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Comparing legal activism in Zimbabwe and Zambia

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Battles over democracy are manifested in contestations over legal frameworks and within judicial institutions. Lawfare refers to the strategic use of law and legal institutions by actors in civil and political society to advance their political goals. We focus on one aspect of lawfare, 'street level' lawfare, instances where the law is mobilized discursively in the press or on the streets to raise attention and persuade a democratic deployment of the law. Comparing Zambia and Zimbabwe, we ask why, despite a far more authoritarian political trajectory, legal strategies have been more effective in struggles for political space in Zimbabwe than in Zambia. We analyse how lawfare for political space has played out historically. Further, we ask how people engaged in legal mobilization remain motivated focusing on their background and formation. Finally, we discuss their support networks, from international donors and national and transnational civil society linkages.

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Contents

1	Introduction	5
2	Comparative Context: A Question of Timing?	7
2.1	Zimbabwe.....	7
2.2	Zambia.....	9
3	Legal Education and Professionalism	13
4	Activism and Donor Funding	16
4.1	Zimbabwe.....	16
4.2	Zambia.....	18
5	Legal-Judicial Operations	20
5.1	Zimbabwe.....	20
5.2	Zambia.....	23
6	Conclusion.....	27
7	References.....	28

1 Introduction

The contestation between authoritarian governments and countervailing forces of democratic resistance has reared its head across many countries and political arenas, including in the courts. Tensions are particularly high given the global context of democratic backsliding – following a brief period of liberalization during the Third Wave of democracy. According to the Varieties of Democracy (V-dem), the global wave of autocratization is accelerating and deepening (Maerz et al. 2020). Across the globe, autocrats are becoming increasingly innovative and ruthless in maintaining their clutches on power. The strategic use of law by autocrats is a key mechanism for the incremental erosion of democratic rights witnessed (Bermeo, 2016; Hug and Ginsberg 2018). Thus, in many countries battles over democracy are manifested in contestations over the legal framework and within judicial institutions. In particular, certain processes by which the legal-judicial complex operates to advance domestic political ends fall under an analytical classification known as “lawfare”, the strategic use of law and legal institutions, by actors in civil and political society as tools to advance their political goals” (Gloppen 2018, p. 1-2). Lawfare includes strategies aimed at formal changes in laws and regulations (legislative lawfare); attempts to use the law ‘as is’ in courts/tribunals (court-centered lawfare); as well as more informal strategies where law...is mobilized discursively in the press or on the streets (socio-discursive lawfare) to raise attention and persuade (Gloppen 2018, 1-2). In this paper we focus on the last aspect of lawfare, the democratic deployments of ‘street level’ lawfare. We examine the neighboring countries of Zambia and Zimbabwe and we aim to understand why, despite a far more authoritarian political trajectory, legal strategies have been more effective in struggles for political space in Zimbabwe than in Zambia.²

Situating ‘street level’ lawfare (or legal activism) by democratic and public interest minded members of the legal profession, the judiciary, and the public in the country specific contexts of Zimbabwe and Zambia, we acknowledge that legal activism is more evolved in Zimbabwe, given the historical differences in their political struggles. But, we are interested in the factors that made lawfare in Zimbabwe impactful. As Zambia’s regime is eroding toward autocratization (Sishuwa et al. forthcoming), this question has become more pertinent and Zambian activist lawyers are increasingly looking across the borders for examples how to effectively organize legal warfare.³ In this article, we analyse how lawfare for political space played out historically and in which context specific operations have been undertaken. Further, we ask how people undertaking legal mobilizations remain motivated

² Fieldwork was carried out in 2018-2019, since then the political situation in Zimbabwe has deteriorated significantly.

³ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020.

focusing on their background and formation. Finally, we discuss their support networks, from international donors and national and transnational civil society linkages.

Our research is based on thirty-one interviews with lawyers, university lecturers, legal activists, civil society leaders and donors in both countries, personal observation by of one of the authors in Zambia's legal sphere, in addition to existing literature.⁴ Following this introduction, the second section briefly presents the historical background of the two countries with respect to legal activism. We then proceed in section three to discuss differences in legal education and professionalism, followed by a comparison of legal activism and donor support and legal-judicial operations in section four. A comparative analysis of the two country cases is presented in section five before section six concludes our analysis.

⁴ Due to the current security situation, we keep the identities of the informants anonymous. The interviews were conducted in Zimbabwe in November 2018 and November 2019 and Zambia in March and April 2020.

2 Comparative Context: A Question of Timing?

Zimbabwe is a precursor in legal activism, given its history of persistent and remarkable lack of democratic space, even from its very origins of independence struggle. The country's legislative framework and corresponding judicial institutions – hence coined “legal-judicial complex” – thus became battlegrounds for democratic contestation by necessity and under repeated trial by fire. In Zambia, on the other hand, strategies of lawfare were hardly given a chance to mature granted the country's relatively abundant democratic space and alternative routes for activism. This situation, however, is subject to change with the presently-in-power Patriotic Front (PF) willing to display increasingly nefarious tactics leading up to the 2021 presidential election.

2.1 Zimbabwe

Zimbabwe was formed following the armed liberation of then-rebel groups Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU) from the settler-led Rhodesian government, eventually mediated in the 1979 Lancaster House Agreement. The resulting Lancaster House constitution was, from its drafting process, cited as non-responsive to the needs and rights of common people and furthermore not adopted via popular consultation. Although ZANU proceeded to win Zimbabwe's first elections as an independent state, a violent civil war between itself and ZAPU continued to determine *de facto* control over resources and power. Zimbabwean citizens – especially ZAPU supporters – were targeted for atrocities and human rights violations such as the Gukurahundi massacres as a part of ZANU's bid for electoral dominance (Dorman 2016).

