LAW, CRIMINOLOGY & CRIMINAL JUSTICE | RESEARCH ARTICLE

Curtailing police discretionary powers: Civil action against the police in Zimbabwe

Ishmael Mugari¹ and Emeka E Obioha¹

Abstract: The wide discretionary powers that the police wield need to be put in constant check to prevent arbitrariness. As the gatekeepers of criminal justice, any unpalatable behaviour on the part of the police will taint the whole criminal justice process. Whilst there are different mechanisms to hold the police to account, the court, being an important player in the criminal justice process is situated in a better place to review the propriety of police actions. This paper, which is largely based on archival research, explores the extent of police abuse of power and how the incidents have been dealt with by the courts in Zimbabwe. The paper shows that civil action has been instituted against the police for wrongful police actions such as: unlawful arrest and detention; indiscriminate use of force; assault, torture and inhuman treatment; and malicious criminal prosecution. The court has offered relief to victims of police abuse through awarding monetary damages for pain and suffering, loss of income, and contumelia. Through its review power over police actions, the court has provided relief such as ordering the release of unlawfully detained persons. Lastly, the court has also passed important judgements against statutory provisions which stifle police accountability.

Subjects: Criminal Law & Practice; Criminology - Law; Policing & Police Law; Tort

Keywords: Abuse of power; civil suits; excessive force; malicious prosecution; unlawful arrest; torture

1. Introduction
The notion of police oversight is one of the central aspects in modern democracies, chiefly due to the far reaching implications of police powers. Police officers also wield considerable discretion when executing a wide range of powers, namely: the powers to arrest, detain suspects, search, and

ABOUT THE AUTHOR
Ishmael Mugari holds a Doctorate in Police Science. His research focuses on criminology, police accountability, police strategy and national security issues.

Emeka E. Obioha is a Professor of Sociology at Walter Sisulu University, South Africa. His research focuses on sociology, anthropology, criminology, social problems and development.

PUBLIC INTEREST STATEMENT
This paper explores the role of the court in curtailing police abuse of power in Zimbabwe. In the absence of an independent police oversight body in Zimbabwe, the paper reveals that the courts have passed judgements against the police for unlawful arrest and detention, indiscriminate use of force, mistreatment of suspects and malicious criminal prosecutions. Thus, the paper reveals some of the manifestations of police indiscrretion, which give rise to civil action. The paper also reveals the legal framework for curtailing police abuse of power, as well as some statutory provisions that curtail the court’s effectiveness as a police oversight institution.
to use force. These wide discretionary powers that are wielded by police officers, as well as their role as the gatekeepers of the criminal justice system, signify the significance of accountability in all policing activities. Policering researchers have often highlighted that police work largely involves the exercise of judgment and choice, hence it is discretionary in nature. Perhaps one of the defining characteristics of police work is the power to use force or coercion and this power has a bearing on all the other police powers. The police's decision to use force is often unpredictable, urgent and will have to be made in a split of a second and this brings dilemma on the aspect of police discretion. Moreover, the police often use coercion in emotionally charged and tense circumstances during their encounters with the public.

The level of autonomy in which the police find themselves in during exercising of these discretionary powers becomes a challenge if police officers engage in acts that result in the public questioning their integrity. Notwithstanding the inevitability of police discretion, there, however, remains a serious concern that its misuse will result in corrupt, arbitrary or unethical behaviour. Therefore, police discretion needs to be put under constant check. The need for constant check was enunciated in the Canadian case of Beaudry V The Queen, where it was held that “Police discretion is not absolute or unfettered. An exercise of police discretion must be justified rationally”. In light of the aforementioned discretionary powers, and the consequences of arbitrariness in the exercising of the powers, it becomes critical to have mechanisms for curbing abuse of such powers. Therefore, there have to be rules, regulations, supervision and structured mechanisms to curtail abuse of police discretionary powers. Ultimately, nations have put in place internal and external mechanisms to curb incidents of abuse by the police.

Internal mechanisms adopt the internal affairs model, in which the police department is responsible for receiving and investigating complaints alleging misconduct by police officers. External mechanisms mainly entail independent investigations of police misconduct by independent police oversight bodies. In Europe, the most notable police oversight body is the Independent Office for Police Conduct (IOPC) in England and Wales, whilst the Independent Police Complaints Directorate (IPID) of South Africa is the most notable independent police oversight body on the African continent. These independent bodies conduct independent investigations of police misconduct. In Australia, the Law Enforcement Conduct Commission (LECC) is the main independent police oversight body, though it has very limited investigative powers. Notwithstanding the importance of these independent police oversight bodies, Zimbabwe does not have an independent police oversight body for handling police misconduct.

Given that the law sets the parameters of what the police should do or not do, this makes legal control a significant mechanism for holding the police to account. The notion of legal accountability refers to the role that is played by the criminal courts and the civil courts to hold the police to account for criminal and civil violations by police officers. Whilst there are many ways of holding the police to account, police subservience to the rule of law places the court in a better position to whip the police into conformity to the law. Stressing the important role that is played by the court in holding the police to account, Ballye points out that:

“In a democracy, police actions must be governed by the rule of law rather than by directions given arbitrarily by particular regimes and their members. Democratic police do not make law, they apply it, and any judgements must be subject to monitoring and correction by courts”.

The court’s police oversight role is three-pronged: (1) through criminal courts; (2) through adjudicating over civil suits against the police; and (3) through its review powers over police actions. One of the direct ways of dealing with an errant police officer is through criminal prosecution. Such a prosecution is based on the principle that just like other ordinary citizens who are subject to the law, the police are also subordinate to the same laws. Each police officer should be responsible for the legality of his or her own actions and should therefore be prosecuted if any of his or her actions amount to a criminal
offence. In a constitutional democracy, the subjection of the police and their powers to criminal law in the same manner to ordinary citizens legitimises the police authority over citizens. Thus, where there is criminal activity perpetrated by police officers, criminal proceedings should always have priority, especially given that police officers must abide by the laws in the same way as citizens do.

