not yet reported).

¹²⁹ *Ngulube v Zimbabwe Electricity Supply Authority & Another* SC 52/2002 (not yet reported).

¹³⁰ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported) at 6–7 of the cyclostyled judgment.

The Chief Justice echoed the same sentiments when he opened the legal year in the High Court at Harare on 13 January 2003. He warned certain unnamed lawyers that, whilst reasoned criticism of the courts would be tolerated, behaviour that went beyond that would be punished. This was undoubtedly an attempt to cower lawyers whose views do not coincide with those of certain judges.

The approach to human rights by the present Court can best be demonstrated by two of its decisions. In the first major judgment of that Court concerning the land invasions, the issue was decided against the Commercial Farmers Union. The Union had brought the original application to set aside the land acquisition exercise on the basis that it was unconstitutional.¹³¹ The former Supreme Court agreed with the farmers. The new Court acceded to an application by the Minister of Lands, Agriculture and Rural Resettlement to set aside the earlier order.¹³² The Court granted the relief sought by the Minister on the basis of a law which did not exist when the matter was argued, and without giving any opportunity to make submissions on the application or validity of that law.¹³³ The Court disregarded the statement of Dumbutshena AJA (the former Chief Justice of Zimbabwe), with whom the Chief Justice of Namibia concurred, in *Kauesa v Minister of Home Affairs & Others*,¹³⁴ where he said:¹³⁵

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

The other case is that of *Tsvangirai v Registrar General*,¹³⁶ in which the Court raised for the first time during the oral hearing a particular interpretation of the legislation, which was not the case made by either of the parties. Senior counsel who appeared for the appellant then placed supplementary heads of argument before the Supreme Court, drawing attention to the principle that it is not for the Court to take points which have not been raised by any of the parties, and dealing with

¹³¹ See *Commercial Farmers Union v Minister of Lands, Agriculture and Rural Resettlement & Others* 2000 2 ZLR 469 (SC); 2001 2 SA 925 (ZS).

¹³² *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

¹³³ *Minister of Lands, Agriculture and Rural Resettlement & Others v Commercial Farmers Union* SC 111/2001 (not yet reported).

¹³⁴ 1996 4 SA 965 (NmS); 1995 11 BCLR 1540 (NmS).

¹³⁵ At 973–974 (SA); 1545 (BCLR).

¹³⁶ *Tsvangirai & Others v Registrar-General of Elections* SC 93/2002 (not yet reported).

the merits of the matter.¹³⁷ In giving its judgment, the Supreme Court considered this to be an 'unusual development' and expressed 'our extreme displeasure at this attempt to influence our determination of this appeal'. The Court refused to have any regard to the supplementary heads of argument.¹³⁸ Obviously, the arguments raised in them on behalf of the appellant formed no part of the reasoning in the judgment, which dismissed his appeal.

The other problem that has been encountered with the Supreme Court at present is the extremely long period between the hearing of a matter and the giving of judgment. In the time of Chief Justice Gubbay, judgments were usually given within a very short time. For example, in the *Catholic Commission* case,¹³⁹ dealing with delays in carrying out sentences of death, where the judgment traverses the law in many other countries, the delay between the close of argument and the giving of judgment was 34 days. In the two judgments relating to whipping, the judgment pertaining to adult whipping¹⁴⁰ was given just over two months after argument, and the one relating to juvenile whipping,¹⁴¹ which judgment had two dissenting judgments and three separate concurring judgments, was given just three months after argument.

At present that is not the position. A constitutional application concerning the right of private broadcasters was not only delayed until after the presidential elections before being set down for argument, but eight months have passed since argument took place and there is no sign of a judgment. Whatever the explanation for the delays, they are perceived to be a deliberate attempt to avoid making findings against the government on issues relating to human rights.

5 The future: Prospects of human rights litigation in Zimbabwe

The future is very difficult to predict. The Minister of Justice had publicly stated that 'any country that goes through a revolution should ensure that all tenets of governance like the judiciary reflect the country's norms, values and culture in composition and structure'.¹⁴² The Minister has often expressed the view that the courts must reflect the philosophy and policies of the elected government. The Minister sees any criticism

¹³⁷ See *Director of Hospital Services v Mistry* 1979 1 SA 626 (A) 635F-H.

¹³⁸ *Per* Gwaunza JA at 3-4 of the cyclostyled judgment.

¹³⁹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Others* 1993 1 ZLR 242 (SC); 1993 4 SA 239 (ZS); 1993 2 SACR 432 (ZS).

¹⁴⁰ *S v Ncube & Others* 1987 2 ZLR 246 (SC); 1988 2 SA 702 (ZS).

¹⁴¹ *S v A Juvenile* 1989 2 ZLR 61 (SC); 1990 4 SA 151 (ZS).

¹⁴² *The Herald* 20 February 2003.

of the executive by the judges to be political, and therefore brands those judges for removal.

Recently a retired judge was arrested and charged with corruption, and a serving judge was arrested in his chambers at the High Court, detained in most inhuman circumstances, and also placed on remand on bail for alleged corruption. This judge, Justice Paradza, has now brought a constitutional application to the Supreme Court, challenging the way in which he was arrested and treated, and making specific allegations about the conduct of the Chief Justice and the Judge President.

The absence of any criticism of the way in which Judge Paradza was treated by the Chief Justice and the Judge President has been most unfortunate. Ten High Court judges issued a public statement deploring the arrest and treatment of Justice Paradza. On the other hand, the fact that eight other judges of the High Court did not join in that public statement is a cause for concern, and shows division in the High Court.

The future of the judiciary in Zimbabwe is intertwined with the future of the government of Zimbabwe. Should a democratically elected government take power in Zimbabwe, I have little doubt that two things will happen with the judiciary. Judges who are known to be supporters of the present government, and who have failed their judicial oath by serving the present government and the ruling party, will be removed from office in terms of the Constitution, if they do not resign. Many other judges will welcome the changed atmosphere in Zimbabwe when they can conduct their duties in terms of their judicial oath without fear of reprisals from the government. It is those judges who will lead the judiciary of the future in Zimbabwe, and it is those judges who will publicly pronounce in favour of the citizen to uphold the concept of human rights in Zimbabwe whenever the Constitution and law permits.

It is worth noting again that generally the legal profession in Zimbabwe is wholly committed to the concept of human rights, and to upholding those rights as against the state. Many of those lawyers will become the future judges of Zimbabwe, and Zimbabwe will be well served by them. I want to also recognise the brave work done by magistrates in Zimbabwe, who on a daily basis apply the decisions and the approach of the Supreme Court in human rights matters, even where the government clearly opposes what the magistrates are doing.

Human rights litigation in Zimbabwe is at present going through a difficult and unfortunate phase, but I firmly believe that the future of human rights litigation is assured, and that Zimbabwe will again take its place as one of those countries in which human rights are respected, and in which the judiciary upholds human rights for the benefit of the country and the region as a whole.