



DEFEND • PROTECT • EMPOWER

Capturing the Judiciary: Reality or Phantom?



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Introduction

The recent ruling by the High Court of Zimbabwe reversing the cancellation of vacancies by the same court and Zimbabwe Election Commission (ZEC) and further the reversal of the cancellation setting a new date for nomination for the six (6) constituencies has brought to the fore hitherto questions about the independence of the judiciary. Does this case add evidence to these allegations or rather strengthens assertions of independence? There can never be an exhaustive conclusive finding to these aspersions, at least not in this paper. Rather, the brief aims at opening further debate on what capture of state institutions really mean, principles or tenets of capture *vis a vis* the status quo in Zimbabwe. The brief builds a case around dwindling trust in all state institutions rendering national decisions subject to bi-polar reactions devoid of merit. This becomes the major conundrum going forward.

Defining judiciary capture

Alex Magaisa states that “The concept of judicial capture can be understood as the antithesis of judicial independence. In a broad sense, it describes a situation where the institution of the judiciary has lost its independence. In a narrower sense, it refers to a situation where individual judges have fallen under the control of private interests”

Sections 164 and 165 of the Constitution of Zimbabwe clearly spell out the need for non-interference with the Judiciary and principles guiding judiciary independence and the confidence derived thereof.

The merits of the MDC Alliance/PDP case

The PDP Members of Parliament were withdrawn from Parliament of Zimbabwe in 2021 after one of their members, purporting to be their Secretary General successfully withdrew them. On appeal to the High Court, the decision was reversed, albeit a day before Nomination Court sitting. The President had proceeded to proclaim the seats vacant ahead of the gazetted By-Elections slated for March 26, 2022 in full knowledge of the pending court case. In a turn of events, the High Court and subsequently the Zimbabwe Electoral Commission declared the seats not vacant a day before Nomination Court sitting on 26 January 2022. A different judge of the High Court, after appeal by the “Secretary General” of the PDP, reversed the earlier judgement, in the process ordering ZEC to reopen Nomination Court for the six constituencies.

Five quick controversies to note about the case;

1. The Secretary General claimant's *bonafide* right to the claim was never put under question in the Parliament of Zimbabwe;
2. The decision by the President of Zimbabwe to proclaim the election in the six constituencies regardless of a pending court decision;
3. The decision by ZEC to accept one decision of the High Court and disregard another by the same court;
4. The reversal of a fellow High Court judge's decision by another;
5. The ordering of ZEC to reopen the Nomination Court after closure and legal implications.

Who has the interests in the 6 constituencies? What are these interests?

20 of the 28 constituencies are MDC Alliance now rebranded to Citizens Coalition for Change (CCC), strongholds. The rebranded entity stands a chance to win the 20 constituencies and re-establish their presence in parliament as the main opposition. This will also allow them access to political parties funding. It can therefore be argued that delaying or creating confusion around the six constituencies was meant to derail this chance or possibility. If proven true, the hypothesis points to clear interests by ZANU PF and its controlled outfits to stop this possibility.

In fact, ZEC had already indicated that they need to explore the legal feasibility of re-opening the Nomination Court. However, this was a lame excuse by ZEC since in common law jurisdictions, High Court rulings are law in and of themselves. The timing of the judgement cancelling the vacancies in the 6 constituencies (just a few days before nomination) is highly suspicious. The counter High Court decision reversing the cancellation of the vacancies is even more suspicious. The High Court issued two contrasting decisions in a space of hours. ZEC deliberately chose to respect and implement one decision and to ignore the other.

Was it all planned?

Claims are abounded on what really transpired with most fingers pointing at the capture of the Judiciary working in cahoots with ZEC. The fundamental base for these claims is that the cycle of events within the 48hrs leading to the reversal of the ZEC decision(s) were well orchestrated to frustrate the opposition.

Is Rukanda now a legitimate member of the PDP party?