The second role of presiding over civil suits against the police forms the gist of this paper. Victims can file civil suits for wrongs done to them by police officers, resulting in monetary damages and injunctive relief. Though civil litigation enables victims to seek recourse for wrongs done against them by the police, such litigation has also been known to expose organizational failures such as failure to follow procedures, inadequate training and inadequate supervision. The Constitution is also an important legal control instrument as citizens can approach the court for recourse if the police violate any of their constitutional rights. Section 85 of the Zimbabwean Constitution specifically provides that any person whose rights have been infringed is entitled to approach a court, and the court may grant a relief, which may include an award of compensation. This is important given that most human rights abuses by the police occur between the point of arrest and arraignment in court. An important aspect of civil suits against the police is the vicarious responsibility, in which police agencies will pay for damages on behalf of implicated officers. In Zimbabwe, the State Liabilities Act [Chapter 8:14] provides for the state's vicarious responsibility on contractual and delictual wrongs which are committed by government employees during the course of their employment. Consequently, when police officers, who are state employees, commit civil wrongs, the state will be held liable. Section 3 of the Act provides that the responsible Minister may sued in his/her official capacity during civil proceedings against the state. To this end, the Minister of Home Affairs is usually cited as the first respondent on civil suits against the police in Zimbabwe. As regards individual liability of police officers, section 50 (9) of the Constitution provides that any person who has been illegally arrested or detained is entitled to compensation from the person responsible for the arrest or detention. This provision has a deterrent effect upon individual police officers as personal property for errand police officers can be attached to settle monetary damages that would have been attached by the courts.

Closely related to civil suits is the court’s review power over police actions. The civilian criminal trial affords the court the opportunity to scrutinise police actions. For example, the suspect may raise a complaint of assault by the police and this potentially undermines the prosecution's evidence, with a possibility of criminal charges against the implicated officers. The trial officer can also exclude evidence due to police malpractices like aggressive interrogation, illegally obtaining evidence, or due to omissions or negligence which render the evidence unreliable. This position is outlined under section 70 (3) of the Zimbabwean Constitution, which provides for the exclusion of illegally obtained evidence during criminal trials. Similarly, section 256 of the Criminal Procedure and Evidence Act [Chapter 9:07] renders inadmissible any confession that has been obtained under duress from an accused person. Thus, despite all the hard work that would have been invested in conducting an investigation, the court may fail to convict the suspect due to the illegal means of obtaining evidence.

Given the important role that the court plays in holding errand police officers to account, this paper explores the civil remedy to police abuse of power in Zimbabwe. The paper explores how the Zimbabwe courts have dealt with various forms of police abuse of power, which include: wrongful arrest and unlawful detention; indiscriminate use of force; assault, torture, inhuman and inhuman treatment; and malicious prosecution. The paper also explores judgments on the court’s review of police actions. The importance of the paper is two pronged: first, the paper highlights the police actions which gave rise to the civil or review action by the courts; and second, the paper shows the judgements, including the legal basis for the judgements. Thus, the paper sheds more light on police wrongs in a developing country that has been characterised by numerous allegations of police abuse of power. This paper points out the challenges that need to be addressed by police policy makers in Zimbabwe and in other countries whose police services find themselves in the same predicament.
1.1. The Zimbabwe Republic Police and legal framework

The Zimbabwe Republic Police (ZRP) is the only State law enforcement agency in Zimbabwe, which is centrally controlled from the Police General Headquarters. The organisation’s mandate is spelt out under Section 219 of the Constitution of Zimbabwe, which specifies the following roles of the ZRP: to detect, investigate and prevent crime; to preserve Zimbabwe’s internal security; to protect and secure the people’s lives and their property; to maintain law and order; and to uphold the Constitution, whilst enforcing the law without fear or favour. In relation to policing, perhaps the most critical aspect of the Zimbabwean Constitution is the declaration of rights in Chapter 4. Specifically, the Constitution provides for the following rights and freedoms: the right to personal liberty (Section 49); detained persons’ rights (Section 50); right to human dignity (Section 51); freedom from torture and degrading treatment or punishment (Section 53); freedom of assembly and association (section 58); and freedom to demonstrate and petition (Section 59), all of which have a bearing on policing activities.

The Criminal Procedure and Evidence Act [Chapter 9:07] (also referred to as the CP and E Act) is the main procedural law that regulates the minute operational aspects of the police organisation. The Act provides for police powers to arrest, detain, and search and seize articles that afford evidence of commission of crime. Part V of the CP and E Act outlines for the grounds and procedure of effecting an arrest. When a police officer wants to effect an arrest without a warrant, the Act places emphasis on reasonable suspicion to. Consequently, a police officer who wants to carry out an arrest needs to have a reasonable justification for believing that the person whom he intends to arrest has committed an offence. It therefore follows that absence of reasonable suspicion during the arrest will amount to an arbitrary arrest, and the officer who effects the arrest may be sued for violating the right to personal liberty. Importantly, the Act also provides for the use of force when effecting an arrest, with Section 42 specifically providing for the use of force which is reasonably justifiable to overcome resistance to arrest. Thus, any force that falls outside “reasonableness” in any given circumstances will be deemed to be excessive force.