The end of the civil war in 1987 and formation of Robert Mugabe's consolidated ZANU-PF party sparked a series of new, yet similarly motivated, authoritarian grasps for power. These practices selectively rewarded consistent supporters and punished groups even remotely associated with former rivals, and attacked the newly formed Movement for Democratic Change (MDC) opposition formed under Morgan Tsvangirai in 1999. Repression grew to be increasingly unbearable as the years passed – incidents of police, party cadres, and other under-the-table actors carrying out campaigns of systematic violence across the country have been well-documented (Davidson and Purohit 2004, Human Right Watch 2008). International actors have condemned the actions of ZANU-PF as undemocratic, most notably suspending Zimbabwe from the Commonwealth of Nations due to its violations of principles within the 1991 Harare Declaration (Ibid). Even the Judiciary of Zimbabwe, still a fiercely independent and respected institution in 2000, was unable to intervene when executive-aligned police units refused to enforce a series of court orders protecting the land rights of white farmers (Human Rights Watch 2008). Some elements of the judiciary have since been co-opted to seat judges who have benefited from the patronage of ZANU-PF; other elements have been directly harassed and attacked and forced to step down for defying the ruling party's interests (Davidson and Purohit 2004).

Three significant areas of legal activism were fostered in Zimbabwe's general atmosphere of repression. First is the formation of the National Constitutional Assembly (NCA) in 1997. The NCA is described to be a "large coalition of human rights organizations, churches, trade unions, women's groups...[and] formed on a platform for a new constitution containing greater rights protections."(ibid) Included within the NCA's consortium was a panel of lawyers and legal experts who were engrossed with fighting the government-led Constitutional Commission (CC) over the individual items contained in the collective revision of the constitution. Although the CC was able to gain the upper hand in submitting a new constitution omitting many of the suggestions advocated for by the NCA, the latter was able to score a stunning defeat of the ruling party by organizing a campaign and securing a majority against said changes in the popular referendum. The CC's proposed constitution, containing clauses that enhanced presidential powers and granted government the right to re-appropriate land (read: land belonging to white farmers) for national purposes, was soundly defeated with 54.7% of votes against (Mudede 2000). It is furthermore important to note that the NCA proceeded to evolve into a full-blown opposition party, the Movement for Democratic Change (MDC) (Davidson and Purohit 2004). The programmatic deliberation between the parallel processes of the NCA versus the CC, as well as a campaign in which lawyers worked in coalition with civil society and religious organizations to strike down the constitutional change in the referendum, forewarned how serious a challenge organized strategies of legal activism could pose to ZANU-PF's authoritarian regime.

In the period from 2000 to 2004, ZANU-PF's persistent infringements upon Zimbabwean judicial independence was met by a wave of activist judges whom may be remembered by their resolute defiance via court decisions. Judges at all levels of the judiciary, but in particular the High and Supreme Courts, stood against ZANU-PF's campaign to reallocate land originally belonging to white farmers to party supporters. In 2000, Justices Paddington Garwe and Moses Chinhengo both ruled against government cadres squatting on such lands, even when police failed to act in enforcement of such orders (Human Rights Watch 2008). The issue culminated in 2001, when Chief Justice Anthony Gubbay was handed a vote of no confidence by the Minister of Justice on unsubstantiated grounds of aiding and abetting racism. Gubbay's resignation was followed by the encouraged resignation of the entire bench of Supreme Court judges. These actions, while resulting in the dwindling of independence and capacity for the Zimbabwean judiciary, nonetheless signaled a willingness to take a stand against the abuse of power by the executive. The symbolic power of Justices Garwe, Chinhengo, Gubbay, and others all serve as a reminder of the agency of the judiciary in campaigns of legal activism for democratic space.

One final area of legal activism belongs to non-governmental activists themselves – most notably spearheaded by the mission and operations of the Zimbabwe Lawyers for Human Rights (ZLHR). Founded in 1996, ZLHR has, besides its extensive provision of legal aid, employed strategies of direct strategic litigation, institutional and financial support for civil society, and movement organization in

fighting back against authoritarian encroachments and rights violations. Although consistently staffed by fewer than 200 individuals, ZLHR has been able to take on high profile cases such as the defense of student activists, the Women of Zimbabwe Arise organization, fellow lawyers, and MDC officials – including Morgan Tsvangirai himself in 2007 (ZLHR 2010). ZLHR employees, as well as all members of the legal profession working on political court cases, were often targeted and harassed on equal footing as their clients. For instance, two lawyers known to frequently represent MDC were arrested by the police on the pretenses of “attempting to defeat the course of justice through a falsehood during the course of bail application” (Human Rights Watch 2008). ZLHR nevertheless continued onward in its work, ultimately setting both a regional and international precedent in benchmarking the quality of effective legal activism on a street-level.

2.2 Zambia

Zambia’s re-introduction of multi-party democracy in 1991 marked an end of Kaunda’s soft-authoritarian rule, but with the absence of constitutional reforms to accompany this transformation, presidential executive powers persisted. Jeremy Gould documents the authoritarian lawfare in which the Movement for Multi-Party Democracy (MMD)’s Frederick Chiluba mobilized the legal-judicial complex for self-serving ends (Gould 2011). Chiluba authorized operations such as the arrest of several members of the opposition United National Independence Party (UNIP) following the Zero Option suspected coup (1993), the harassment of the Lusaka newspaper *The Post* using frivolous defamation and slander lawsuits (1991-1996), and the public debacle Black Mamba treason trial against eight senior UNIP officials (1996). He then proceeded to ramp up the stakes by sponsoring a constitutional amendment in 1996 that proposed to drastically broaden executive powers, including a clause granting himself discretionary ability to dismiss judges. The passage of the 1996 Constitutional Amendment, despite being watered down following pressure from various elements of the judiciary, opposition elites, and civil society, cast a permanent shadow upon Chiluba’s manipulation of the legal system to his own gain. These tensions subsequently came to a head with Chiluba’s talks of standing for a third presidential term in 2001.

It was only at this later date that democratic activists hastily, but nonetheless magnificently, organized a legal-judicial response in kind. Gould writes:

The two-term limitation on presidential tenure in the 1996 constitution proved to be Chiluba’s undoing...This is what finally compelled the legal profession to raise its collective voice. In early 2001, the law Association of Zambia (LAZ) became instrumental in forging an alliance with Zambia’s three Christian church bodies (the Catholic, Protestant and Evangelical umbrella organs) and the NGOCC to mobilize mass action against Chiluba’s Third Term bid. This loose coalition called itself the Oasis Forum (Gould 2011, 437-438).

