INAUGURAL WORLD BAR CONFERENCE

ZIMBABWE'S EXPERIENCE OF HUMAN RIGHTS AND THE ROLE OF THE INDEPENDENT BAR

Presented by: A P de Bourbon SC
Chairman, Bar Council of Zimbabwe
29 June 2002

I am flattered to be given this opportunity to address such an august gathering of lawyers, especially coming as I do from one of the very smallest Bars. I would like to thank all of you for the invitation to address this inaugural conference, and I especially thank the General Council of the Bar of South Africa for making the necessary arrangements to enable me to be here today. I am extremely grateful to everyone involved.

It did not take Zimbabwe long after independence in 1980 to establish an independent judiciary. The Constitution agreed at Lancaster House guaranteed the independence of the judiciary. The appointment of John Fieldsend as Chief Justice in July 1980 saw the real birth of the independent judiciary in Zimbabwe. This tradition, not only in keeping with the written Constitution of Zimbabwe, but in keeping with the democratic principles on which member nations of the Commonwealth are founded, grew in intensity in the years that followed. With few exceptions ,the judges in Zimbabwe, between 1981 and mid-2001, showed themselves to be independent of the Executive and on the few occasions when the Executive sought to interfere with the judiciary, the judges publicly stood up and won the day.[i] In that period the Government seemed to recognise and appreciate the importance of the independent judiciary that existed in Zimbabwe.

At the Commonwealth Heads of Government meeting in Harare in 1991, the Government of Zimbabwe pledged itself to the rule of law and the independence of the judiciary, as well as to just and honest government. Within a few years this pledge was seen to be meaningless.

The emergence of a strong opposition party at the time of 2000 parliamentary elections caused a complete change of attitude by members of the Executive towards the Judiciary, and led to the public condemnation of certain Judges by members of the Government. This came to a head at the beginning of 2001 when the Supreme Court ruled that President Mugabe could not use his presidential powers to anull the right of unsuccessful candidates in the 2000 parliamentary election to launch election petitions. About 35 election petitions had been filed by losing opposition candidates, and the Government sought to nullify those petitions by proclamation. The Supreme Court struck down the proclamation in January 2001.[ii] In due course, a number of the election petitions were found to be valid, and the elections voided, although all these decisions are subject to pending appeals.

Shortly after the Supreme Court judgment, a deliberate and public campaign was started by the Government against the Judiciary. The new Minister of Justice had his own personal reasons; he was under investigation by the Judiciary for contempt of court, an investigation which the Supreme Court had earlier held did not infringe any constitutional rights of the Minister.[iii] Pursuant to this campaign, the Minister of Justice and other Ministers made public statements undermining the confidence and standing of the Judiciary, and this culminated in visits by the Minister of Justice to the Chief Justice and other judges to pressure them to resign. An attempt by some senior judges to seek the assistance of the Acting President to restore confidence in the Judiciary was treated by the Government as a sign of weakness by the Judiciary.

As a result of this public pressure, and in part because of his own personal circumstances, Chief Justice Gubbay chose to take early retirement. This was undoubtedly a bitter blow for the Judiciary and the legal profession, and gave confidence to the Executive to continue its pernicious campaign against the judges. Since then, not only has the Chief Justice retired, but five other judges have resigned.

The situation in Zimbabwe became of such concern to the international community that the International Bar Association sent a delegation to Zimbabwe in March 2001 to investigate the situation. This distinguished group of international lawyers found that there had been a deliberate policy by the Government of undermining the independence of the judiciary and interference with the judiciary, but were comforted by an undertaking given by Mr Mugabe that his Government would not seek to pack the Supreme Court.[iv] Regrettably, this undertaking was not honoured, and in mid-2001 four new appointments were made to the Supreme Court, thereby tipping the balance in that court in favour of the Government. This position has been apparent from decisions given since that date, especially in matters relating to the presidential and municipal elections and the land acquisition exercise.

The present position in Zimbabwe is that there is no longer an independent judiciary. There remain a small number of independent judges, but since the Supreme Court, which also sits as the Constitutional Court, is dominated by judges perceived to be pro-active in favour of the Government, I am firmly of the view that Zimbabwe no longer has an independent judiciary.