While the Constitution and the CP and E Act are the main statutes which govern police operations, this paper will also look at provisions within the Public Order and Security Act [Chapter 7:11] commonly known as POSA, as well as The Police Act [Chapter 11:10]. POSA regulates public gatherings, thus impacting on the constitutional rights of assembly and association, as well as the freedom to demonstrate and petition. The Police Act provides for organisation and control of the police force, as well as disciplinary issues. As will be seen later in this paper, POSA and the Police Act have some provisions that stifle police accountability.

Despite the legal constraints set by the Constitution and the CP and E Act, as well as various internal mechanisms to curb abuse of power, the ZRP has on numerous occasions faced allegations of arbitrariness during their encounters with citizens. For example, The Zimbabwe Human Rights NGO Forum observed the tendency by the Zimbabwean police to arbitrarily arrest human rights defenders as well as prodemocracy activists without any reasonable suspicion of them having committed crimes. The continued arbitrary arrests of civil rights activists, journalists and opposition politicians in 2020, as reported in various local and independent media houses also points to the persistence of police abuse of power. The 2018 Country Report on Human Rights in Zimbabwe showed that citizens and perceived government opponents were assaulted and tortured by security forces whilst in custody. The report also claimed the police used indiscriminate force to apprehend, detain and interrogate suspects throughout the year 2018. In November 2019, several civilians were assaulted by the police after gathering for a speech at an opposition party’s headquarters, in violation of the citizens’ freedom of assembly and association. During the COVID-19 lockdown period, state and independent media houses reported incidents of indiscriminate use of force by the police in Zimbabwe. For example, a state newspaper- The Chronicle, reported an incident in which two women from Bulawayo-Zimbabwe’s second largest city- were brutally assaulted with baton sticks by the police for violating lockdown regulations, and they had to seek medical attention after suffering visible
injuries. In light of these police excesses, it is important to highlight that the court becomes a formidable institution in taking corrective action against police abuse, mainly through adjudicating over civil suits against the police.

2. Methodology
The study adopted a qualitative research design, which mainly entailed archival research of decided cases that pertain to police execution of powers and functions. Judgements were obtained from the Zimbabwe law Reports from 1980 to 2019. Whilst court judgements from the year 2010 are easily accessible from the website ZimlII.org.zw, other earlier court judgements are located in law reports and the researcher also perused the law reports to extract leading cases that pertain to police abuse of power. Whilst it was important to make reference to older case law, there was much emphasis on the judicial decisions in the past decade (2010 to 2019). Reference was also made to court decisions South African courts, from where Zimbabwean courts also borrow case law.

The unit of analysis was a single court case. For some few decided cases, especially very old cases, the researcher only highlighted the key legal points on the judgements, without necessarily having to give brief circumstances. It is important to highlight that most of the decisions were made in the High Court, as the Zimbabwean laws make the High Court the court of first instance for civil action. Currently the High Court of Zimbabwe is operating from four regions namely; Harare, Bulawayo, Masvingo and Mutare. Most of the decided cases emanated from Harare (High Court Harare- HH); and Bulawayo (High Court Bulawayo- HB), and a perusal of decided cases could not reveal decided cases relating to the police in the other two regions, chiefly due to the fact that they only started operating in 2018. Cases relating to human rights violations are however referred to the Constitutional Court (CCZ), which is the court of first instance for violation of the Bill of Rights.

The main limitation of this study lies in the fact that only cases that were decided against the police were analysed. There are however numerous cases that were decided in favour of the police. Notwithstanding this limitation, it is the researcher's opinion that the police command and policy makers need information on successful suits against the police as this gives them ammunition for self introspection and taking corrective action in future. Whilst care was taken to ensure that all the significant cases were analysed, there is a possibility that some leading cases could have been overlooked.

3. Analysis and discussion
This section analyses the decided cases on police abuse of power. First, the section looks at the judgements that relate to unlawful arrest and detention, use of indiscriminate force, and treatment of suspects. The second section will mainly dwell on judgements which relate to the court's review of police actions. The third section looks at judgements on the laws which are perceived to be either perpetuating abuse of power by police or hindering the victims of police abuse of power from seeking recourse. Lastly the section looks at the challenges in the court's oversight role over police execution of powers and functions.

3.1. Judgements relating to arrest and detention, use of force, and treatment of suspects
Discretion is necessary when exercising the powers to arrest and to use force. However, when there is arbitrariness in the exercise of these important discretionary powers, this will amount to police abuse of power. Whilst arrest and detention are two different processes, this paper, however, combines the two processes, especially given the thin line that separates the two processes. The discussion on use of force revolves around the use of force during public disorder situations and when carrying out an arrest. The discussion on treatment of suspects revolves around assault, torture and inhuman treatment, as well as malicious prosecution.
3.1.1. Unlawful arrest and detention

The tort of unlawful arrest occurs when police officers unjustifiably restrict citizens’ liberty during arrest and imprisonment (Macheka v Metcalf and Another; Muyambo v Ngomaikarira and Others).\(^1^9\) Thus, it violates citizens’ right to personal liberty. Importantly, section 49 (1) of the Constitution provides for the right to personal liberty, and among other provisions, the police should not detain suspects without trial and citizens should not be arbitrarily deprived of their liberty. Moreover, section 50 of the Constitution provides for accused persons’ rights and among the most notable provisions are: right of access to a legal practitioner or relative; statutory limit of 48 hours of detention after arrest; right to humane treatment; and the right to challenge an unlawful arrest in court. The following are some of the manifestations of unlawful arrest in Zimbabwe: arresting of a person without a probable cause; arresting a person on unjustifiable grounds, only to release him or her a day or two after detention; not informing the suspect of the reason for the arrest when the arrest is effected; and detention of suspects in order to investigate them.\(^2^0\)