The Oasis Forum set the foundation of legal activism aimed to preserve Zambian democracy. Whereas prior actors had conducted piecemeal actions to mitigate the effects of MMD's legal encroachments – e.g., Secretary General of the Zambian Democratic Congress Derrick Chitala's twofold attempts to instigate judicial review against the 1996 Constitutional Amendment and several prominent constitutional lawyers' rallies to aid the defendants of the Black Mamba trial – the Oasis Forum held frequent mass public meetings with civic actors and politicians to coordinate the “No Third Term Campaign”. The No Third Term Campaign largely relied on what could be classified as a means of socio-discursive lawfare – public pressure and awareness in order to protect the integrity of the law – in ensuring Chiluba remained bound to the Constitution's two-term limit. The Oasis Forum-led street protests of citizens wearing green ribbons and behind the scenes threats of MMD members of parliaments seeking to defect subsequently forced Chiluba to step down. The Oasis Forum's preeminence eventually came to an end following an embezzlement scandal and financial mismanagement in 2006. Writing in parallel with Gould and in hindsight, Sishuwa provides an alternative interpretation of the Oasis Forum's legacy (Sishuwa 2020). He shows that other elements undermined Chiluba's attempt at a third term, most notably high-level officials and Members of Parliament internal to Chiluba's MMD, as well as a military resistance to Chiluba's third term. Given the existence of these two factors, it is perhaps not surprising that Chiluba privately stated that he was unafraid of the pressure that members of the legal profession and civil society was placing on him (Ibid). Arguably, given Zambia's democratic space since the political transition of 1991, the development of a culture of legal activism may be regarded as less pressing. Nevertheless, the Oasis Forum's shortcomings and embeddedness within otherwise abundant areas of democratic space attest to the unrefined nature of democratic lawfare practiced in Zambia.

The election of the Patriotic Front (PF) in 2011, which largely rode on the civil society platforms and governance concerns, ironically had the effect of clamping on civic space. The PF took a multi-pronged approach in relation to dealing with critical CSOs. On the one hand, it sought to co-opt those who were willing to join its ranks. This had the effect of weakening and diluting the voice of CSOs and casting doubt upon its legitimacy. On the other hand, the PF aggressively persecuted CSO critics it could not co-opt.⁵ To further clamp on civic space, the PF decided in 2012 to implement the Non-Governmental Organisations Act passed but not implemented by the MMD government in 2009. The Act imposed onerous registration requirements that would effectively bring NGOs under

⁵ The arrest and prosecution of Foundation for Democratic Process (FODEP) Executive Director, MacDonald Chipenzi for spreading false news against government, for example, should be under from this perspective. See the case of MacDonald Chipenzi and Others v The People HRP/03/2014 (Judgment of 4 December 2014)

the control of the government. More specifically, the PF government targeted the Law Association of Zambia, twice attempting to either disband it through legislation or sponsor a splinter association.⁶

The authoritarian tendencies of the PF government not only sought to undermine the capacity of CSOs to mobilise, but is also manifested in various attempts at undermining independent public institutions. Most notably, and displaying the use of legal mechanism so prevalent in processes of democratic backsliding across the globe, the judiciary has been the subject of intimidation and co-optation. To illustrate, in 2012, President Sata suspended and commenced the process to remove from office three judges who had made decisions against the business interests of his allies (Ndulo 2018). The establishment of a new Constitutional Court, without a transparent appointment system of judges, has allowed the government to pack the Court, which handles almost all political cases, with pliant judges.⁷ In 2019, the government forced the resignation of the acting Auditor General, who had revealed massive cases of corruption,⁸ The director and board members of the Financial Intelligence Centre, which had been effective in uncovering cases of corruption by government officials, were targeted by the government from 2016 to 2019, when the government refused to renew the terms of office of the board members.⁹ To further entrench its stranglehold on civic space, the PF government in June 2019, drafted a Constitutional Amendment Bill (commonly known as Bill 10),¹⁰ which seeks to increase presidential powers and further undermine the role of the other arms of government and oversight institutions.¹¹

It is under these circumstances of constrained civic space that activist CSOs appear to be reviving the erstwhile vigor, though with limited capacity, resources and success. The civics are currently engaged in several attempts to broaden civic space and confront the government's authoritarian tendencies. The establishment of Chapter One Foundation, a public interest litigation firm trying to mirror the ZLHR, in 2019, gives expression to this spirit. Chapter One Foundation and LAZ have been instrumental in mobilizing against Bill 10, by both petitioning the Courts to block it and holding public forums to sensitise the people.¹² It should be noted that although many CSOs have been weakened since 2011 when the PF assumed office, this has not prevented some of them from waking up from that slumber and are now, with limited capacity, mobilizing to expand political space.

⁶ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020.

⁷ Article 127 Constitution (Amendment) Act no. 2 of 2016

⁸ <https://diggers.news/local/2018/06/29/state-house-downplays-resignation-of-auditor-general/>

⁹ <https://www.lusakatimes.com/2019/09/10/fic-boss-john-kasanga-fired/>

¹⁰ Constitution of Zambia (Amendment) Bill No. 10 of 2019

¹¹ Ibid.

¹² See the case of Law Association of Zambia and Chapter One Foundation Limited v Attorney General 2019/CCZ/0013/0014. For a discussion of the case, see Pamela T Sambo and O'Brien Kaaba (2020). It should be pointed out, however, that in July 2020, a new LAZ Council came into office and so far shows less commitment to champion the rule of law.

Considering that the government has been increasingly using legal mechanisms to target civil society and to shrink political space, CSOs are increasingly reviving legal activism in trying to contain the encroaching authoritarian tendencies of government.

The question of timing looms over Zambia's legal activists now more than ever. It appears inevitable that they will need to adapt to the threats against democracy posed by an ever-transgressing PF leading up to the heavily contested 2021 presidential election.