To understand the problems confronting the legal profession in Zimbabwe I note that the Bar in Zimbabwe is a *de facto* bar consisting of 19 members. Regrettably, some members of the Bar are not prepared to take human rights cases against the Government. The impression that the Government propaganda machine creates is that human rights litigation is an anti-Government activity, and those who engage in it are disloyal and are continually under threat. This makes some lawyers nervous, and unwilling to accept ceratin work.

This threat received judicial approval when an application to the present Chief Justice to recuse himself and to reconstitute the Supreme Court to afford a fairer hearing to the Commercial Farmers' Union led to the following statement:

> "The unbridled arrogance and insolence with which the application for the reconstitution of this Court was made in this case is simply astounding and, to say the least, unacceptable. This is the first and the last time that such contempt of this Court will go unpunished."[v]

Many lawyers who appear before the Supreme Court constituted of recently appointed judges receive a hostile reception, and quite frankly no matter how thoroughly or competently the argument is prepared and presented, no acknowledgement of that is ever given.

The story of judicial involvement of human rights in Zimbabwe since independence in April 1980 falls into three broad time categories. There was an initial period from 1980 to 1987 when the ability of the courts to interfere with existing legislation was restricted in terms of the Constitution, and in addition a state of emergency existed in the country. During this time very limited advances were made in the field of human rights, but, with some exceptions, whenever possible the courts did rule in favour of the citizen against the State.

The most important constitutional findings in this period related to the right of access to lawyers. In two well known decisions the courts held that persons in preventative detention or under arrest had a constitutional right to see their lawyer,[vi] and that the failure to afford this right could invalidate confessions obtained by the police.[vii] On the other hand, the court found in favour of the government relating to the cancellation of rights under Rhodesian legislation, and the court drew the distinction between the acquisition of property and the extinction of rights to property.[viii] This judgment has caused considerable controversy, but has been followed consistently since.

The second period ran from 1987 through to 2001, and in the main covered the period when Chief Justices Dumbutshena and Gubbay presided over the Supreme Court. During this time I believe that Zimbabwe attained a very deserved reputation, not only in the Commonwealth, but throughout the world, for its enlightened and forward thinking approach to human rights. Those sixteen years saw many advances in the field of human rights in Zimbabwe, far too numerous to fully catalogue in an address of this nature. However, some do deserve mention.

The inordinate delays in carrying out sentences of death were found to be unconstitutional,[ix] a judgment which was subsequently followed by the Privy Council.[x] Corporal punishment as a

criminal sanction was held to be unconstitutional,[xi] as was the punishment of solitary confinement and reduced diet.[xii] Civil imprisonment for debt was held not to be contrary to the Constitution.[xiii] The courts also laid down clear guide lines as to the right of the courts to review unconstitutional decisions made within Parliament itself, relating to charges of contempt brought against members.[xiv] Legislation dealing with the funding of political parties was held to be unconstitutional.[xv] On the other hand, in one of the few matters concerning land acquisition which came before the courts in this period, the courts found for the Government.[xvi] Surprisingly the Government later repealed the law which had been approved by the courts.[xvii]

The one decision, based on constitutional principles, which had a direct impact on both the Bar and the legal profession related to the right of the alter ego of a private company to represent the company in the High Court. This decision overturned the tradition and practice that lawyers had to represent companies in all High Court proceedings.[xviii] But on the other hand, in relation to disciplinary proceedings within the public service or at the university, the right to legal representation has been recognised.[xix]

But the court has not gone as far as some other countries. By a majority it held that it was not contrary to the Constitution to criminalize homosexual activities between consenting males.[xx]

Perhaps most significantly, this period saw the firm adoption of the right of freedom of expression as the mainstay of constitutional rights,[xxi] and the application of this right to mobile telephone services[xxii] and broadcasting services.[xxiii] The courts recognised the right to a fair hearing as a fundamental constitutional right.[xxiv]

The Supreme Court also struck down the old false news criminal provision in our legislation, holding that it was no longer compatible with present day constitutional principles.[xxv] This ruling was not accepted by the Executive which caused Parliament to re-enact the provision

in recent legislation. As mentioned earlier, it is also held that the right of freedom of expression did not extend to criticism of the courts amounting to contempt.[xxvi]

Regrettably, on a number of occasions the rulings of the Supreme Court were not accepted by the Government and constitutional amendments were passed through Parliament to undo the advances made by the Supreme Court. In several other instances, the Government either ignored the decisions of the Supreme Court, or failed to apply them on a broad basis to all those affected, making it necessary for repeated applications to be made to the Supreme Court for relief in respect of individuals.