The tort of unlawful arrest and detention is by far the most popular civil action against the police. This is largely because an unlawful arrest is a serious infringement of citizens’ rights. In the case of Mapuranga v Mungate, it was held that detaining a suspect and subsequently restricting his right to free movement is a serious infraction of liberty, which is far beyond the estimate of mere monetary values.\(^2^1\) This was reiterated in Minister of Home Affairs and Another v Bangajena, in which the Court held that “the deprivation of personal liberty is an odious interference and has always been regarded as serious injury”.\(^2^2\) Perhaps the most common aspect of unlawful arrest and detention arises from abuse of police discretionary powers, and the police need to carefully exercise their discretion before they effect an arrest. The justifications for an arrest and detention were articulated in the case of Botha v Zvada, in which the police had arrested an old man (71 year old) and had detained him for six days on murder allegations.\(^2^3\) The Court provided the following reasons of arrest and detention: (1) to stop the suspect from absconding; (2) to prevent the commission of further crimes; and (3) to prevent interference with investigations and witnesses.\(^2^4\) The Court also noted that whilst the police officer had reasonable suspicion that the plaintiff had committed an offence, it was unreasonable to believe that the accused person—a 71 year old—would abscond court or commit further crime.\(^2^5\) The plaintiff was subsequently awarded damages for unlawful arrest and detention. This case shows that an arrest or detention should not always be intended, and where the police can just summon the suspect to court, there will not be need for arrest, of course notwithstanding the underlying grounds for arrest.

In many occasions, victims have filed civil suits against the police for unlawful arrest and detention. In Muyambo v Ngomaikarira and Others, the plaintiff was arrested after the police had received a tip off that he had killed a rhino.\(^2^6\) Without verifying the allegation, the police arrested him and detained him three days, only to release him without charge. The plaintiff was detained 300 km away from his residence. He successfully sued for unlawful arrest and detention, and was awarded damages of US$3 000. Highlighting the absence of reasonable suspicion to justify the arrest, Patel J remarked:

“... There is in fact no nexus linking the plaintiff to the commission of the offence other than from the tip-off from the third defendant. Having regard to the undisputed fact that no charges were subsequently laid against the plaintiff, the only conclusion one can draw is that the defendants acted without reasonable and probable cause in arresting the plaintiff”.\(^2^7\)

The case shows the implications of the tendency by the police to just arrest suspects basing on tip-offs from the public. Thus, the police need to investigate the tip-offs for them to build reasonable suspicion before effecting an arrest. In another similar case of Nyambara v The Co-ministers of Home Affairs and others, police arrested the plaintiff after the police had received a tip-off indicating that he had been involved in a spat of robberies.\(^2^8\) The plaintiff was acquitted by the courts. The Court noted the absence of evidence to support the fact that the plaintiff had been
involved in the robberies. In this case, though the informant had told them that the plaintiff had been involved in the commission of the robbery, the informant did not provide the reasons for the suspicion and it was the onus of the police to investigate the reasons. Importantly, Dube, J remarked, “It is not good enough to arrest a suspect purely on the basis that a finger has been pointed at him … “. In yet another recent judgment in Mapiye v Minister of Home Affairs and Others, the plaintiff sued for unlawful arrest, torture and assault after he had been arrested on allegations of assaulting a ruling party supporter. He was assaulted, detained and released without being formally charged. Awarding damages of US$4,000, the learned Judge held: “A peace officer who arrests a suspect on the basis that he was implicated in the commission of an offence is required to verify and find corroboration of the informant’s statement before he arrests and detains the suspect”. The above cases confirm the long established position that police should investigate in order to arrest and not to arrest in order to investigate. It is through thorough investigations that the police can establish the reasonable suspicion to justify the arrest.

In Muskwe v Minister of Home Affairs and Others, the plaintiff, a 65 year old man had been arrested and detained on allegations of unlawful entry. He was interrogated for a day and was forced to sign a warned and cautioned statement, which he however refused to sign. Plaintiff also alleged that he was assaulted and a medical affidavit was produced in court. Though the court held that the arrest was justifiable, the subsequent detention for the whole day and for some hours in the following day was grossly irrational and unwarranted. The court also held that the plaintiff was an aged unsophisticated subsistence farmer, hence the decision to arrest and detain him was not justified. The Court awarded damages of US$1,000 for unlawful arrest and detention and US$500 for contumelia. This case also confirms the position that police powers should be exercised sparingly, even where the police believe they are obliged by the law to act. At times, inaction on the part of the police will serve the police from costly civil suits.

3.1.2. Indiscriminate use of force

The civil suit relating to indiscriminate use of force emanates from force used during public disorder situations and force used while effecting an arrest. Use of force should be underpinned by the three principles namely legality, necessity and proportionality. The case of Musadzikwa v Minister of Home Affairs and Another clearly dealt with indiscriminate use of firearms during public disorder situations. An innocent passer-by had sustained injuries after police officers had automatic weapons to stop a riot in an urban area. The court found it not conducive for the police organisation to release its officers onto a densely populated urban area armed with FN rifles. Whilst it can be argued that the police were expected to use force and firearms to deal with a degenerating riotous situation, the court noted the unreasonableness of using FN rifles. In another case of Mugadza v Minister of Home Affairs and Another, the plaintiff sued the police after was shot by a stray bullet during food riots. The court also held that the discharge of firearms by the police was wrongful and culpable. The court also reiterated the unreasonableness of discharging automatic weapons in a densely populated urban area.

