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RECENT DEVELOPMENTS 2001/2

Challenging Restrictions on the Right to Protection of the Law in Zimbabwe

In June 2000, a general election was held in Zimbabwe. Of the 120 common roll constituencies, 62 were won by the ruling party, ZANU(PF) and 57 by the Movement for Democratic Change (MDC). The MDC alleged that the general election campaign was marred by widespread violence, intimidation and illegal practices. As a result proceedings were instituted in the High Court challenging the outcome of the electoral process in 37 constituencies. The hearings were due to commence in January 2001. On 8 December the President issued the Electoral Act (Modification) (No. 3) Notice, 2000 (SI 318/2000), which purported to justify the validation of the election results by reference to a series of assertions:

> "RECOGNISING that the general elections held following the dissolution of Parliament on the 11th April, 2000, were held under peaceful conditions and that the people who voted did so freely and that the outcome thereof represents a genuine and free expression of the people's will;
>
> NOTING that the candidates who lost in that general election have instituted civil suits challenging the results and that these suits are frivolous and vexatious as evidenced by the results of the recount of the ballot papers relating to some constituencies;
>
> REGRETTING that the litigation referred to above is sponsored by external interests whose motives and intentions are inimical to the political stability of Zimbabwe;
>
> CONCERNED that the institution of such litigation has placed intolerable burdens on duly elected Members of Parliament and is compromising their duties as Members of Parliament;
>
> CONCERNED further that the multiplicity of such suits has already overstretched the limited resources of the Registrar-General of Elections and the judicial system and other national resources and that the involvement of external interests is undermining the political stability of Zimbabwe and the democratisation process;
>
> NOW, THEREFORE, in the interests of democracy and the peace, security and stability of Zimbabwe it is hereby notified that His Excellency the President, in terms of section 158 of the Election Act has made the following Notice . . .".

The Notice itself purported to validate the election of candidates in the following terms:

> "The election of a [member of Parliament] shall not be rendered void . . . nor shall he or his election agent be made subject to any incapacity . . . upon a finding that any contravention of the [Electoral] Act was committed with reference to the election, and the doing of anything in connection with, arising out of or resulting from the general election . . . which is or may be such a contravention is to that extent hereby validated and shall be deemed not to be such a contravention."

In *The Movement for Democratic Change & Mushonga* v. *Chinamasa NO* (SC 7/2001, unreported) the applicants (who included one of the unsuccessful candidates in

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the June election) sought an order from the Supreme Court setting aside the Notice. They argued it infringed their constitutional right to protection of the law and, in particular section 18(9) of the Constitution which provides:

> "... every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights and obligations."

The Supreme Court noted that the right of full and unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes for it ensures "a mechanism by which such disputes are resolved in a peaceful, regulated and institutionalised manner" (at 14–15). The court held that the existing civil right of the applicants was to participate in a free and fair election and that they were legitimately entitled to expect that the result in every constituency would be free and fair and properly representative of the will of the voters. Therefore they had a civil right to challenge in the High Court the result of an election which was claimed to have been tainted by corrupt and illegal practices. The Notice had effectively denied them such access. Accordingly, it was declared null and void as being contrary to section 18(9).

It is worth noting that this highly sensitive case came before the Supreme Court in January 2001 at a time when there was considerable tension between the judiciary and the government. Prior to this, the lead judgment in constitutional cases was almost invariably delivered by the Chief Justice. On this occasion, the judgment was delivered by "The Full Court". This is only explicable as a ploy to emphasize the unity of the Court and is a sad reflection on the political pressures being faced by the judges.

Use of the Presidential Pardon in Zimbabwe

How a country comes to terms with a past that is characterized by serious human rights abuses remains a matter of considerable debate. In this issue of the Journal, Jeremy Sarkin explores the method of bringing perpetrators to trial (p. 143 above). Another approach adopted by some countries is to seek to "draw a line through the past" by the use of an amnesty law or presidential pardon. The Clemency Order No. 1 of 2000 (General Notice 457A) is a troubling example of the use of the presidential power of pardon to prevent victims of political violence and human rights abuses from seeking to enforce their rights through the courts. Its main provisions are set out below as is the forthright response of the Law Society of Zimbabwe.

General Amnesty for Politically Motivated Crimes

Title

1. This order may be cited as the Clemency Order No. 1 of 2000.

Pardon for politically motivated crimes

2. A free pardon is hereby granted to every person liable to criminal prosecution for any politically motivated crime committed during the period 1st January to 31st July, 2000:

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Provided that this pardon shall not apply to any person who has committed a specified offence.

