

THE HONOURABLE ANTHONY GUBBAY

THE LIGHT OF SUCCESSIVE CHIEF JUSTICES OF ZIMBABWE IN SEEKING TO PROTECT HUMAN RIGHTS AND THE RULE OF LAW

INTRODUCTION

Zimbabwe is a Republic within the Commonwealth. Before it attained legitimate independence from Britain, the country was known as Southern Rhodesia and later as Rhodesia. The population numbers between 12,5 and 13 million.

In 1890 the British South Africa Company, operating under a Royal Charter obtained by Cecil Rhodes, commenced to exercise powers of governance over the country. Then, in 1923, as a result of a referendum, Southern Rhodesia became a self-governing colony.

Following the 1962 general election, which was won convincingly by the Rhodesia Front Party, extensive negotiations between the Southern Rhodesian and British Governments took place over the question of independence, which constitutionally could only be conferred by Britain. No agreement was reached and, consequent upon the declaration of a state of public emergency in the country, on 11 November 1965 Prime Minister Ian Smith and other Ministers holding office under the 1961 Constitution, purported to issue a Unilateral Declaration of Independence. This led to a protracted armed struggle within the country by the armed wings of the two African nationalist parties, ZANU and ZAPU.

The last decade of this civil war against the white government of Rhodesia was the most brutal. The white regime used all the coercive authority of the state to retain its hold on power. Measures taken included the enactment of increasingly repressive security legislation, strict control over access to food and land, censorship and propaganda, the assassination of guerilla leaders and the use of biological warfare.

In August 1979 the British Government invited the parties to the armed struggle to a conference at Lancaster House. It was held from 10 September to 21 December 1979 and was attended principally by the Patriotic Front led by Robert Mugabe and Joshua Nkomo and a delegation from Rhodesia. After discussions, agreement was reached on an independence constitution. This came into force on 18 April 1980, after a general election had been won by the ZANU party headed by Robert Mugabe.

At independence the High Court consisted of the Chief Justice and ten white Judges. The Appeal Court comprised the Chief Justice, the Judge President and one full time Judge of Appeal. All the Judges were white. The self-same Chief Justice, who had indicated an unwillingness to serve under a nationalist

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government, represented the judiciary at the granting of Independence and swore into office Robert Mugabe as Prime Minister. The non-executive President was a Methodist cleric, the Reverend Canaan Banana.

As part of the process of reconciliation the Mugabe Government left in office all the members of the judiciary who had served under the white minority government of Ian Smith. However, during May 1980 the Chief Justice and one Judge of Appeal retired, having both reached sixty-five years of age. On 8 May 1980 the first black Judge was appointed to the High Court. He was Enoch Durnbutshena who died in December last year.

Born into the tiny but influential Zvimba community in 1920, Durnbutshena was educated at a mission school. At South Africa's Fort Hare University, where he attained a bachelor of arts degree, and later in the Northern Transvaal where he taught and lectured, he established himself as a formidable debator. He fitted in easily with a small elite group of young South African and Rhodesian blacks who, ultimately, were to dramatically rearrange a large part of Africa.

Rejecting full time politics, Durnbutshena took to journalism. For a time he was a correspondent for the publication known as "The Drum", which was the clearest voice of post-war Africa. Wishing to further his studies in journalism in the United States, he left the country in early 1960. But when he reached London he was unable to obtain a United States entry visa. Happily on the advice of Rhodesia's governor, Sir Humphrey Gibbs, and with the intervention of the country's then Chief Justice, Sir Jolm Murray, Enoch Durnbutshena was admitted as a member of Greys Inn. He was called to the Bar in 1963.

Later that year he returned to his country and commenced practice as an advocate. Like his illustrious predecessor, Herbert Chitepo, he became prominent in the defence of the causes of African nationalism. It was during this period time he and I were to meet.

Becoming a thorn in the side of the Smith Government, in 1967 Durnbutshena escaped arrest and detention by walking across the border into Zambia. He practised there until 1979 when once more he returned to the country of his birth.

The first Chief Justice of Zimbabwe was John Fieldsend. He was appointed for a fixed term and assumed office on 1 July 1980. Born in England, Sir John (as he later became) was brought up in Southern Rhodesia. After graduating in law he practised as an advocate in Bulawayo. In 1962 he was appointed a judge of the High Court, but resigned in 1968 in protest against the decision of the Appellate Court to grant judicial recognition to the government of Ian Smith. He returned to Britain, where for the next twelve years he served in the office of the Lord Chancellor.

During the early years of Independence many of the previously appointed white Judges resigned. By mid-1984 only two remained, with one retiring at the end of 1986. The other was myself.

At present the Supreme Court (the successor of the Appeal Court) has eight Judges and the High Court has nineteen, fifteen including the Judge President

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are assigned to the High Court at Harare and four at Bulawayo. The composition of both courts at the present moment is non-racial.