High Court judge Amy Tsanga in April 2021, dismissed the recall of members of the People's Democratic Party – Phulu (Nkulumane), Tendai Biti (Harare East), William Madzimume (Kambuzuma), Settlement Chikwinya (Mbizo), Sichelesile Mahlangu (Pumula) and Regai Tsunga (Mutasa South) noting that Rukanda, who claimed to be the PDP secretary-general, the legitimacy of his membership to the party was put to question and there was no finality of the same. Was the High Court then furnished with new concrete information that the Secretary General of PDP is Mr Rukanda?

ZEC powers to affect law making

The case on ZEC independence is largely built on the basis that they require the Minister of Justice to approve/facilitate their law-making function, without which they cannot directly interface with the Parliament of Zimbabwe for law making purposes. In a statement announcing the cancellation of Nomination Court seating for the six PDP constituencies the Chief Executive Officer of ZEC, Utoile Silaigwana, stated that “The proclamation calling for by-elections issued by His Excellency the president in terms of Statutory Instrument I of 2022 on 6 January 2022 is accordingly amended.” This by all means confirms the long-held suspicion that ZEC's insistence on limited law-making functions if therefore selectively applied. This is concretized by the fact that a day later, after another court ruling, ZEC turned around and said they need to check the legal feasibility of reopening Nomination Court which they did nevertheless.

<https://www.newsday.co.zw/2022/01/high-court-reverses-biti-5-others-parly-bounce-back/>

<https://www.businesslive.co.za/bd/world/africa/2021-05-16-zimbabwe-justice-minister-accuses-judiciary-of-being-captured/>

Reversal of High Court decision

Jacob Mafume of PDP claimed that “There has never been a High Court judge who has cancelled another judge's order. The ordinary thing is for people to appeal. We are surprised and in awe to whatever this development is. The same court cannot give contrasting orders within hours of itself”

Is there precedence of High Court reversing its own decisions? Are these signs of capture?

Capture claims as a political tool

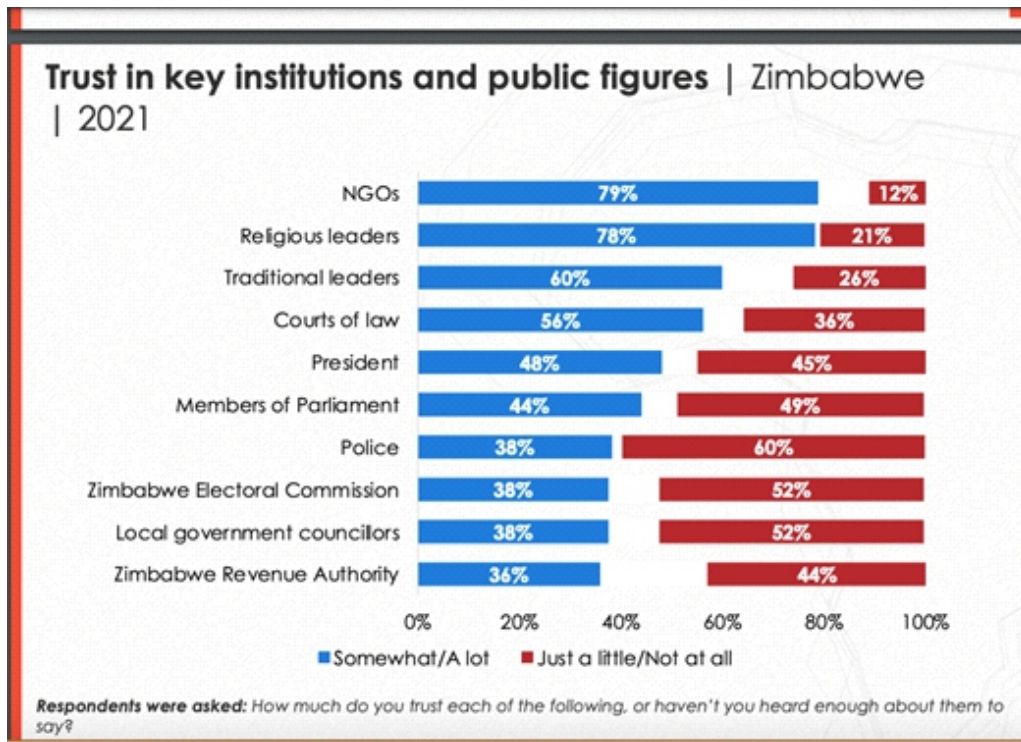
In 2020, when three judges said in a judgment that Luke Malaba had ceased being a judge and chief justice after he turned 70 years old, Zimbabwe's Justice Minister Ziyambi Ziyambi accused the country's judiciary of being “captured” by foreign forces seeking to destabilize the government after the High Court ruled it was illegal to extend the tenure of the chief justice by five more years. However, the state had no basis to this claim but only as an intimidation tool and excuse for the events that followed eventually reinstating the Chief Justice. The by elections scenario, however, seems to offer more evidence to capture, either of the whole system or of individuals within the system.