Remission of sentence for politically motivated crimes

3. A remission of the whole or the remainder of the period of imprisonment is hereby granted to every person convicted of any politically motivated crime committed during the period 1st January to 31st July, 2000:
Provided that this remission shall not apply –
(a) to any habitual criminal serving a sentence of extended imprisonment
(b) in respect of any sentence for a specified offence; or
(c) any prisoner serving a sentence imposed by a Court Martial.

Interpretation

4. For the purposes of paragraphs 2 and 3
"politically motivated crime" means –
. . . any offence motivated by the object of supporting or opposing any political purpose and committed in connection with –
(i) the Constitutional Referendum held on the 12th and 13th February, 2000 or
(ii) the general Parliamentary elections held on 24th and 25th June, 2000:
whether committed before, during or after the said referendum or elections . . .;
"specified offence" means –
(a) murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty;
(b) any conspiracy, incitement or attempt to commit any offence referred to in paragraph (a)
(c) being an accessory after the fact to any offence referred to in paragraph (a) or (b).

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Statement by the Law Society of Zimbabwe

1. The Law Society of Zimbabwe is concerned by the decision by the President to pardon politically motivated crimes committed in conjunction with the February referendum and the June elections. The pardon covers offences such as common assault, assault with intent to do grievous bodily harm, arson, malicious injury to property, public violence, extortion, intimidation, criminal defamation, abduction, kidnapping, culpable homicide, public indecency and other offences as long as they can be shown to have been politically motivated.
2. Although the society is pleased to notice that murder, rape and offences involving dishonesty were excluded from the pardon, it is nevertheless concerned that there are a large number of serious offences which have been included in the pardon.
3. The pardon will add credence to the perception of condonation and encouragement of violence by the government. It will weaken whatever resolve there may have been on the part of law enforcement officers to deal with violence. It will seriously undermine efforts by Zimbabweans to restore a climate of legality which is essential for the continued maintenance of law and order

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and observance of the rule of law. Furthermore, it will seriously undermine the efforts of a number of Zimbabweans who have been working tirelessly to improve the image of the country in the eyes of investors and tourists.
4. The Law Society calls upon all political parties, particularly the dominant political parties namely, ZANU(PF) and the Movement for Democratic Change, to display by their words and deeds, an unwavering commitment to condemnation of all forms of violence and to display proper leadership by guiding Zimbabweans in such a manner as to make it clear that violence is not a means by which a person can secure election to parliament or ascension to power.

Publication of Report on the Ghana Governance and Corruption Survey 2000

The Ghana Anti-Corruption Coalition (GACC) is a group of public and non-governmental organizations that have joined forces in an effort to combat corruption in Ghana. The GACC includes the Serious Fraud Office, Commission for Human Rights and Administrative Justice and the Institute of Economic Affairs. In order to establish a solid empirical base for developing effective strategies to combat the problem, in 2000 a national survey was undertaken covering households, business enterprises and public officials. The results are contained in the Report on the Ghana Governance and Corruption Survey that was published in February 2001. This provides a detailed insight into the phenomenon of corruption in Ghana and is based on the views of 1,500 households, 500 business enterprises and 1,000 public officials interviewed throughout the country between May and June 2000.

Its main findings are as follows:

- A majority of households pay 10% of their incomes in bribes (unofficial payments) to public officials;
- Many firms (44%) make unofficial payments to public officials, with over a quarter (27%) frequently or always making such payments;
- Unofficial payments constitute a regular feature of transactions between business firms and public service agencies. 56% of firms reported that frequently service is delivered once they make unofficial payments.
- A veritable "culture of corruption" prevails in Ghana: most unofficial payments (46%) to public officials are initiated by firms and 31% are solicited by the public officials themselves; and 50% of firms know in advance how much unofficial payment is required of them.
- According to households, the Traffic Police (MTTU), Customs and Excise (CEPS), Regular Police, and Immigration Service top the list of the most bribed public agencies. Among the respondents who recently made contacts with MTTU, 87% of them paid bribes. Similarly, the percentages are 77%, 67%, and 62% for CEPS, Regular Police, and the Immigration Service respectively.
- The Judiciary also receive unofficial payments from all sectors of business surveyed.
- Most public agencies are rated low in terms of honesty and integrity. The MTTU, Regular Police, Government Ministers, Political Parties, CEPS, Passport Office and the Judiciary are rated among the least honest public agencies according to households, enterprises and public officials.