Several judgements were also issued against the police for indiscriminate use of force by the police in the last decade. In Nyandoro v Minister of Home Affairs and Another, the defendant, a 65 year old was arrested, together with other suspects, while taking part in a demonstration. He was assaulted with baton sticks by about ten police officers. Upon being taken to a police station, he was further assaulted and detained, only to be released after four days. He sought medical attention and he underwent a surgical operation. Awarding US$5,000 damages for special damages and general damages, Patel J had this to say:

“There can be no doubt that the assaults upon the plaintiff’s physical integrity were unlawful in that they were perpetrated without lawful authority. They were also patently wrongful as being demonstrably incompatible with *bono mores* and the legal convictions of the community concerning the exercise of police powers.”
In a horrifying case involving the use of excessive force during arrest (Simbanegavi v Officer Jachi), the plaintiff was arrested on suspicion that he had stolen a motor vehicle. At the time of arrest, the defendant police officer fired six bullets at the plaintiff’s legs. The plaintiff was only taken to hospital two hours after being shot and his left leg was amputated whilst four steel rods were inserted in his right leg. Surprisingly, he was not formally charged. He was awarded a total of US$21,367 for pain and suffering and special damages. Notwithstanding the fact that the arrest was not grounded on reasonable suspicion, there was disproportionate use of force to effect the arrest. In Nyambara v The Co-ministers of Home Affairs and Others, the plaintiff was also shot and injured during the arrest, with the plaintiff claiming that he was shot while lying down. The two cases depict highest levels of police brutality. In the former case, no justification whatsoever could be proffered for firing six shots onto the plaintiff’s legs when the objective to arrest him had been achieved.

3.1.3. Assault, torture and inhuman treatment

A police officer also has to exercise discretion when dealing with suspects. Assault, torture and inhuman treatment are manifestations of indiscretion on the part of police officers. Section 88 (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] defines assault as any act by a person that involves the application of direct or indirect force to the body of another person, resulting in bodily harm to that other person. The court made a far reaching ruling against assault in the case of Mapuranga v Mungate, where it was held, “Every person’s body is however sacred and inviolable. No other man has a right to meddle with it in the slightest manner except in the circumstances prescribed by the law.” The case has been cited in most cases that involve assault by police officers. The case of Nyandoro v Minister of Home Affairs and Another also reveals assault at the hands of the police. After, using indiscriminate force to arrest the plaintiff, the police also assaulted the respondent during interrogation at the police station.

The tort of torture arises when interviewing suspects during police investigations. The Convention Against Torture (CAT) defines torture as follows:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of a public official or other person acting on an official capacity.”

The leading case in relation to this tort is that of Karimazondo and Another v Minister of Home Affairs and Another, where the plaintiffs, who were married, were arrested on murder allegations, though the charges were later dropped. Ironically the first respondent was a serving police member while the second respondent was his wife. Whilst in custody, the plaintiffs were tortured by the police, with medical reports indicating that they suffered serious physical and psychological effects. The learned Judge said:

“The actions of the police in this case were in flagrant and disregard of the rights of the plaintiffs … the brutality and callousness with which the assaults were perpetrated on the first plaintiff instils in any right thinking person a sense of horror and shock … The unlawful and inhuman treatment to which the first plaintiff was subjected was, in my view totally unnecessary, vindictive and malicious.”

The fact that the first respondent was a police officer was disturbing and a question would be asked, “If they can do that to one of their own, what of the members of the public who will be at the mercy of their callous behaviour?” Similarly, in State v Slatter, the suspect was charged with assisting in the sabotage of an air force base. However, there was no evidence which implicated the suspect, other than his own statement, which had been obtained through torture. The court
rendered the confession as inadmissible and held that any threats during questioning of suspects makes the confessions inadmissible.\textsuperscript{51}

Inhuman and degrading treatment was announced in Chituku v Minister of Home Affairs and Others, in which the court reiterated that treatment of a detained suspect or a convicted person which infringes on the dignity of that person or surpasses the expected civilized standards of decency and involves the unjustified infliction of suffering and pain is inhuman and degrading.\textsuperscript{52} In a recent case that has significant implications on the protection of minority rights (Nathanson V Mteliso and Others), the plaintiff, who is transgender, was arrested by the police for criminal nuisance.\textsuperscript{53} The plaintiff was taken to a police station and asked to undress in front of five male police officers who wanted to confirm her gender. Upon viewing the plaintiff's genitalia, police officers started to laugh and jeer at her. She was then referred to a general practitioner, who upon examining her ordered that she be examined by a gaenacologist. The gaenacologist confirmed that she was transgender. During detention, she was given a single flea ridden blanket, which she could not use for the whole night. Awarding damages for inhuman and degrading treatment, the learned Judge had this to say:

“…imagine five male strangers demanding and ordering one to display their genitalia for them to examine it. It is better left to imagination how the plaintiff must have felt after this invasive conduct by these five police officers. It must naturally have gotten worse for the plaintiff when the officers started fidgeting and making fun of her after this inconclusive examination”\textsuperscript{54}

The police were supposed to protect the plaintiff's right to dignity, as well as to take cognizance of the fact that the plaintiff was transgender, thus bringing in the need to protect minority rights. The case will also be looked at under the tort of malicious prosecution, which also formed part of the civil suit.