3 Legal Education and Professionalism

Salisbury, capital of Southern Rhodesia (Zimbabwe), was the hub of the Central African Federation. The Federal Parliament was based there, as well as the only university for Northern Rhodesia and Nyasaland (current day Zambia and Malawi). Possessing a history of settler colonialism, Southern Rhodesia developed a much higher state capacity than other colonial states. It had a strong and well-educated judiciary which judgments still set precedent to date. The protracted liberation war (1965-1980) resulted in radical activism. Mugabe, a strong believer in education, invested heavily in this sector, expanding schooling for the African population while leaving the previous white elite schools in place. The University of Zimbabwe became an intellectual hub, but also a hotbed for radical thought, protest and activism. This in turn shaped the law school. The spokesperson of MDC, a lawyer himself, gained experience by being a student leader in the 1990s protests against ZANU-PF authoritarian rule. By then 'academic space was infiltrated, killed and there was a paucity of critical research.'¹³ One place of continued independent thought was the UZ's law school which 'employed some radical Marxist-Leninist lecturers, who taught us how to fight the system.'¹⁴ Graduates from UZ's law school were not only prepared for corporate law, but because of heavy donor investment in Zimbabwe's legal sector (see below) graduates had options to become human rights or constitutional lawyers, or to be active in legal aid. Specialization was an option in Zimbabwe. Moreover, those who opted to become corporate lawyers receive the necessary support to engage in public litigation.¹⁵ The University of Zimbabwe was impacted by SAP and economic crisis from 2000s onward, which has resulted in a brain drain as well as law lecturers working part-time in combination with private practice. In the words of a senior lecturer: 'currently the faculty is under very young leadership... we are the oldest university but with the youngest faculty. That has a bearing on the kind of legal education we provide to young ones.'¹⁶

By contrast, Zambia's liberation struggle was short-lived. After the dissolution of the Federation and Zambia's independence Kaunda invested in education, but favoured an egalitarian system rather than the elitist approach as in Zimbabwe. The University of Zambia (UNZA) was established in 1966 and the programme of legal education commenced in 1967, producing the first graduates in the early 1970s. Zambia's official ideology was Kaunda's Humanism. This led to a scenario, where according to Chan the rights-based approach became limited:

¹³ Anonymous, former political party spokesperson, interview by author, Harare, November 2018.

¹⁴ Ibid.

¹⁵ Anonymous, several corporate lawyers, Harare, November 2018.

¹⁶ Anonymous, Senior Law Lectures at University of Zimbabwe, 27 November 2019.

[...] the language of *Zambian* politics is not about rights. Perhaps this is the legacy of Kenneth Kaunda and his moralizing philosophy of Humanism. The language of *Zambian* politics is about the internal morality of the nation – which it is the role of the state to safeguard. Morality is, however, often personalized, so that debate becomes an inquisition as to which person is moral or immoral, and it is the role of the state to punish those persons found immoral as verified by constitutional provisions (Chan 2013, 14).

The brief era of radicalism at UNZA during the 1970s was mainly fed by the lecturers who were part of the southern African liberation movements, notably ANC in exile (Hugh MacMillan 2014). After Zambia lost its position as a frontline state and combined with the effects of a sharp economic downturn in the 1980s and neo-liberal reforms of the 1990s, radicalism at UNZA waned. From 1980s the emphasis was on corporate management of UNZA, UNIP political interference increased and, aided by depleted salaries, the brain drain set in. Law education was now mostly geared towards the production of corporate lawyers and government bureaucracy. In reality, there was no market for specialization in Zambia. Human right interest during the 1990s was mostly based on individual action of lawyers/lecturers like Prof Chanda and through the Law Association of Zambia (LAZ). In the instance of the OASIS Forum activism, lawyers unusually acted as a collective. Lack of emphasis on postgraduate studies at UNZA equally explains the absence of specialization and intellectualism. Those *Zambian* legal scholars who studied abroad, were far more exposed to human rights law and legal activism. These include former UNZA lecturer, Muna Ndulo, who remains an influential thinker from abroad by advising LAZ and supervising and mentoring *Zambian* academics.

Not only is there a general lack of interest in law and society, but as noted above, it was never as urgent given *Zambia's* democratic space. Legal activism was strong around the end of the UNIP, one-party era, but lost momentum with the democratic turn. With an increase of authoritarianism since 2011, human rights law has found a place in *Zambia* but without the structures that are place in *Zimbabwe* and other countries in the region.¹⁷ It has marked a shift in legal activism. In recent years, UNZA has introduced human rights and environmental law, with a (re) emphasis on the connection between law and society.¹⁸ Also the emergence of public interest litigation organisations, like Chapter One Foundation, which utilizes regional structures like Amnesty International, OSISA and ZLHR. The difference between donor support for legal activists in both countries is striking and partially explains the levels of engagement. As will be elaborated below, while *Zimbabwean* civil society organisations still receive significant amounts of funding from western donors given the political and

¹⁷ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020

¹⁸ Anonymous, Lecturer at University of Zambia, Lusaka, April 2020.

economic situation, the funding to *Zambian* civil society has significantly diminished over the years following its democratic trajectory and attainment of lower middle-income country status.

4 Activism and Donor Funding

4.1 Zimbabwe

Legal activists in Zimbabwe usually operate through civil society organizations or professional bodies like the Law Society of Zimbabwe. These invariably have limited capacity to raise internal resources for the scale of activism needed. The Zimbabwean government does not fund civil society organisations. As a result, many civic organisations rely heavily on foreign funding to run their programmes. This collaboration between Zimbabwean CSOs and foreign funding agencies goes several years back into the colonial history of the country. For example, the National Association of Non-Governmental Organizations (NANGO) which was founded in 1962, while Zimbabwe was still under colonial rule, was heavily funded by some international donors such as the EU and the German Development Cooperation (EU 2013, 8).

The funding has generally been increasing over the years and has allowed CSOs in Zimbabwe to be well organized and coordinated. (Ibid) For example, between 2009 and 2019, the EU and its member states provided to Zimbabwe, mainly through CSOs, more than \$1 billion in development assistance focused mostly on the provision of social services and food security, reinforcing democratic institutions, and fostering economic recovery. (EU 2019) The EU and the UK have been the largest donors to Zimbabwe, not only in terms of providing funding for social services but also contributing significant funding to CSOs in form of democracy and governance support. Apart from these two, the Swedish government contributed around \$170 million to democracy support programmes, while Norway contributed \$60 million between 2009 and 2019 (ibid., 19). The other major donors who provide significant support to CSOs in Zimbabwe include USAID, Netherlands, Switzerland, Denmark, Germany, Czech Republic, Australia, Norway, and UN Agencies such as the UNDP (Ibid). CSOs such as the Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights (ZLHR), which have been at the heart of legal activism, have received significant funding over the years, which has enabled them to develop into vibrant and resilient institutions, with capacity to resist encroachment or capture by the ruling government.¹⁹ Apart from funding staff and overhead costs, donor support has given such CSOs international exposure and unparalleled technical skills, which have allowed the activists to bring the democratic issues affecting Zimbabwe successfully to international fora such as the African Commission on Human and Peoples' Rights and various UN human rights process.²⁰ The heavy reliance on donor funding has, however, exposed CSOs to criticism and attacks from the ruling ZANU-PF, accusing them of supporting the Western agenda

¹⁹ Anonymous, legal activist and scholar, interview by author, Harare, 25 November 2019; and Anonymous, director of Zimbabwean legal organization, interview by author, Harare, 27 November 2019.