The Constitution of Zimbabwe came into force with the advent of Independence. It contains a justiciable Declaration of Rights. Chief among the rights protected are the right to life; the right to personal liberty; the right to freedom of conscience, expression, assembly and association; the right not to be subjected to torture or inhuman or degrading punishment or treatment; the right to be afforded a fair trial within a reasonable time by an independent and impartial court; the right to freedom from discrimination; and the right to protection against deprivation of property.

Anyone who alleges that a fundamental right or protection has been, or is likely to be, breached in relation to him or herself, may apply directly to the Supreme Court for redress. And the High Court, and any inferior court, are required to refer any such question to the Supreme Court for determination if so requested by the parties, provided that it is not frivolous or vexatious.

The Constitution gives the Supreme Court a very wide discretion as to the nature of the redress it may order for the purpose of enforcing or securing the enforcement of the Declaration of Rights. This unfettered discretion has been utilised on many occasions. Recently, and so as to secure the protection to a citizen wife of the right to reside permanently, and without interference, in any part of Zimbabwe, the Chief Immigration Officer was ordered to issue to the alien husband such written authority as was necessary to enable him to remain in the country on the same standing as any other alien who is a permanent resident.

THE FIRST PERIOD

During the tenure of office of Chief Justice Fieldsend the main area of conflict between the judiciary and the executive involved cases of detention without trial; that is, a deprivation of liberty permitted, subject to certain conditions, under the law of Zimbabwe, during a declared period of public emergency. The state of emergency, which had been declared by the Smith government at its unilateral declaration of independence on 11 November 1965, and extended repeatedly every six months, was kept in force by the new government for ten years.

Now a blatant failure to comply with court orders first occurred in the case of the York brothers. In January 1982 two farmers, the York brothers, were arrested and charged with the illegal possession of arms of war. The State's most important witness left the country before the trial. A statement made by one of the accused to the police, apparently admitting the crime, was ruled by the trial court to be inadmissible because it had been made as a result of police threats to arrest his family.

The State case collapsed and the brothers were acquitted. The government, however, ordered their immediate detention. The High Court held that the detention was illegal as the State had failed to comply with the conditions of detention. The brothers were then re-detained on fresh detention orders, but had to be released a second time as the orders still did not comply with the necessary conditions. Again they were re-detained in terms of new orders.

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It was only after this third attempt that the High Court ruled that the detention orders were validly made. The reasoning advanced was that they were being held under "investigative" detention as opposed to "preventive" detention. Hence those rights guaranteed by the Constitution as applicable to preventive detention were not available to the detainees. Not unexpectedly this decision was criticised as being an exercise in semantics.

On the plain facts there was no conflict between the executive and the judiciary. The Minister of Home Affairs, responsible for the police, had made a series of mistakes and the courts were unable to uphold the detentions until those mistakes had been rectified. However, a statement made by the Minister to the court during the second detention hearing declaring that no information would be forthcoming as to where the detainees were being held, even in the face of a court order to that effect, was indicative of just such a conflict. The same Minister, speaking in Parliament, accused the judiciary of dispensing "injustice by handing down perverted pieces of judgment which smack of subverting the people's Government". The Minister of Home Affairs went on to attack the legal profession as a whole in the following terms:

"We are aware that certain legal practitioners are in receipt of moneys as paid hirelings, from governments hostile to our own order, in the process of seeking to destabilise us, to create a state of anarchy through the inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed in breaking up the unholy alliance between the negative bench, the reactionary legal practitioners and governments hostile to us, some of whose representatives are in this country."

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The Minister's statement clearly represented a threat to both the independence of the judiciary and the function of the country's legal system. Representatives of the Law Society met the Minister of Justice to express their concern. The Law Society subsequently issued a statement according to which "the Minister of Justice confirmed that it remained the view of the government that it is the duty of legal practitioners to act fearlessly in the interests of their clients and in the interests of the administration of justice". The statement went on to condemn the unwarranted attack upon the judiciary, which undermined the confidence of the people in the courts of the country.

The Chief Justice, after consulting Prime Minister Mugabe and the Minister of Justice also issued a statement expressing his concern at the attack upon the judiciary and the legal profession. The Minister of Justice himself put out a press release to the effect that the government recognised the role which an independent judiciary is to play in the sustenance of democratic order; and that it was government's belief that the executive and judiciary should complement each other in the fulfilment of their functions.

Although the statement of the Minister of Justice contained much that could be seen as recognising and supporting the independence and effectiveness of the judiciary, confusion remained as to the exact nature of the government's position on this issue. This was because a few days earlier the Prime Minister had said in Parliament that:

"the Government cannot allow the technicalities of the law to fetter its hands in what is a very clear task before it, to preserve law and order in the country. We shall, therefore, proceed as Government in a manner we feel as fitting ... and some of the measures we shall take are measures which will be extra legal".

Taking extra-legal measures meant disobeying the law. That is exactly what the Minister of Home Affairs did two days after the Prime Minister spoke. And the Prime Minister's words clearly conveyed, whatever the Minister of Justice might say, that it is government's policy to disobey the law whenever it considers such disobedience necessary for the preservation of law and order.