3.1.4. Malicious prosecution

Police officers' indiscretion when dealing with suspects may also culminate into malicious prosecution. Malicious prosecution encompasses instituting a criminal action against another person without a justifiable cause, with the criminal action terminating in favour of the accused.\textsuperscript{55} For a civil action of malicious prosecution to be successful, four requirements have to be established, namely: the defendant instigated the prosecution; the prosecution was concluded in plaintiff's favour; the prosecution was not based on reasonable or probable cause; and the prosecution was spurred by malice (Thompson and Another V Minister of Police and Another).\textsuperscript{56} Differentiating between the tort of unlawful arrest and detention and malicious prosecution in Stambolie v Commissioner of Police, Gubbay JA said, "Whereas in the case of false arrest and imprisonment, the cause of action arises on the day the arrest is effected, in the case of malicious arrest and detention the cause of action arises only when the prosecution has been terminated in favour of the plaintiff".\textsuperscript{57} The two cited authorities make it abundantly clear that the cause of civil action for malicious criminal prosecution arises when criminal proceedings have been finalised and they should have been finalised in the plaintiff's favour. Whilst in Zimbabwe, the police do not have prosecutorial powers, the tort arise because it is the police who set the prosecution in motion.

In Manjoro v Minster of Home Affairs and Others, the plaintiff was arrested on allegations of the murder of a police officer.\textsuperscript{58} The suspicion arose due to the fact that a car that was used as a get-away car at the murder scene was being driven by the plaintiff. Plaintiff raised an alibi and also indicated that the car in question was actually being driven by her boyfriend named Darlington, who however could not be located. The police, in their wisdom or lack of it, did not investigate the defendant's alibi. The plaintiff was acquitted and sued the police for malicious prosecution. Awarding damages to the plaintiff, it was held that:

“...there is no justification in prosecuting the plaintiff when they had not fully investigated her story and proved that she was lying that she was not the one who was driving the
car on that day. After they failed to locate Darlington, they decided to keep her as bait in the hope that Darlington would give himself up to the police.\(^\text{59}\)

This case is critical in assessing the extent of police abuse of power. In addition to damages for malicious prosecution, the court awarded damages on five other torts namely: wrongful arrest; assault; medical expenses; pain and suffering and contumelia; and future loss of income. Thus, a single act of police abuse of power can trigger multiple damages against the police.

In the case of Nathanson \textit{v} Mteliso and Others, the arrest arose after an altercation between the plaintiff and one of the respondents.\(^\text{60}\) Upon seeing a motor vehicle of a police reaction team, the first respondent reported the plaintiff to the police to the effect that the plaintiff (who is trans-gender) had entered a female toilet. The plaintiff was bundled into a police truck and taken to a police station where a charge of criminal nuisance was preferred against her. After leaving the court on the first hearing, the first respondent allegedly threatened the plaintiff and the prosecutor, resulting in the plaintiff staying in hiding for some time.\(^\text{61}\) The charges were later terminated because the given facts did not disclose a clear cut offence. The plaintiff was awarded damages for malicious prosecution. The respondent’s ordeal was compounded by the fact that for a crime of criminal nuisance, even the police can assess the fine and the fine is on the lowest level of the standard scale of fines. Having to detain someone for three days for such a minor offence showed high level of abuse of the justice process. The Court also made two key observations: (1) “the conduct of the police was tantamount to using a 16 pound hammer or a machine gun to crush an ant”; and (2) “… the police arrested the plaintiff in order to investigate the offence that she was alleged to have committed”.\(^\text{62}\) The court also correctly pointed out that the plaintiff had not committed any cognisable crime which warranted arrest and the resultant infraction of liberty.

Overall, the selected decided cases reveal that despite the presence of constraints as spelt out in the Constitution and the CP and E Act, police officers sometimes exercise their powers in an arbitrary manner. This shows abuse of the wide discretionary powers by the police during their encounters with citizens. It is also important to highlight that the presence of legal restrictions will not guarantee adherence by the police officers during their day-to-day encounters with citizens. They still have to exercise their discretionary powers, which, in some occasions, are not prudently exercised. Ultimately, indiscrimation will result in unlawful arrest and detention, indiscriminate use of force, torture and inhuman treatment, and malicious prosecution.

### 3.2. Judgements on the court’s review power of police actions

The court has also used its review power to whip the police into line when they abuse their powers. In the case of Mavhiza and Another \textit{v} Inspector Musambwai and Others, the plaintiffs, who were employed by the Zimbabwe National Water Authority (ZINWA) attended at a police camp to disconnect water over an unpaid water bill.\(^\text{63}\) After discovering that the water had been reconnected the following day, they were advised by the ZINWA head office to remove the water meters. The plaintiffs were arrested and only released after they had reconnected the water. Reprimanding the police for their abuse of power, Zhou, J held:

> “I have taken into account, too, the evident abuse of the powers, as the defendants abused their positions to obtain a reconnection of water by arresting and detaining the plaintiffs. This is a case in which an improper motive or malice is clearly established. In this instance, the police used their power to get for free a service that they were supposed to pay for, with the court taking a corrective action”.\(^\text{64}\)

The court has also intervened when the police exceed their limits during the execution of their powers. In the case of Madondo and Another \textit{v} The State, the appellants were arrested and detained beyond the constitutional limit of 48 hours without a warrant for further detention.\(^\text{65}\) The Court ordered the immediate release of the appellants as their continued detention was considered illegal. In \textit{Movement for Democratic Change v Officer Commanding Bulawayo Central
District, the applicant notified the police of an intention to hold a demonstration, in recognition of the provisions of the Public Order and Security Act [Chapter 11:17]. Their request was declined by the police on the grounds that similar protests had turned violent in Harare. However, the Court upheld their request, with Makonese, J stating:

“It ought to be noted that the freedom to take part in a peaceful assembly was of such importance that the right could not be restricted in any way, on flimsy grounds. A fair balance has to be struck on the one hand, the general interest requiring the protection of public safety and, on the other, the applicant’s freedom to demonstrate”.67

In these two cases the courts had to intervene to grant relief, which no other external accountability institution was in a position to grant.