²⁰ Ibid

of regime change,²¹ or as one activist has stated: ‘They are often accused of being mouth pieces for donors.’²²

The volume and nature of donor support in Zimbabwe is often influenced by political developments in Zimbabwe, as well as policy changes in the donor countries. Between 2000 and 2008, following the ZANU-PF land invasions from white farmers, gross human rights violations, and generalized democratic backsliding, foreign donors substantially increased funding to CSOs. Most of the funding went towards supporting the human rights and democracy agenda in Zimbabwe. During this period, emphasis was placed on good governance, accountability, human rights and electoral integrity support (EU 2019, 13). This was a golden period for CSOs as they acted as a major player in fighting for the restoration of democratic government. However, following the Government of National Unity that was established after the disputed elections in 2008, and the ensuing relative stability, there was a reduction in donor funding for activist CSOs (Sachikonye 2019). The reduction in donor funding was further affected by the elaboration of the constitution in 2013 and the holding of elections in the same year, generally considered to have been a reflection of the will of the people. Following the adoption of a new constitution and successful 2013 elections, many donors, including the EU, moved towards an agenda of re-engagement with the Zimbabwean government, viewing these developments as a marked improvement in the right direction (EU 2019). The donors took the view that the government needed to take a leading role in order to achieve necessary political reforms towards democratization. This had the consequence of reduced funding to CSOs and dedicating some resources to direct engagement with the government by the donors (Sachikonye 2019, 4).

The recent reductions in funding to CSOs has coincided with budget cuts in most Western countries, arising from growing skepticism about the value and effectiveness of foreign aid. This situation has also been compounded by a growing skepticism and backlash against democracy related funding. (EU, 2019, Hyde, 2020). It is estimated that since 2008, there has been a reduction of about 80 percent funding to activist CSOs by donors (Sachikonye 2019, 4). The ZLHR, for example, had an annual budget of about \$5million for its operations and overheads, which was fully met by donors until 2013. Since then, the funding has been declining and in 2019, it only managed to secure \$3million.²³ Despite this reduction, compared to other Sub-Saharan African countries, Zimbabwean CSOs are still receiving substantial donor funds and are still vibrant.²⁴

²¹ Dutch Ambassador to Zimbabwe, interview, Harare, 28 November 2019.

²² Anonymous, University law lecturer, Harare, 27 November 2019.

²³ Anonymous, director for Zimbabwean legal organization, Harare, 27 November 2019.

²⁴ Anonymous, former director for Zimbabwean legal organization, Harare, 25 November 2019.

4.2 Zambia

Compared with to their counterparts in Zimbabwe, legal activists in Zambia either operate on an individual basis or in collaboration with civil society organizations (with the exception of Chapter One Foundation). They receive little financial support from the Law Association of Zambia and no funding from the Government of Zambia. They have limited capacity to raise internal resources for designated operations. Zambian legal activists are heavily reliant upon foreign donors for support.

The international donor presence in Zambia is lower than in Zimbabwe. Despite Zambia being a top recipient of state-to-state donor aid in the early-to-mid 1990s, it has received less attention and quantity of funding since 2005 (Rakner, 2013): Zambia attained the World Bank status of Middle-Income Country (MICs) in 2011, largely due to sustained economic growth on the back of high copper prices, and thus does not qualify for economic and sectoral support meant for poorer countries. Zambia are not affected by humanitarian crises of comparable scale and urgency compared to neighbouring countries. Zambia also holds a relatively stable democracy and human rights situation compared to others. The 2005 Paris declaration and subsequent donor harmonization paved the way for reductions in the amount of state-to-state funding directly available to the country. The collective donor conclusion, however, may have been drawn to soon given the trend of increasingly authoritarian practices by Zambian ruling parties post- 2011. Some foreign institutions, including those with mission statements designated toward monitoring democratic spaces (e.g., the Carter Center), have begun to pay more attention to this trend. The quantity of donor funding, however, has yet to substantively increase.

Support to the legal-judicial sector, compared with larger sectors such as public health, is a comparatively low priority for existing donors in Zambia. The U.S. government, for instance, paid \$440.48 million dollars in foreign assistance to the country in 2019. Of this funding, \$433.13 million was allocated to the health sector whereas only \$1.5 million was provided to democracy, rights, and governance (US Foreign Assistance 2019). The legal-judicial sector took a percentage split within the total DRG funding. As another example, the World Bank has primarily funded research on Zambia's Commercial Court as a part of its Ease of Doing Business Report (World Bank 2019). Although the World Bank does host occasional programming related to legal-judicial development, its FY19-23 Country Partnership strategy does not list any form of legal or judicial intervention as an objective (World Bank 2018).

International donors may be reluctant to fund legal activists because of recent, high profile diplomatic disputes with the Zambian government. The German Ambassador received a clear rebuke from the ruling party after publicly voicing his disapproval of clauses within the highly controversial Bill 10 Amendment at the end of 2019. The U.S. Ambassador was declared persona non grata for his public speech decrying the status of corruption and the lack of adherence to LGBTQ rights in the country. The act of banishing any diplomat, let alone one originating from one of the country's largest sources

of foreign assistance, carried real weight in conveying the ruling party's message of 'asserting sovereignty.' Any attempt to influence the domestic politics of Zambia, but especially in a way that could be tied to the jeopardization of the ruling party's hold on power, would carry the consequences of diplomatic meddling. In this regard, funding legal activism may be considered a no-go zone.