With the knowledge of hindsight, I do not believe that this criticism and disobedience of the judiciary by the executive can be dismissed as mere teething trouble - as the manifestation of a newly elected government flexing its muscles after emerging from an inordinate period of oppression under white minority rule.

A further controversial episode occurred in 1983 when six white officers of the Zimbabwe Air Force were charged with being involved in a serious sabotage attack on an airforce base. The only evidence against them were signed confessions which they alleged were obtained as a result of torture. The trial judge was Enoch Dwnbutshena. He found that all the accused were denied access to their legal representatives prior to making the confessions; and also that the confessions were made as a result of fear after sustained physical and mental torture. Accordingly he held that the confessions were inadmissible and the accused were all acquitted. They were placed in preventive detention immediately upon release, but only for a short period. They were then deported from the country.

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An appeal by the Attorney-General to the Supreme Court, which as it happened was comprised of three white Judges all appointed prior to 1980 (I was one of them), was dismissed. That decision was condemned by the Minister of Home Affairs. He accused the Judges of "class bias and racism". No contradiction of that false statement was made by any other Minister or the Attorney General.

There is little doubt that during this early period the frequent use of detention without trial, both in instances where the courts had previously acquitted the detainees and to avoid the judicial process entirely, amounted to an erosion of the rule of law. So did the government's stance in simply ignoring court orders to pay damages to victims (considered to be political enemies) of human rights violations. Since the State Liabilities Act prohibits execution, or attachment or process in the nature thereof, against State property, there is no legal remedy against such refusal. Further, damage awards cannot be enforced through contempt orders. Thus, whether or not to compensate is left to the State's discretion.

Overall the interference with the rule of law during the Fieldsend era, though disturbing, was fairly insignificant compared with what was to follow. This in part was due to the fact that for the first five years of the life of the Constitution pre-existing legislation was saved from challenge as being in contravention of the Declaration of Rights. Consequently, little constitutional litigation came before the courts. And when it did, the only high profile case government lost was one in which the Supreme Court ruled that then apartheid South Africa was, in law, not an enemy of Zimbabwe. The decision was not questioned by the Executive.

THE SECOND PERIOD

In February 1984 Enoch Dumbutshena, who had never been a member of the ruling party, and who, while in the High Court, had decided against the government in both the York case and at the trial involving the airforce officers, was appointed the country's first indigenous Chief Justice. His elevation was acclaimed by both the profession and the judiciary. The then Minister of Justice said at the time that such appointment demonstrated a determination in Zimbabwe to have a truly independent judiciary which will interpret the Constitution and try all cases - be they of a sensitive security nature or otherwise - with total impartiality. Fine words, but was this really the government's objective?

One of the earliest appeals that came before the Supreme Court presided over by DUMBUTSHENA CJ was that of PF-ZAPU v Minister of Justice. It concerned the question of whether the courts could enquire into an act of state and executive prerogatives in areas in which executive prerogatives in areas in which executive prerogatives oust the jurisdiction of the courts. PF-ZAPU (the political party then headed by Joshua Nkomo) maintained that its members had been deprived of their legal right to contest a general election fairly because the date fixed by the President for the sitting of the nomination court afforded them insufficient opportunity to peruse the voters' rolls and study the newly defined constituencies.

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The decision before the High Court was whether it could redress PF-ZAPU's grievance. It held that it had no power to do so, as its hands were tied by the doctrine of an act of state or executive prerogative. The Supreme Court disagreed. In the lead judgment of the CHIEF JUSTICE it was said:

"... the arbitrary exercise by the executive of a prerogative, regardless of its effect on those who may be deprived of their rights or interests or who have legitimate expectations, is nowadays subject to judicial review. The reason for reviewing such executive action is that it would be unfair to deprive a citizen of his rights, interests or legitimate expectations, without hearing what he has to say, or to deny him the opportunity to find out whether the decision emanating from the exercise of an executive prerogative is legal or not or, for that matter, irrational or unfair".

This was the Chief Justice, not taking sides between political parties but, in typical manner, striving to ensure fair play whatever the political opinions of those involved.

The expiration of the five year valid deferment on pre-Independence legislation and administrative action taken in pursuance thereof, resulted in more alleged violations of the Declaration of Rights coming before the courts.

One of the most important protections of substantive human rights is that enshrined in section 15(1) of the Constitution which reads:

"No person shall be subject to torture or to inhuman or degrading punishment or other such treatment".

In 1987 an adult male sentenced to whipping challenged the constitutionality of this form of punishment. He argued that it violated his right to protection from inhuman or degrading punishment. The Dumbutshena Court upheld the contention. The punishment, which had been on the statute books for in excess of seventy years, was struck down on the ground that, having regard to the sensitivities which emerge as civilisation advances, it was both inhuman and degrading. In the course of the judgement it was remarked:

"We must never be content to keep upon our Criminal Code provisions for punishment having their origins in the Dark Ages".