3.3. Judgements on laws which stifle police accountability
Another important role of the court has been to decide on some of the laws that are contrary to democratic ideals and that lie in the way of justice against the police. In the case of Nyika and Another v Minister of Home Affairs and Others, the plaintiffs, who had been shot by the police and spend some time in hospital intended to sue the police for unlawful arrest and wrongful use of firearms. Both plaintiffs had suffered life threatening injuries. However, section 70 of the Police Act [Chapter 11:10] sets 8 months time limit for suing the police and the respondents could not sue the police due to the lapse of 8 months. The plaintiffs then challenged the constitutionality of the said section. The Court held that Section 70 of the Police Act was inconsistent with Section 69 (2) [right to a fair, speedy and public hearing within a reasonable time] and Section 56 (1) [right to equal protection and benefit of the law] of the Constitution. In passing the decision, there was heavy reliance on the South African case of Mohlami v Minister of Defence, where it was stated that in a social context where poverty and legal illiteracy abound, and where legal aid is limited, the curtailed time frame can only but deny ordinary people the right to access to courts.70

In another similar case, DARE and Others v Saunyama and Others, the Constitutional Court of Zimbabwe made a ruling on the constitutionality of Section 27 of the Public Order and Security Act [Chapter 7:11] (POSA). The section gives the regulating officer, who is the officer commanding police district, powers to issue a prohibition order against holding demonstrations for a period not exceeding a month. The Officer Commanding Harare Police District, who is the Regulating Authority for Harare metropolitan area, had issued a prohibition order banning the holding of protests in Harare for a month. The Constitutional Court ruled that Section 27 of the POSA was unconstitutional. In a veiled comment on the susceptibility of the section to abuse, Makarau JCC said: “ … Thus, a despotic regulating authority could lawfully invoke these powers without end …”. Thus, the court has also been instrumental in taking corrective action on some of the laws that perpetuated police abuse of power.

3.4. Limitations of the court’s police oversight role in Zimbabwe
Despite playing a significant as a police oversight institution, the major limitation lies the challenges of implementation of judgements against the police. In the case of Muskwe v Minister of Home Affairs and Others, the High Court awarded the plaintiff a sum of US$1500 for assault and torture by the police in April 2013. The plaintiff later died in 2014, a year after the judgment, but he had not yet received the damages. In a related case of Simbanegavi v Officer Jachi, the plaintiff won a civil suit against the defendant after he had been shot by the defendant- a police officer- while effecting an arrest. A year after the judgment, the Human Rights NGO Forum reported that the plaintiff had not yet received the damages and further alleged that the defendant was still serving in the ZRP. The State Liabilities Act [Chapter 8:14] also acts as an impediment because it outlaws the attachment of State property when the court awards damages against state employees. This explains why victims can go for several years without receiving their monetary damages, and the challenge is more pronounced when implicated individual officers lack the financial capacity to pay the damages.
Another limitation lies in the impediments that come as a result of some repugnant legal provisions. An example is the already discussed Section 70 of the Police Act, which prescribes suing the police after a period of 8 months. Despite the constitutional challenge in the case of Nyika and Another v Minister of Home Affairs and Others, several cases were thrown out after the plaintiffs had failed to file their civil suits within the stipulated 8 month period. Moreover, the legislative authority is yet to take corrective action to repeal the unconstitutional provision. In other cases (for example, Mangena v Minister of Home Affairs and Others), the courts had to spend time deciding on whether the civil claim fell within the 8 month period, rather than to decide on the merits of the case. In the case of DARE and Others v Saunyama and Others, the Constitutional Court ruled Section 27 of POSA to be unconstitutional and also took cognisance of the fact that the section could be abused by the regulating authority.

3.5. Preventing police abuse of power

Whilst the court plays an instrumental role in holding the police to account, there is need for more mechanisms, to address the challenge of police abuse of power. One way to deal with police abuse of power is to have an independent police complaints body in the mould of IOPC in England and Wales and IPID in South Africa. Such a body should adopt both a proactive and reactive approach to dealing with police abuse of power. This is important because not all aggrieved citizens will afford the costs that come with filing civil claims against the police. There is also need for the legislature to repeal repugnant provisions such as section 70 of the Police Act and Section 27 of POSA. Moreover, there is need for a law which mandates the responsible ministry (in this instance, the Ministry of Home Affairs) to pay monetary damages to victims of abuse within a stipulated time frame. This will enable the victims of police abuse to get timely justice. Training is also instrumental in imparting human rights consciousness on all police officers. Human rights should not only form the significant part of initial police training but should also be offered on a continuous basis after basic police training. This will inculcate a human rights-consciousness on police officers so that they exercise their wide discretionary powers within the confines of the law.

4. Conclusions

This paper shows a snapshot of some of the processes where civil action can be brought against the police and where courts discipline the police for abuse of power. The wide discretionary powers given to the police have been abused through unlawful arrest and detention, indiscriminate use of force, torture and inhuman treatment. Despite the presence of laws which curtail police abuse of power, the police organisation has had to contend with civil action emanating from abuse of these powers. In the absence of an independent police complaints mechanism in Zimbabwe, the court is the viable alternative for citizens to seek recourse for police abuse of power. Notwithstanding the role that is played by the court in holding the police to account, challenges in the execution of judgements against the police, as well as the presence of repugnant legal provisions, militate against the court’s effectiveness as a police oversight institution.

Funding
The authors received no direct funding for this research.

Author details
Ishmael Mugari1
E-mail: ishiemugari@gmail.com
Emeka E Obioha2
1 Department of Social Sciences, Walter Sisulu University, Mthatha, South Africa.

Disclosure statement
No potential conflict of interest was reported by the author(s).