Nevertheless, one of the largest sources of donor funding to the Zambian legal-judicial sector is the Programme for Legal Empowerment and Enhanced Justice Delivery (PLEED) project.²⁵ A multi-million dollar per year project with plans to continue beyond 2021, PLEED is co-sponsored by the European Union (EU) and the German Agency for International Cooperation (GIZ). PLEED provides critical support for Access to Justice in Zambia, making interventions at all levels of the judiciary, affected constituent communities, and the Legal Aid Board. It is engaged with prison, police, and paralegal training and institutional reform.²⁶ These tasks, although not directly tied with the ends of any particular sources of legal activism, are nonetheless relevant to advancing public interest law and the legal profession.

PLEED's work at the community and local level and holds high potential for legal activism in the long-term. It partners with civil society organizations such as the Danish Institute for Human Rights (DIHR) and UP Zambia, both of which retain lawyers or legal advisors on their staff. Such collaboration, albeit bringing an indirect stream of funding, nonetheless highlights a linkage between public interest legal professionals and broader civil society. Experience and training for lawyers along this line of work may build future capacity for activist purposes. An informant described PLEED as emblematic of international donors' overall strategy of shifting away from direct intervention upon any sector related to governance and instead toward the fostering of endogenous changes through civil society and broad-based movements.²⁷ Even though the Zimbabwean ZANU-PF has caught on and criticized this strategy, the Zambian PF has yet to do so. It is through this fashion that an indigenous Zambian strain of legal activism may potentially arise. Yet, in the short term, with donors cowed from diplomatic backlash and existing activists underfunded, legal activism cannot be sustained without significant increases in external support.

²⁵ Anonymous, Legal Advisor at International Human Rights NGO in Zambia, Lusaka, April 2020.

²⁶ Anonymous, Legal Advisor at International Human Rights NGO in Zambia, Lusaka, April 2020.

²⁷ Anonymous, Donor for PLEED, Lusaka, April 2020.

5 Legal-Judicial Operations

Legal activism occurs within a specific legal system, professional culture and country context. Legal rules, for example, of legal standing, determine who can file an action in court and the existing scope for public interest litigation. Restrictive rules of standing entail that very few cases of public interest litigation can be lawfully undertaken. Professional culture relates to the values the profession lives by and shape their interactions with the larger community and inter se. In a culture where the legal profession is narrowly focusing on the interests of the regulation of lawyers, it may develop practice rules that inhibit legal activism and further embolden a culture of detachment from larger societal concerns. As will be discussed below, Zimbabwean law appears expansive in scope in terms of legal standing and, as a result, legal activists can take up matters of public interest litigation. The Zimbabwean legal profession also seems to be more outward looking and continually engaging in matters of public interest. The Zambian law, in contrast, is restrictive on legal standing especially when it comes to human rights matters. The Zambian legal profession also seems to be more inward looking and detached from political contestations. In comparing the specific examples of operations of legal activism, it will be shown how these play a role in shaping the extent and possibly success of enlarging political space through legal activism.

5.1 Zimbabwe

Activist CSOs and individuals in Zimbabwe have been at the heart of expanding political space or staving off diminishing political space. They have been very active in the process of constitutional reform and the enacting of a relatively more progressive constitution, public interest litigation about enforcement of human rights, urging for a transparent, accountable, fair and democratic electoral processes as well as shining the spotlight before international fora on the situation in Zimbabwe. In defending human rights, CSOs, especially the Zimbabwe Lawyers for Human Rights (ZLHR), have defended activists who have been persecuted, tortured or detained for criticizing the ZANU-PF regime. This has often meant providing legal representation (both locally and before international human rights bodies), providing safe homes for safe-havening activists, and in extreme cases, facilitating the rescue of activists into other jurisdictions.²⁸ In many cases, the victims were awarded compensation.²⁹

The success of legal activism in this respect is partly due to permissive rules of standing under Zimbabwean law, which allow for public interest litigation, as well as a legal culture that is broadly engaged in public discourses. In terms of legal standing (*locus standi*), the Zimbabwean Constitution

²⁸ Anonymous, former director at Zimbabwean legal organization, Harare, 25 November 2019; Anonymous, director at Zimbabwean legal organization, Harare, 27 November 2019.

²⁹ Anonymous, director at Zimbabwean legal organization, Harare, 27 November 2019.

is expansive in allowing several interested categories of persons to commence an action in order to vindicate constitutional rights. Those competent to commence action are: a) any person acting in their own interests; b) any person acting on behalf of another person who cannot act for themselves; c) any person acting as a member, or in the interests, of a group or class of persons; d) any person acting in the public interest; or e) any association acting in the interests of its members.³⁰ This broad rule on standing has basically opened a broad avenue for legal activists to bring to court as many human rights and governance cases before the courts. According to a Zimbabwean academician and lawyer, this has made the Zimbabwean Constitution one of the most litigated constitutions in Africa.³¹

The legal culture in the profession in Zimbabwe is also permissive of engagement with larger societal issues of public concern. As a result, in regulating lawyers, the Law Society has even developed a special practicing license for lawyers working in CSOs to enable them to appear in their own right as in-house counsel for those organisations.³² This has enabled many public interest cases to be taken up by CSOs and allowed for a broad range of issues, ranging from children and women's rights, civil and political rights, as well as environmental rights, to be litigated by specialized CSOs employing experienced and specialized in-house lawyers.³³

The culture of activism by the legal profession goes back to colonial days when it was common for lawyers to take up cases relating to the liberation struggle before the courts and also some activist lawyers joined the armed struggle. The legal profession has been engaged with public affairs ever since. The same Zimbabwean academician and lawyer believes that what changed at independence for the legal profession was that the profession was no longer fighting with guns, stating: "once we were not fighting with guns, we fought in court."³⁴ The combination of these factors means that the profession in Zimbabwe is well positioned to play an influential role in fighting for democratic political space.

Perhaps one of the most successful areas of activism, which has left a permanent legacy, is the role of CSOs in the constitution making process in Zimbabwe. The 1980 independence Constitution was generally seen as a compromise document between the freedom fighters and the white minority and, therefore, lacked legitimacy. As a result, it was expected that the Constitution would be reformed to take into account broader wishes of the people. CSOs were in the forefront in urging constitutional

³⁰ Section 85 Constitution of Zimbabwe

³¹ Anonymous, University law lecturer, Harare, 27 November 2019.