Dark clouds formed over the field of human rights in the middle of 2001 when Chief Justice Gubbay was forced to retire, and four new judges were appointed to the Supreme Court. Shortly thereafter, one of the long serving judges died, another retired and one other resigned. Although there have been one or two judgments given recently which reflect well on the human rights position in Zimbabwe,[xxvii] the reality in Zimbabwe is that human rights are under extreme threat as a result of changes to the bench of the Supreme Court. Matters involving human and constitutional rights are not being heard as matters of urgency, and even when a date of hearing is eventually obtained, delays in rendering the decision have become far longer than used to be the case.

In the first major judgment of the new Court concerning land, the issue was decided against the commercial farmers based on a law which did not exist when the matter was argued, and without giving those of us who represented the farmers the chance to challenge the validity of the law or otherwise debate the matter.[xxviii] Dissenting judgments by the remaining Supreme Court judges appointed before mid-2001 have become the order of the day. This must be contrasted with the second period I have mentioned where there were very few dissenting judgments. In fact, I can only recall three.

The Bar in Zimbabwe, although only a *de facto* bar after the fusion of the legal profession in 1981, has always been at the forefront of the presentation of arguments in the High Court and the Supreme Court relating to human rights. On many occasions, members of the Bar appeared at the request of the court to argue matters so that the court could have a balanced basis upon which to make its decisions. Whether that will continue in the future remains to be seen.

Throughout this process the lawyers in Zimbabwe, headed recently by Sternford Moyo, the President of the Law Society, did what they could to challenge what was being done in respect of the Judiciary. Both the Law Society and the Bar Council issued public statements condemning political interference with the Judiciary. Both bodies gave considerable assistance to the International Bar Association delegation when it visited Zimbabwe. Members of the Bar went out of their way to speak to Judges who were under threat from the Executive and to encourage them to resist the unlawful pressure from the Executive. But the Bar has to continue to operate within the system, and can only do so much outside the courts. The Bar in Zimbabwe has been greatly assisted by the support and encouragement of the Bars in other countries within the Commonwealth, including South Africa, England and Wales and Australia. We have never felt isolated, and the support that we have received has been of great encouragement to us to persist in doing what members of the Bar do best, that is asserting the rights of their clients to the best of their ability without fear of the repercussions from either the Judiciary or the Executive. I have no doubt that the independent Bar in Zimbabwe, and indeed the bulk of the legal profession, are looked upon with disfavour by both the new Judiciary and the Executive because they continue to operate independent of political pressure or favour.

I hope that all lawyers who cherish the concept of an independent bar, and who are wedded to the principle of independence of the judiciary, will continue to give support to the lawyers in Zimbabwe to enable us to resist political intervention in the legal process, and to enable us to

carry out our function in ensuring that those who appear before the courts receive the best possible representation that is available to them.

One of the shortcomings that the Bar faces in presenting argument relating to human rights is the unavailability of research material. Whilst I appreciate that a great deal of this is available on the Internet, the Bar lacks research assistance and lacks access to foreign currency to enable it to obtain textbooks, journals and law reports to assist in this regard. The University of Zimbabwe can only provide limited assistance. Some NGO's, in particular Article XIX, are very helpful in this regard, and I would hope that one of the consequences of a meeting such as this is that other independent bar organizations will be in a position to assist those in Zimbabwe undertaking what has now become difficult and quite frankly threatening work.

The democratic principles most under threat in Zimbabwe at present is freedom of expression. Recent laws relating to public order,[xxix] broadcasting services[xxx] and access to information[xxxi] have been passed in order to stifle the rights of Zimbabweans to express themselves. Experience in recent months has confirmed the worst fears of the legal profession that some Judges will go out of their way to ensure that use of this legislation by the police and the Executive is either condoned or not subjected to criticism.