Citation information
Cite this article as: Curtailing police discretionary powers: Civil action against the police in Zimbabwe, Ishmael Mugari & Emeka E Obioha, Cogent Social Sciences (2022), 8: 2075132.

Notes
1. BJ Doherty, “Pathways to Accountability? Independent Oversight, the Right to Life and the Investigation of Deaths Involving the Police” (PhD diss., Portsmouth, 2013) 32.
2. S Bronitt and P Stenning, “Understanding discretion in modern policing”, Criminal Law Journal 35 (2011): 319–332.
3. RA Harmon, “When is police violence justified?”, Northwestern University Law Review 102, no 3 (2008).
4. Beaudry V The Queen 2007 1 SCR 110.
5. I Mugari, “Civilian Police Oversight: A contemporary Review of police oversight mechanisms in Europe, Australia and Africa”, Journal of Applied Security Research (2021):1–22.
6. Mugari, Civilian Police Oversight, 10.
7. DH Bayley, Changing the Guard—Developing Democratic Police Abroad (Oxford: Oxford University Press, 2006).
8. A Harris Holding police accountability theory to account (PhD diss., Portsmouth, 2013), 10.
9. J McDaniel, “Rethinking Police Accountability and Transparency within the EU: Reconciling national and supranational approaches” (PhD diss., Kent, 2015).
10. J Ransley J Anderson and J Prenzler “Civil Litigation Against police in Australia: Exploring its Extent, Nature and Implications for Accountability”, The Australian and New Zealand Journal of Criminology 40 (2007): 143–160.
11. I Mugari and EE Obioha, “Perspectives about execution of powers and functions by the Zimbabwe Republic Police”, Conexus Journal of Sociology and Social Policy 9, no 1 (2018): 127–149.
12. McDaniel, Rethinking Police Accountability, 74.
13. McDaniel, Rethinking Police Accountability, 75.
14. Constitution of Zimbabwe Amendment Act of 2013 (hereinafter called the Constitution of Zimbabwe).
15. Zimbabwe Human Rights NGO Forum, Freedom from Arbitrary Arrest and Detention (Human Rights Bulletin, 108, 2015).
16. US Department of State, Zimbabwe 2018 Human rights Report (New York: Bureau of Democracy, Human Rights and Labour, 2018).
17. US Department of State, Zimbabwe 2019 Human rights Report (New York: Bureau of Democracy, Human Rights and Labour, 2019).
18. N Tshili, “Domestic violence cases rise under lockdown”, The Chronicle, 9 May 2020.
19. Macheka v Metcalf HH-62-2007; Muyambo v Ngomaikarina HH 138–2011.
20. Mugari and Obioha, Perspective about Powers, 129.
21. Mapuranga v Mungate 1997 (1) ZLR 64 (H).
22. Minister of Home Affairs v Bangajena 2000(1) ZLR 306 (S).
23. Botha v Zvada 1997 (1) ZLR 415 (S).
24. Ibid.
25. Ibid.
26. Muyambo v Ngomaikarina HH –138- 2011.
27. Ibid.
28. Nyambara v The Co-ministers of Home Affairs HH-99-2015.
29. Ibid.
30. Mapije v Minister of Home Affair HH-146-2018.
31. Ibid.
32. Musakwe v Minister of Home Affairs HH-83-2013.
33. Ibid.
34. Ibid.
35. Musadzikwa v Minister of Home Affairs (1) ZLR 405 (H).
36. Ibid.
37. Mugadza v Minister of Home Affairs 2001 (2) ZLR 134 (H).
38. Nyandoro v Minister of Home Affairs HH-196-2010.
39. Ibid.
40. Ibid.
41. Simbanegavi v Officer Jachi HH-40-2013.
42. Ibid.
43. Nyambara v The Co-ministers of Home Affairs, supra, note 26.
44. Mapuranga v Mungate 1997 (1) ZLR 64 (H).
45. Nyandoro v Minister of Home Affairs, supra, note 36.
46. Ibid.
47. Article 1 of the Convention against Torture (CAT).
48. Karimazondo v Minister of Home Affairs 2001 (2) ZLR 363 (H).
49. Ibid.
50. State v Slatter 1983 ZLR 144.
51. Ibid.
52. Chitiku v Minister of Home Affairs 2004 (1) ZLR 36 (H).
53. Nathanson V Mteliso and Others HB-176-2019.
54. Ibid.
55. Mugari and Obioha, Perspectives about Powers, 130.
56. Thompson V Minister of Police 1983 (3) SA 98 A.
57. Stambolie v Commissioner of Police 1983(3) ZLR 283.
58. Manjoro v Minister of Home Affairs HH-153-2018.
59. Ibid.
60. Nathanson V Mteliso, supra note 51.
61. Ibid.
62. Ibid.
63. Mavhiza v Inspector Muwambwi HH-247-2014.
64. Ibid.
65. Madondo and Another v The State HH-512-2015.
66. Movement for Democratic Change v Officer Commanding Bulawayo Central District HB 126–2016.
67. Ibid.
68. Nyika v Minister of Home Affairs HH 181–16.
69. Ibid.
70. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).
71. DARE v Saunyama CC9-2018.
72. Ibid.
73. Muskwe v Minister of Home Affairs, supra note 30.
74. Zimbabwe Human Rights NGO Forum, United Nations Day in Support of Victims of Torture. Fighting Impunity (Harare, June 2014) 1.
75. Simbanegavi v Officer Jachi, supra note 67.
76. Zimbabwe Human Rights NGO Forum, United Nations Day Torture, 1.
77. Nyika v Minister of Home Affairs, supra note 66.
78. Mangena v Minister of Home Affairs HH 115–2016.
79. DARE v Saunyama, supra, note 69.