Signs of a divided state

Two important factors to consider;

I. Diminished Trust

Zimbabweans do not trust their national institutions, rather rendering their trust to NGOs and religious leaders. Trust in ZEC is at 38%, 10 points lower than it was in 2016. However, slightly above half of Zimbabweans (56%) still have trust in the courts of law.



Available at: https://afrobarometer.org/sites/default/files/zimbabwe_r8_diss_l-zs-bh-11june2021finalreleaseversion.pdf

2. Political Polarisation

Another sign of a divided state is high levels of polarization. Decisions of national institutions never find common resonance with the population depending on who they seem to favour.

In the end...

Clear concise answers to the recent decision decisions by both the High Court and the Zimbabwe Election Commission might not be availed in the nearest future, if not ever. However, what is clear is that these decisions are made in context, hardly in law and practice nor precedence. They mirror the divided society, a divided nation. A proceed with caution scenario...

ABOUT US

Citizen in Action Southern Africa (CIASA) is a registered apolitical and citizen's rights focused organisation established by a group of young human rights defenders and activists coming together to defend, promote and empower marginalised and disenfranchised community groups in its diversity to fully enjoy their rights. The organisation was registered in 2020 as a Trust. The **CIASA** formation was meant to tackle important issues at a scale where it can achieve significant and measurable impacts. The **CIASA** was formed after the realisation that marginalised community groups are being left behind in the empowerment, democracy and governance, and national development discourses of several Southern African countries owing to lack of specific targeted interventions and investments for vulnerable groups particularly youth and women. The team who established **CIASA** also recognised the solidarity and movement building crisis ailing countries in addressing national crisis especially lack of proper democratic and economic governance interventions targeting diverse youth and women and girls in marginal setups such as hard-to-reach rural areas, resettlements and other economically excluded areas. **CIASA** was established immediately to provide oversight and think tanking around the welfare and rights of marginalised groups with a sole purpose of ensuring progressive realisation and enjoyment of rights by all. The organisation work with citizens in low living standards where social harmony for marginalised women is threatened. Access to basic social services such as water and sanitation, health and education have turned out from being a right into a privilege in both rural and urban areas. **CIASA** is therefore influencing the policies as it relates to the rights of women and girls in their diversity and advance the rights-based and pro-people approach to political, social and economic empowerment through well-thought citizens or community-driven and led reforms premised under the principles of transparency, accountability, democracy and good governance. The organisation is there to create and facilitate space for citizens and communities to have a collective voice to challenge oppressive systems and structural barriers and in turn effectively participate in key decision making processes across the cultural, political, social, environmental, technological and economic spectrum. **CIASA** communicates and measure its results based on its theory of change framework which seeks to defend, promote and empower citizens in all spheres of life.



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