This attitude by the Executive has shown itself most recently by threats from Ministers against the Law Society, and by the arrest of the President and Secretary of the Law Society on what are clearly spurious allegations of political activities. The Judge who heard an urgent habeas corpus application gave no significant relief to the two applicants, and made no substantial criticism of the police who had:

- refused lawyers access to their two clients
- taken the two, together with the female staff of the Law Society offices, to a remote game reserve in order to question them, isolate and disorientate them and deprive them of access to lawyers

- given them no food over a period of 31 hours
- claimed to the Judge in Chambers that they did not know the whereabouts of the two applicants.

Fortunately, shortly after the Judge refused to order their release, the police did in fact release them. But these actions have added to the feeling of insecurity and perhaps even fear amongst lawyers, especially those who undertake human rights litigation or represent opposition politicians.

The President of the Law Society has made repeated public statements condemning abuses of human rights in Zimbabwe. This lead to the Government threatening to amend the legislation concerning the operations of the Law Society to take away an elected council and replace it by one appointed by the Minister. This threat has to be taken seriously because of the recent legislation enacted to stifle freedom of expression amongst journalists and among political opponents of the Government. This new legislation has been used repeatedly to cause the arrest of journalists and opposition political figures for allegations which quite frankly are no more than what they had to say or publish did not meet the approval of a particular minister or the Government as a whole.

Can the Bar in Zimbabwe play a role in developing the law relating to human rights? Given the proper circumstances, and a fair and impartial judicial atmosphere, there is no doubt in my mind that the Bar can pick up where it left off by being at the forefront of the development of human rights law in Zimbabwe. At present the ability of the members of the Bar to do this is being stifled by the atmosphere in the country. International awareness of the threats to human rights in Zimbabwe is vital. It is vital that the International Bar Association and similar bodies continue to monitor the situation in Zimbabwe and even if their reports and statements have no effect on the Government, they do have an immense effect on international opinion. Visits by eminent lawyers also help to boost the morale of those of us who remain in Zimbabwe, and encourage us to press on regardless of the difficulties that we are presently facing.

That is why I welcome this opportunity to let it be known the difficulties under which the Bar in Zimbabwe operates. We are a small grouping, but I firmly believe that we have made an important contribution to the development of the law in our country, both generally and in respect of human rights, and all we want to do is to continue to ensure that the country is based on true democratic principles, and not under threat from an authoritarian regime.

Thank you.

---

[i] See for example the public statement issued by the Supreme Court Judges after the Speaker of Parliament publicly criticised the judgment in Smith v Mutasa, *infra*. The statement is set out in 1989 (3) ZLR at pages 218-220

[ii] Movement for Democratic Change & Anor v Chinamasa & Anor NNO SC 7/2001 (not yet reported)

[iii] In re Chinamasa 2000(2) ZLR 322 (SC), 2001 (2) SA 902 (ZS). In 2001 a provision was introduced into the General Laws Amendment Act to prevent charges of contempt of court being brought without the approval of the Attorney-General. The Act was declared to be unconstitutional, and has yet to be re-enacted, see Biti & Anor v Minister of Justice, legal and Parliamentary Affairs & Anor SC 10/2002 (not yet reported)

[iv] International Bar Association: Report of Zimbabwe Mission 2001, issued 23 April 2001, paragraphs 13.24 and 13.7

[v] Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers' Union SC 111/2001 (not yet reported) at page 7 of the cyclostyled judgment

[vi] Minister of Home Affairs v Dabengwa & Anor 1982 (1) ZLR 236 (SC), 1982 (4) SA 301 (ZS)

[vii] S v Slatter & Ors 1983 (2) ZLR 144 (HC) at 152-155; on appeal *sub nom* Attorney-General v Slatter & Ors 1984 (1) ZLR 306 (SC) at 309-312, 1984 (3) SA 798 (ZS)

[viii] Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC), 1982 (1) SA 490 (ZS)

[ix] Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors 1993 (1) ZLR 242 (SC), 1993 (4) SA 239 (ZS). The subsequent decision in Nkomo & Anor v Attorney-General & Ors 1993 (2) ZLR 422 (SC), 1994 (3) SA 34 (ZS) confirmed the constitutional right where it had accrued before the Constitution was amended to overturn the earlier decision of the Supreme Court