Two years later a challenge was made to the whipping of boys under the age of eighteen years. By a bare majority the Supreme Court held that there were few differences between corporal punishment of minors and that of adults - the only distinction being the length and thickness of the cane used. It was stressed that the court cannot shrink from the sacred task of protecting human rights of the people of Zimbabwe merely because there was no suitable alternative punishment available for errant juveniles.

The government was unhappy. Notwithstanding protest, it later took steps to nullify the second decision by an amendment to section 15(1) of the Constitution.

The case that brought the judiciary in conflict with the legislature was that involving the former Prime Minister of Rhodesia, Ian Smith. The facts were

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simply that, as a member of the House of Assembly, Mr Smith had been found guilty by the House of contempt of Parliament in respect of utterances he had made in South Africa in support of apartheid policies and in opposition to the imposition of economic sanctions against South Africa. He was suspended from service of the House for one year and, in addition, declared disentitled to receive salary and allowances during that period. Mr Smith applied to the High Court for an order declaring unlawful the punishment depriving him of his remuneration. At the hearing the Speaker produced a certificate which sought to stay the proceedings on the ground of Parliamentary privilege. The High Court came to the conclusion that the Speaker's certificate was conclusive and stayed the proceedings. On appeal the Supreme Court had no hesitation in holding the decision to be wrong. DUMBUTSHENA CJ delivered the unanimous judgment. First he pointed out that when a certificate from the Speaker is produced stating that the matter is one of Parliamentary privilege, the Court must examine the certificate in order to establish the legitimacy of the privilege claimed. Secondly, he found that the monetary deprivation imposed was illegal and in conflict with the Constitution. Consequently that part of the punishment (but not the suspension) was set aside.

The Speaker was furious. He refused to recognise and give effect to the Supreme Court judgment. He maintained that no court of law can question a decision made by Parliament. He said that he would not pay Mr Smith unless the House reversed its decision to suspend him without pay. He suggested that Parliament might have to "liberate itself from the Supreme Court Judges"; "that the judiciary should not interfere with the legislature because the legislature in all Commonwealth countries is supreme". These statements could not be allowed to go unchallenged. So the Chief Justice and the other Supreme Court Judges publicly responded to this effect:

"We feel strongly and greatly offended by the Speaker's attitude towards the rule of law. What the Speaker was saying is that Parliament makes the laws and Parliament is exempt from obeying its own law. It is a view that disregards with contempt the rule of law and the courts of justice. Parliament may not by its actions contravene rights upheld in the Declaration of Rights. The duty of deciding whether Parliament's actions contravene such rights is not given to Parliament. Otherwise its members would be judges in their own cause. An impartial body is trusted with the duty. We, recognising our own human weaknesses, are the body to whom that duty has been entrusted by the Constitution. We are satisfied that our decision was correct, but that is not the point. The decision was ours to make. We have made it."

The Bar Council, the Law Society, the Faculty of Law of the University of Zimbabwe and the Catholic Commission for Justice and Peace in Zimbabwe, expressed concern at the attitude of the Speaker which sought to undermine the authority of the courts. It was said by one such body that "the judiciary is the watchdog of the country's Constitution. And that if the legislature or the executive can disregard it at will there is no way that the people's rights can be guaranteed. We may as well tear up that document we call our Constitution".

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It was only after he had sought and obtained the authority of the House that the Speaker paid Mr Smith. He refused to back down, but the members of Parliament did not support his stance. So the conflict was finally resolved.

This was the last judgment of constitutional importance written by DUMBUTSHENA CJ before he reached the age of retirement at the end of April 1990. In an effort to retain his outstanding personal and professional qualities to the country, as the senior Judge of Appeal I wrote to President Mugabe suggesting that the Chief Justice's term of office be extended for at least two years. There was an historic precedent for adopting such a course. I pointed out that Enoch Dumbutshena had secured for the judiciary of Zimbabwe an international reputation of high standing.

The President declined the approach. Although I was never informed of his reasons for doing so, I suspect that the government believed that DUMBUTSHENA CJ was not sufficiently on side and that under his direction and influence the Supreme Court was giving too many judgments against it.

THE THIRD PERIOD

I was never told why the President chose me to succeed Enoch Dumbutshena as Chief Justice. It was unexpected. I did not regard myself as in the running. First, I had been appointed to the judiciary by the Smith regime in 1977. Secondly, it must have been appreciated that DUMBUTSHENA CJ and I had worked closely together and shared a determination to accord persons their basic rights. Almost invariably, we had always been on the same side in such judgments. Thirdly, it had been widely forecast that in pursuance of the policy of affirmative action, a black Judge would be appointed. I remain very grateful for the opportunity to have served as the country's Chief Justice for eleven years. I am sad and disappointed at not having been allowed to retire in happier circumstances at the end of April 2002; yet not resentful. The work has been fulfilling and, as it happened, the increasing awareness by legal practitioners of the scope and impact of the Declaration of Rights enabled the Supreme Court to decide many fascinating matters and to create, in all humility, a sound human rights jurisprudence for the country. Regrettably, however, it is one that has attracted the continuing annoyance and displeasure of the government, which in virtually all the disputes has come second. I shall mention a few of the judgments I wrote on behalf of the court, which were roundly criticised and either reluctantly implemented, or ignored.