³² Anonymous, lawyer and activist, Harare, 25 November 2019.

³³ Anonymous, director at Zimbabwean legal organization, Harare, 27 November 2019; Anonymous, lawyer and activist, Harare, 25 November 2019.

³⁴ Anonymous, University law lecturer, Harare, 27 November 2019.

reform. In 1997, the CSOs, formed a loose coalition of activist CSOs, churches and trade unions under the name of the National Constitutional Assembly (NCA) (Dorman 2002). The NCA not only broadened the campaign for constitutional reform but drafted a model constitution which it proposed to the government.

The government, however, did not heed and in 1999, launched its own constitution making process. The process was generally perceived as illegitimate as it excluded some key stakeholders and the draft constitution resulting from it did not incorporate some major recommendations from the people. Despite these protests by CSOs, the government went ahead to put the resulting draft constitution to a referendum in February 2000.³⁵ The NCA campaigned vigorously against the draft constitution and, as a result, the draft constitution failed at the referendum (Mhandara, et al 2003, Dorman 2003). The defeat of the ZANU-PF was a landmark development in post-independence Zimbabwe as “for the first time, the ruling ZANU (PF) party had not been able to impose its chosen policy.” (Dorman 2002, 93) These events catalyzed CSOs to raise broader human rights and governance issues, demanding accountability and reform from government.

The CSOs continued to play a key role in subsequent constitutional processes. In 2007 another search for a legitimate and credible constitution was launched by the government. However, this time the process was shrouded in secrecy as only representatives of three parties with representation in parliament were part of the process, that is, the – ZANU PF, the Movement for Democratic Change led by Morgan Tsvangirai (MDC-T) and the Movement for Democratic Change led by Arthur Mutambara (MDC-M). The resulting draft was known as the Kariba Draft Constitution (named after the place where the meetings for the party representatives were had). The NCA rejected the draft, arguing that it lacked legitimacy as it did not mirror the views of the people and that the process was defective (Mhandara, et al. 2003). The 2007 process did not see the light of day and was overtaken by events, as the 2008 elections led to instability and the consequential establishment the a Government of National Unit through the signing of the Global Political Agreement (GPA).The GPA was an interim stabilization mechanism, which in part, required the enactment of a people driven, inclusive and democratic constitution. In pursuit of this, the new constitution making process, as dictated under the GPA, commenced in June 2010.³⁶ The CSOs played a cardinal role in monitoring the constitution making process, making concerted submissions on cardinal issues and raising the profile of the dialogue. Once drafted, CSOs played a key role in popularizing the draft constitution and campaigning for its acceptance in the referendum in March 2013.

³⁵ Ibid

³⁶ Ibid.

The 2013 constitution is seen as fairly progressive as it has expanded the Bill of rights to include social and economic rights, has made the appointment of judges more transparent, and broadened *locus standi* in favour of public interest litigation.³⁷ The broadening of *locus standi* is perceived as having opened a greater window for activists to undertake several public interest cases to enforce the norms of the constitution.³⁸ The 2013 constitution also provides for a role for CSOs to be consulted in the process of enacting legislation. To this effect, CSOs have been collaborating with parliament in the process of amending, repealing or elaborating new laws in order to align legislation to the new constitution.³⁹ In some cases, CSOs have drafted entire pieces of model legislation and submitted to parliament for adoption. This has been possible on account of the expertise CSOs have built over a long time.⁴⁰

5.2 Zambia

In the case of Zambia, both the rules of standing and rules regulating the profession are restrictive. This has tended to narrow the scope of lawyers from engaging in broad causes to enlarge or save shrinking political space. The rule of legal standing in Zambia only allows the person who has suffered or is likely to suffer a violation of their rights to seek a remedy in court.⁴¹ This restrictive rule means that activist individuals or CSOs cannot take up broad governance issues unless they align them with some other acceptable ground upon which an action can be brought. This implies that matters of governance cannot be litigated as matters of human rights violations in a broad sense as they can only be seen from the lenses of specific individuals who have suffered harm and not the implications on the entire political spectrum.

The rules that shape the legal culture of lawyers are also restrictive and more focused on protecting the business interests of the profession. The rules of practice prohibit lawyers from taking cases without being paid a fee and further prohibit lawyers working in charitable organisations or CSOs from taking up public cases.⁴² For example, in the case of *Musa Ahmed Adam Yusuf v Mahtani Group of Companies and Others*,⁴³ the High Court held:

³⁷ Anonymous, director at Zimbabwean legal organization, Harare, 27 November 2019; Anonymous, legal activist and scholar, Harare, 25 November 2019; Anonymous, lawyer and activist, Harare, 25 November 2019.

³⁸ Anonymous, legal activist and scholar, interview by author, Harare, 25 November 2019; Anonymous, lawyer and activist, Harare, 25 November 2019.

³⁹ Anonymous, University law lecturer, Harare, 27 November 2019; Anonymous, University law lecturer, Harare, 27 November 2019.

⁴⁰ Ibid

⁴¹ Article 28 Constitution of Zambia 1991. The severity of this has been mitigated a little bit through the 2016 Constitutional Amendment which in article 2 allows any person to protect the constitution. This, however, does not extend to the Bill of Rights.

⁴² Rule 28 Legal practitioners Practice Rules 2002 (Statutory Instrument Number 51 of 2002)

⁴³ 2011/HPC/0081, <https://zambialii.org/node/3247>

The requirement for a legal practitioner to state the name and place of his business confirms the fact that a legal practitioner can only practice through a firm name and not in his personal capacity. Indeed, practice in Zambia will show that this is what actually happens. Therefore, since he provides legal services under the umbrella of his firm, it is only in the firm name that the plaintiff can institute an action for payment of his fees. He cannot claim the fees in his personal capacity as he has no *locus standi* or sufficient stake in the funds to enable him do so.

The importance of this holding is that only lawyers either serving as in-house counsel or those practicing in law firms are entitled to litigate on behalf of their clients. Lawyers cannot, therefore, provide *pro bono* services through civil society organizations.