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The Report notes that the magnitude of corruption in some organizations is "alarming" and focuses on a number of "hot spot" public agencies, including the Judiciary and the Police. These are viewed as being particularly significant as they "constitute an important part of an overall 'enabling environment' for good governance and sustainable development" (p. 28).

As regards the Judiciary, respondents reported negative experiences with the courts. These included an excessively lengthy process (34% and 26% for urban and rural households respectively), too high official costs (27% and 25% for rural and urban households respectively) and court decisions influenced by corruption (19% and 17% for urban and rural households respectively).

Enterprises were asked to give an indication of the obstacles that were preventing them from using the courts. Delays in court proceedings appeared to be a major problem. Of all the firms covered by the survey, nearly half (49.2%) cited the long process involved in court proceedings as the most important obstacle to the use of the courts. As a result about one-fifth (19%) of reported cases were either settled before trial or before ruling was made by the courts. Corruption was also cited as an important obstacle to using the courts. Nearly 16% of the firms gave this as the most important obstacle, second only to the number who complained about the length of proceedings. Another important obstacle was the high "unofficial costs" involved in court processes (cited by 10.8% of firms surveyed). About 5% of firms also cited the complexity of court proceedings as an important obstacle to the use of the courts. In consequence, 28% of firms had decided against taking a case to the court in the last two years.

On the basis of these negative experiences with the courts, the Report classifies the judiciary/courts as among the "bad organizations" with a low average honesty rating of 2.6 (0 = least honest; 5 = most honest). An assessment of the judiciary in terms of selected corruption indicators shows that 19% of respondents perceive that jobs are bought in the institution, 27% of court officials receive unofficial income, and the average bribery frequency is 30%. In fact, out of the 8% household respondents that made contact with the courts, more than half (53%) reported making unofficial payments.

Respondents also consistently rated the police low in terms of quality and honesty. Households rated the Motor Traffic Police among the worst service providers (42%), followed by the regular Police (50%). Both rural and urban households agreed that the Police Service was the least honest institution. In the ratings of public officials, the regular Police were among the twelve least efficient institutions. The Motor Traffic Police were rated as the least honest institution with a rating of 2.1, followed by the regular Police with a rating of 2.3.

Enterprises also reported unfavorable perceptions about the Police. Assessment of the quality of service by firms gave the regular Police a rating of 2.49 and the Traffic Police the lowest rating of 2.42. Responses also indicated that both regular and traffic Police were the most frequent recipients of unofficial payments.

Overall the Ghana Governance and Corruption survey indicates that corruption is pervasive and public concern is high. It finds that the causes of corruption include a combination of factors: the perception of public officials that they are extremely underpaid, deficiencies in the internal management of public service organizations (in terms of accountability and transparency), poorly defined government rules and regulations, weak enforcement of law in general and anti-corruption measures in particular. The survey also suggests a potential

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for strong public support, especially in the business community, for renewed national anti-corruption efforts. Accordingly, the Report recommends that there is a need to:

- Strengthen ongoing institutional reforms with specific emphasis on improving internal management practices and salaries; streamlining government rules and regulations; as well as promoting ethics and accountability.
- Create a corruption reporting mechanism with proper protection of whistle-blowers.
- Prioritize reforms in important but "troubled" public agencies such as the Police, MTTU and the Judiciary to improve service delivery and accountability.
- Streamline and enforce existing anti-corruption laws and regulations, and develop codes of ethics for both the private and public sectors.

Based on the Report, the GACC has published an Action Plan that identifies and prioritizes six strategic objectives. These are:

1. Ensuring the demonstration of political will by all stakeholders, especially political leaders, institutional executives, business persons and civil society groups through: the endorsement of and participation in the process of forging an anti-corruption agenda and official commitment to an information disclosure policy
2. Streamlining of key public sector institutions: i.e. encouraging political leadership commitment to integrate anti-corruption elements in public sector reforms and to accelerate devolution of power through decentralization
3. Improving public financial management systems: e.g. by co-opting civil society representatives into public procurement structures
4. Strengthening institutional and operational capacity of key oversight bodies
5. Restoring public confidence in institutions for the maintenance of law and order: e.g. with respect to the MTTU, institutionalize spot fines for traffic offences and use the proceeds as incentives to the police over and above normal salaries; with respect to the Judiciary, install automated record generation and management systems
6. Involving civil society in anti-corruption strategies, institutional and economic governance.

It is intended that national and regional workshops will review and finalize the Action Plan into a national anti-corruption policy.

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