In 1991 the conditions in the condemned section of a high security prison were challenged on the ground that they infringed a death sentence prisoner's constitutional right to be protected against inhuman or degrading treatment. The prisoner was being permitted access to the open air, in an exercise yard, for thirty minutes on weekdays only. Over weekends and public holidays he was confined throughout in a tiny, windowless cell. That period of exercise time was not in conformity with the United Nations Standard Minimum Rules for the Treatment of Prisoners, which lays down a minimum of one hour in the open air daily if the weather permits. Although the Director of Prisons was ordered to allow the prisoner the same period of exercise time every weekday, weekend and public holiday, he initially declined to do so. Eventually he was persuaded by the Minister of Justice to comply with the order, but, in defiance, did not apply the mandate of the court to other prisoners on death row.

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Two years later the Supreme Court held that delays of fifty-two months and seventy-two months from the date of imposition of sentence of death to the proposed date of execution were so inordinate as to amount to inhuman or degrading treatment. This judgment was publicly criticised by the President and the Attorney-General on two grounds: first, that it was illogical to mark prolonged delay in carrying out a sentence of death as inhuman or degrading, for by its very nature delay lengthened the life of the condemned prisoner, an occurrence that he would desire, and did not shorten it; and secondly, that in altering the sentence to life imprisonment the Supreme Court had abrogated to itself the executive power of the prerogative of mercy that vested in the President.

Then followed two decisions which limited the authority of the police. In the first, a trade union, under a section of the notorious Law and Order (Maintenance) Act, had applied to a police officer in command of Harare Central District for permission to stage a peaceful public demonstration. Permission was refused. No reasons were given. In spite of this the procession went ahead, with some of the protestors being arrested, charged and convicted. In setting aside the convictions it was noted that "a procession... is by its very nature a highly effective means of communication and not one provided by other media. It stimulates public attention and discussion of the opinion expressed". It was held that the particular section of the Act meant that it was permissible to exercise the constitutional right of assembly and procession on roads, streets, pavements, through-fares or similar places, as long as both pedestrian and vehicular traffic are not impeded. And that the arbitrary prohibition of the regulating authority, not related in any way to conditions of public safety or public order, could not be sustained.

In a subsequent case the Supreme Court struck down a section of the National Registration Act which authorised a police officer to demand the production of an identity document, and to arrest any individual, registered in terms of the Act, found in a public place without such a document on his or her person. This provision was unconstitutional because it allowed the random stoppage of movement of a person for the purpose of a spot check. It gave the police an absolute discretion with regard to deciding who to stop. It was not necessary for the police to have a reasonable suspicion that a person was breaking the law. In the circumstances, such a stoppage, however brief, interfered with the guaranteed right to freedom of movement.

These two judgments were condemned publicly by the police on the ground that the Supreme Court had made their work impossible; their hands had been tied. In relation to the control of demonstrations and street processions it was repeatedly claimed that any disturbances that eventuated were the blame of the courts. And the inability to seek the production of the identity document prevented the police from identifying unlawful immigrants and criminals who were evading the law to the detriment of the country's well-being.

For the initial ten years of its life the Declaration of Rights in the Constitution of Zimbabwe could only be amended by a unanimous vote of the Assembly, the lower house, in what was then a bicameral Parliament. Not surprisingly there was no amendment to any of the rights provisions.

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From 11 May 1990, however, amendments to the Declaration of Rights, as well as any other provision of the Constitution, may be passed by at least two-thirds of the now unicameral Parliament.

During the period 1991-2000 the Parliament of Zimbabwe passed several amendments to the Declaration of Rights to the disadvantage of the individual. In early 1991 Parliament passed the Constitution of Zimbabwe Amendment Act (No. 11). Two saving provisions were added to section 15(1) (the protection against inhuman or degrading punishment or other such treatment). The first enacts that corporal punishment inflicted upon a male under the age of eighteen years shall not be held to be inhuman or degrading. This amendment, as I have mentioned, effectively overruled the majority decision of the Supreme Court. It also runs counter to article 5 of the African Charter of Human and People's Rights and to the United Nations Convention on the Rights of the Child. The second provision specifically allows sentence of death to be carried out by the method of hanging. The reason for this amendment was that the Supreme Court had been due to hear a test case in which argument was to be presented on the question of whether execution by hanging was a violation of section 15(1). Both the State and the defence had been required to adduce evidence as to the reliability of the various procedures and precautions adopted in execution by hanging; and to address the physical pain and mental anguish, if any, to which the condemned person is subjected by such method. The amendment pre-empted the court from deciding the controversial issue. The Minister of Justice announced to Parliament that the amendment was necessary "in order to prevent the Supreme Court from doing away with the death sentence (a punishment sanctioned under the Constitution) via the back door".