[x] Pratt v Attorney-General for Jamaica & Anor [1993] 3 WLR 995, [1993] 4 All ER 769 (PC)

[xi] S v Ncube & Ors 1987 (2) ZLR 246 (SC), 1988 (2) SA 702 (SC) (adult whipping) and S v A Juvenile 1989 (2) ZLR 61 (SC), 1990 (4) SA 151 (ZS) (juvenile corporal punishment)

[xii] S v Masitere 1990 (2) ZLR 289 (SC); 1991(1) SA 821 (ZS)

[xiii] Chinamora v Angwa Furnishers (Pvt) Ltd & Ors 1996 (2) ZLR 664 (SC), 1998 (2) SA 432 (ZS)

[xiv] Smith v Mutasa & Anor NNO 1989 (3) ZLR 183 (SC), 1990 (3) SA 756 (ZS); Mutasa v Makombe NO 1997 (1) ZLR 330 (SC), 1998 (1) SA 397 (ZS)

[xv] United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (SC), 1998 (3) SA 85 (ZS)

[xvi] Davies & Ors v Minister of Lands, Agriculture and Water Development 1994 (2) ZLR 294 (HC), 1995 (1) BCLR 83 (ZH); on appeal 1996 (1) ZLR 681(SC), 1997 (1) SA 228 (ZS)

[xvii] Part IV of the Land Acquisition Act [*Chapter 20:10*], repealed by section 9 of the Land Acquisition Act 2000 (Act 15/2000)

[xviii] Lees Import & Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd 1999 (2) ZLR 36 (SC)

[xix] Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor 1993 (1) ZLR 162 (SC); Nhari v Public Service Commission 1999 (1) ZLR 513 (SC)

[xx] S v Banana 2000 (1) ZLR 607 (SC), 2000 (3) SA 885 (ZS)

[xxi] In re Munhumeso & Ors 1994 (1) ZLR 49 (SC), 1995 (1) SA 551 (ZS); Woods & Ors v Minister of Justice & Ors 1994 (2) ZLR 195 (SC), 1995 (1) SA 703 (ZS)

[xxii] Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor 1995 (2) ZLR 199 (SC), 1996 (1) SA 847 (ZS); Retrofit v Minister of Information, Posts and Telecommunications 1995 (2) ZLR 422 (SC), 1996 (3) BCLR 394 (ZS); TS Masiyiwa Holdings (Pvt) Ltd & Anor v Minister of Information 1996 (2) ZLR 754 (SC), 1998 (2) SA 755 (ZS)

[xxiii] Capital Radio (Pvt) Ltd v Minster of Information 2000 (2) ZLR 243 (SC)

[xxiv] Holland & Ors v Minister of the Public Service, Labour and Social Welfare 1997 (1) ZLR 186 (SC), 1998 (1) SA 389 (ZS). This right includes the right of an independent prosecutor in a criminal case, Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (SC)

[xxv] Chavunduka & Anor v Minister of Home Affairs & Anor 2000 (1) ZLR 552 (SC),2000 (4) SA 1 (ZS)

[xxvi] In re Chinamasa 2000 (2) ZLR 322 (SC), 2001 (2) SA 902 (ZS)

[xxvii] Tsvangarai v S SC 91/2001 (not yet reported) (declaring an statutory offence to be unconstitutional) and Biti & Anor v Minister of Justice, Legal and Parliamentary Affairs & Anor SC 10/2002 (not yet reported) (declaring unconstitutional a bill defeated at its Third Reading in Parliament, but immediately reintroduced)

[xxviii] Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union SC 111/2001 (not yet reported). This judgment failed to follow the decision in Kauesa v Minister of Home Affairs & Ors 1996 (4) SA 965 (NmS) at pages 973-974 which held it to be a breach of a litigant's constitutional rights to decide an issue without hearing argument

[xxix] Public Order and Security Act [*Chapter 11:17*] (Act 1/2002), commencement date 22 January 2002

[xxx] Broadcasting Services Act [*Chapter 12:06*] (Act 3/2001), commencement date 4 April 2001

[xxxi] Access to Information and Protection of Privacy Act [*Chapter 10:27*] (Act 5/2002), commencement date 15 March 2002