The rules of practice create a culture of detachment from public causes and entail that lawyers generally focus on their commercial interests. Although there are a few lawyers who have been active in the human rights and constitutional law activism area, overall there is a paucity of public interest litigation and engagement by the profession.⁴⁴ There is, therefore, “lack of cohesion towards a common goal of [advocating for] good governance” in the profession.⁴⁵ As a result, lawyers have generally tended to be polarized and driven by personal interests.⁴⁶ Efforts to increase legal activism of the Law Association of Zambia (LAZ) under the Presidency of Linda Kasonde resulted in significant backlash from within the profession and from politicians. In 2016 some senior lawyers who were unhappy with the perceived increased activism of the Linda Kasonde led council of the LAZ, filed a motion at the annual general meeting of the association in 2016 to remove the entire council of the society.⁴⁷ This was followed by the drafting of a Bill by the ruling party in 2017 to abolish the Association.⁴⁸ Although neither attempts succeeded, arguably they left a chilling effect on the profession.

Nonetheless, in practice, direct impact litigation proves to be a viable avenue for activist operations. Defined as lawyers’ participation in court cases that are high-profile, or at the very least meaningful in outcome toward the status of democracy or human rights, direct impact litigation offers the chance to incrementally contest both deliberate policies set by an authoritarian ruling party and *de facto* undemocratic circumstances arising on their own. Linda Kasonde’s Chapter One Foundation is groundbreaking in this regard, standing as the only domestic Zambian organization with a stated mission to engage in such operations (note that foreign firms and private commercial firms are sometimes contracted by parties for representation in these cases as well). Chapter One’s selection of

⁴⁴ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020.

⁴⁵ Anonymous, UNZA law lecturer, Lusaka, April 2020.

⁴⁶ Ibid

⁴⁷ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020.

⁴⁸ Ibid

cases, although not done in a formulaic manner, is nevertheless strategic in seeking to maximize external impact for the amount of effort committed. The organization, including Ms. Kasonde herself, has won several victories in cases escalated to Lusaka's Superior Courts.⁴⁹ Following in the footsteps of Zimbabwe's ZLHR and other direct impact litigation organizations, Chapter One and other legal activists in Zambia face the challenge of scaling up the size and furthermore improving the effectiveness of their operations in meeting the demand for the numerous court cases that matter in opening the country's democratic spaces.

Direct impact litigation has taken hold in Zambia in part because judicial institutions have maintained a degree of independence and ability to judge cases upon their legal merits. While court tampering and intimidation has occurred in the past – most notably with Michael Sata's 2012 suspension of a Supreme Court Justice and two High Court Judges⁵⁰, as well as more recently with political cadres flooding the halls of the Supreme Court during opposition leader Hakainde Hichilema (HH)'s electoral petition – a number of judges still feel that they can freely pass decisions without suffering political consequences. One judge in the Lusaka Superior Courts stated that they have found themselves ruling on both sides of stated activist causes, despite informally drawing pressure from peers in the Judiciary and other government bodies connected to the ruling party in cases where government has a vested interest.⁵¹ Said individual stated that it would ultimately be, at the very least, extremely rare for a judge to succumb to political influence and fail to consider a case on its legal merits alone.⁵²

A less successful but still important avenue of activist operations lies with public statements made by either legal experts or practitioners. Some of these efforts have recently been able to draw attention; most notably these include Constitutional Expert Muna Ndulo public seminar criticizing the Bill 10 Amendment⁵³ and senior lawyer John Sangwa's letter addressed directly to President Lungu.⁵⁴ Traction gained, however, has been counteracted by content published by state-controlled media and retribution from the ruling party itself. A PF Member of Parliament filed a complaint with the Law Association of Zambia for Sangwa's practitioner's license to be revoked, as well as a (now-obliged) request for him to be censured before the courts.⁵⁵ Moving forward, a serious question is whether authoritarian encroachment upon socio-discursive spaces has rendered it too late for lawfare in

⁴⁹ Anonymous, former President Law Association of Zambia and legal activist, Lusaka, April 2020.

⁵⁰ Lusaka Times, "Sata suspends three Judges appoints Judge from Malawi to head tribunal into judges conduct", April 30, 2012.

⁵¹ Anonymous, Judge from Lusaka Superior Courts, Lusaka, April 2020.

⁵² Ibid.

⁵³ <https://diggers.news/local/2019/08/12/prof-ndulo-sangwa-demand-complete-withdrawal-of-amendment-bill-10/>

⁵⁴ Lusaka Times, "Tutwa reports John Sangwa to LAZ for professional misconduct over the open letter to President Lungu", September 19, 2019

⁵⁵ Lusaka Times, "Tutwa challenges Sangwa to relinquish his rank of State Council", July 27, 2020

Zambia to include a media/publicity component to its operations. If not, legal activists have yet to adapt a sustainable and effective method to secure democratic gains without incurring significant personal costs.

6 Conclusion

Above, we have examined legal activism within Zambia and Zimbabwe, with the aim to understand under what circumstances legal strategies are effective in maintaining political space for opposition voices. This question has become more pertinent in Zambia in recent years with the increase of authoritarian rule and the consequent desire to learn from Zimbabwe's (and other countries) experiences. By providing the two countries respective political histories, we take into account the differences in democratic trajectories of both countries. The obvious difference in the country's historical trajectories is that in Zimbabwe from an early stage in its nationhood, the legal sphere became the foremost battleground for democratic contestation. In Zambia, on the other hand, strategies of lawfare did not mature in part due to the country's democratic space and alternative routes for activism. Other elements are at play as well, most notably the level and direction of legal education, financial support of civil society activism, and related to this, diverse career choices for lawyers. Importantly, we also saw a societal acceptance of the participation of legal civic actors in constitution and law-making processes in Zimbabwe, whose legal association and judiciary allow members of the law profession to freely litigate public interest matters. While the socio-discursive aspect of lawfare, namely the free discussion around law in the public sphere, has always been present in Zambia and more noticeable in recent years, it will still require structural reforms in rules and regulation, plus additional financial support, to make legal activism more impactful. Given the legal-judicial complex's increased susceptibility to recent autocratization processes in Zambia and Zimbabwe, strong practices of legal activism may become more important going forward in both countries.

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