The eleventh amendment also altered section 16, the protection against deprivation of property without compensation. It reduced the amount payable in the event of expropriation from "adequate compensation payable promptly" to "fair compensation payable within a reasonable time". It also removed the right of an expropriatee to challenge in a court of law the fairness of any compensation awarded.

In 1993 Parliament passed a further amendment to section 15(1) in order to overcome the Supreme Court judgment that inordinate delays in carrying out the death penalty amounted to inhuman treatment.

The Constitutional Amendment (No. 14) Act, promulgated on 6 December 1996, amends section 22 (which had been interpreted by the Supreme Court so as to allow the foreign husband of a Zimbabwean citizen to reside permanently in the country and engage in employment or other gainful activity) so as to grant neither foreign husbands nor foreign wives of citizens, residence as of right in Zimbabwe by virtue of marriage.

On 19 April 2000, just two months before the General Election was due to be held, Constitutional Amendment (No. 16) Act was passed. Whereas previously the owner of agricultural land compulsorily acquired for resettlement of people had to be compensated, the amendment spelt out that such obligation no longer pertained; it was the exclusive responsibility of the former colonial power to do so. This provision, read in context, refers to compensation with respect to the soil. It does not absolve the government from liability to

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compensate for improvements effected upon the land, though, unfairly, such compensation may be paid "in instalments over a period of time".

The essence of a constitution is that it should, among other things, lay down the rules of conduct for state organs. Parliament, which is established and exists in terms of the constitution, should be subordinate to it. It should not be able to change the constitution and diminish or dilute the scope of a fundamental right or protection after it has been defined by the judiciary, whenever it suits it to do so.

This has been recognised by some countries. Article 25(1) of the Namibian Constitution states that no repeal or amendment of any provision is permitted insofar as this "diminishes or detracts from the fundamental rights and freedoms contained in (the Constitution) and no such purported repeal or amendment shall be valid or have any force or effect".

Where Parliament has the power to amend with ease a constitution and the bill of rights is at risk of being downgraded to suit government, the judiciary might find it necessary to take a stand. It would do so by invalidating constitutional amendments that are considered to be a nullification of the fundamental rights and protections. But to do so is very different from the judicial review of legislative or governmental acts which are tested against the standards set by the constitution. Where the court is protecting the bill of rights against amendment it is testing the validity of a constitutional provision, passed in accordance with procedure, against some standard. The question is, which standard? The constitutional provision under challenge is as much a part of the constitution as the original provisions. As the constitution is the supreme law of the land and the ultimate source of legality and legitimacy, on what basis may a court adjudicate upon the validity or otherwise of the constitution? If the judge does not derive his values from the constitution, from what source, extraneous thereto, does he derive those values and what is their authority?

The Supreme Court of India suggested the answer. It has held that a constitution stands on certain fundamental principles which are its structural pillars; and if these pillars are damaged or demolished, the whole constitutional edifice will crumble. Therefore it is the duty and function of the judiciary to protect the constitution against such damage. Otherwise its very independence and the maintenance of the rule of law is eroded.

A further manner in which the Zimbabwean Judiciary has been undermined is by the unreasonable utilisation of the Presidential Pardon. In terms of section 31 of the Constitution, the President has a right to grant a pardon, amnesty or clemency to convicted prisoners. There is no set criteria upon which this power is exercised and in the absence of such, abuse has been inevitable.

What has been happening over the years is that the President has been using this pardon to free those from his political party or members of the Central Intelligence Organisation (CIO), convicted of politically motivated crimes. There are many instances of such persons being pardoned after commission of serious political crimes.

The most famous case of the abuse of the Presidential Pardon is the Kombayi case.

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Patrick Kombayi, a flamboyant businessman, contested as an opposition political candidate for the City of Gweru constituency in the 1990 General Election. During the run up to the election, there were indications that his opponent, the ruling party's candidate and Vice President, Simon Muzenda, could be embarrassed. As a result there was much violence and tension in Gweru, the culmination of which was the almost fatal shooting of Kombayi, by a member of the CIO and a government supporter. These two men were ultimately convicted and sentenced to long terms of imprisonment by a magistrate's court. Their appeal to the Supreme Court was dismissed. Within a day of that order, the President published a Presidential Proclamation pardoning the two criminals.

The Presidential Powers (Temporary Measures) Act was designed to give the President powers to deal with a situation requiring urgency in the interest of defence, public health, public order and the economic interest of the country. Yet this Act has been utilised in the interest of the ruling party. One recent instance of its exercise illustrates the usurpation upon the authority of the judiciary.

On 8 December 2000 the President issued a Proclamation, seeking to validate the results of elections, held in June, in thirty-seven constituencies. The results had been challenged by members of an opposition party on the ground that pre-election violence, intimidation and vote-rigging had rendered the elections in such constituencies not free and fair. The issue was pending determination by the High Court. Upon an application brought direct to the Supreme Court, I held, with the concurrence of my brother Judges, that the effect of the Notice was to curtail the right of access of the aggrieved parties to the High Court. It denied them the constitutional entitlement to a determination of the existence of their civil rights and obligations. Consequently, the Notice was declared to be null and void. The expected outpouring of intemperate criticism from the Minister of State Information and Publicity followed.

On 6 October 2000 the President issued Clemency Order No. 1 of 2000. It granted an amnesty to those who kidnapped, tortured and assaulted people and burnt people's houses and other possessions as a way of politically intimidating them during the period from 1 January to 31 July 2000 (that is, in connection with the 12 and 13 February Constitutional Referendum and the 24 and 25 June Elections). The Amnesty has meant that those arrested and facing trial for such serious offences have had to be released and no new investigations and prosecutions can now take place into these crimes.

In the main, these crimes were committed by supporters of the ruling party against supporters or supposed supporters of opposition parties. Thus the effect of the Amnesty is to create the impression that political violence will be condoned and those responsible for it will go unpunished. This is extremely dangerous. It sends the wrong signal, suggesting that election related violence will be tolerated - a bad precedent for future elections. Already there are reports of persons who have benefited from the Amnesty taking violent action against those who reported them to the police. In the words of Amnesty International:

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“This pardon represents a lost chance for justice and the possibility of breaking the cycle of impunity that has riddled Zimbabwe. By failing to tackle impunity for gross human rights abuses, the order provides no deterrent either to continuing human rights abuses or contempt for international human rights law.”

Certainly the gravest abuses of the rule of law, absent any hint of legitimacy, have occurred over the past two years. The trend started with the arrest, detention, interrogation and torture, in January 1999, by the Army's military police, of two journalists over an article they published in a daily newspaper about an alleged coup plot by a few officers. The journalists were held for over a week before being placed in the custody of the police. Neither the President, nor a Minister nor the Commissioner of Police, issued any statement that the action of the military authority was in violation of the law. There was no expression that the power to arrest and detain civilians vested solely in the police working with the courts. The perception was, therefore, that the military authority may operate beyond the reach of the law; and this more especially when the President announced publicly that the journalists had forfeited their right to legal protection by having acted in such a blatantly dishonest manner. The reason for non-intervention professed by the Commissioner of Police was “because the nature of the enquiry involved highly sensitive matters of national security which could not be dealt with by my officers”. To complete the scenario. The journalists laid criminal charges against the perpetrators of their illegal detentions and torture. Both the Attorney-General and the Commissioner of Police exhibited not the slightest interest in investigating the complaints. In the event, the journalists sought and were granted an order from the Supreme Court directing the Commissioner of Police to institute a comprehensive and diligent investigation of the offences alleged to have been committed with a view to the prosecution of all persons against whom there was a reasonable suspicion of complicity. Two years on, and nothing appears to have been done to bring the offenders to justice. The Commissioner of Police simply refuses to perform a duty imposed upon the Police Force by the law of the land.

During February 2000 the unlawful countrywide occupation of white owned agricultural land by war veterans and land hungry followers resulted in an application being brought before the High Court by the Commercial Farmers Union. The order sought was against the Chairman of the War Veterans Association and the Commissioner of Police. It was granted by consent on 17 March 2000. It declared that the occupation of farms by persons claiming a right to do so in pursuit of an entitlement to demonstrate against the iniquity of land distribution, was unlawful. All such persons were ordered to vacate within twenty-four hours. The Commissioner of Police was directed to instruct his officers and members to enforce the law.

Despite having agreed to the order, the Commissioner of Police applied within a few days to amend it on the ground that he did not have the manpower to effect the removal of those in unlawful occupation; and that in any event, their right of occupation merited a political and not a legal solution and, as such, was not promotive of the rule of law. The amendment was refused. The order stood. It was not, however, obeyed. The President criticised it as nonsensical. That it certainly was not. To have ruled any other way would have amounted to a violation of the law. The unlawful occupations, with the encouragement of government, have proceeded at an accelerated pace.

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Then there was another order by consent, this time granted by the Supreme Court on 10 November 2000. The order again declared that the entry of uninvited persons on commercial farming properties was unlawful. It required the respondents, who were the Ministers most closely concerned with agricultural land reform and the Commissioner of Police, and those under their control, not to give sanction to the entry, or continued occupation, of farms, by persons involved in resettlement, until all legal requirements and procedures therefore had been fulfilled. The order was not meant to prevent the Government from pursuing land resettlement. Not at all. This has never been the objective or policy of the courts. The effect of the order was that land resettlement should be carried out within the framework of the Constitution and in compliance with the provisions of the Land Acquisition Act; and not by unlawful invasion.

Finally, in this regrettable saga, on 21 December 2000 the Supreme Court once more declared that the relevant Ministers and the Commissioner of Police should comply immediately with its order of 10 November 2000 and with the order of the High Court made on 17 March 2000. It was said:

“Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by parliament have been flouted by the government. The activities of the past nine months must be condemned.”

In elucidation it was pointed out that:

“The settling of people on farms has been entirely haphazard and unlawful. . . . A network of organisations, operating with complete disregard for the law, has been allowed to take over from government. War veterans, villagers and unemployed townspeople have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the CIO and the Army. The rule of law has been overthrown in the commercial farming areas and farmers and farm workers on occupied farms have been denied the protection of the law.”

The order made, likewise, was ignored. The official stance taken up is that land distribution is a political and not a legal matter which cannot be resolved by the application of “the little law of trespass”. The courts must keep out of the arena. The President has said that he will not allow the police to move against the farm invaders who are merely taking over land which was “stolen” from blacks by whites.

It is completely unacceptable to qualify the rule of law in this way. Rulers who pick and choose which laws they wish to obey by defining certain matters as “political” because it suits them, thereby vitiate the principle of equality before the law, setting one standard for themselves and another for the people they govern. That is at variance with elementary justice as well as international norms.

But the most disturbing conduct has been the harassment of the High Court and Supreme Court Judges by war veterans and followers. They have called

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upon Judges to resign or face removal by force. The Minister of Information spearheaded this campaign by accusing the Supreme Court and, in particular, myself, of being biased in favour of white landowners at the expense of the landless majority. He called on me to resign. Then, on 14 December 2000, President Mugabe, speaking at his party's congress, disowned the courts. In connection with the land issue he said: "The courts can do what they want. They are not courts for our people and we shall not even be defending ourselves in these courts".

Such attacks show a blatant and contemptuous disrespect of the process of the Constitution which guarantees judicial independence. Judges should not be made to feel apprehensive of their personal safety. They should not be subjected to government intimidation in the hope that they would become more compliant and rule in favour of the executive. They should not face anything other than legitimate criticism arising from what was done in the discharge of judicial duty.

The invasion of the Supreme Court building on the morning of 24 November by close to two hundred war veterans and followers can only be described as disgraceful. In the course of entry the policeman on guard was assaulted. The mob rushed from the main entrance through the building to the courtroom, where the Judges were about to hear a constitutional application brought by the Commercial Farmers Union. They shouted political slogans and even called for the Judges to be killed. They stood on chairs, benches and tables in a show of absolute contempt for the institution of the courts as the third essential organ of a democratic government. Such deplorable behaviour sent the clearest message that the rule of law was not to be respected. The invasion lasted for an hour. It disrupted, as it was intended to do, the proceedings of the Court.

Disappointingly, but perhaps expectedly, there was no official condemnation of the incident. Not a word was heard from the President, the Minister of Justice, or the Attorney-General. Only the President of the Law Society spoke out boldly against it, as he had done on previous occasions when the Judiciary had been the subject of threats or unfounded criticism. To him and the legal profession he represents, go much appreciation for the support shown to the Judiciary.

In early January 2001 the head of the High Court, Judge President Chidyausiku, (now Chief Justice) joined in the attacks upon myself by publicly accusing me of bias in favour of the white commercial farmers. He said that I had started the controversy about the handling of the land issue by the courts in a public address given in 1991. True, I had criticised a proposed constitutional amendment that sought to remove the power of the courts to determine the fairness of the compensation payable for land acquired for resettlement. These remarks, said the Judge President, "gave an implicit assurance to the white commercial farmers that if they sued the government after being evicted they would win their cases. This encouraged the farmers to sue and they have won their cases as promised".

In effect the Judge President accused me, and the Supreme Court, of having pre-decided in their favour all the cases brought by commercial farmers. The accusation is unfounded. In 1996 the Supreme Court decided against the commercial farmers in holding that designation of land for acquisition did not

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amount to acquisition, thus disentitling them to be compensated in terms of the Constitution. I have dealt with the other two decisions of the Supreme Court. In the one the government consented to the order handed down. In the other the illegality of what was happening was not in dispute. While acknowledging that a programme of land reform is essential for future peace and prosperity, the Supreme Court (as then composed) could not accept and tolerate the unplanned, chaotic, politically biased and violent nature of the ongoing fast-track programme.

I would stress that the Judiciary has a crucial part to play in enforcing the law and in upholding the Constitution. Unjustifiable and unreasonable attacks on its integrity jeopardize that process. They undermine the constitutional role of the Judiciary, erode confidence in its decisions and damage it as an institution. It is virtually defenceless against such attacks.

What prospect is there of an improvement in the situation I have outlined?

Fortunately the power of international public opinion is growing. Pressure is being put on pariah regimes by enlightened governments, international human rights bodies and renowned human rights lawyers and activists. It no longer depends on military might or economic power, but increasingly on the moral stance which a nation adopts both in foreign relations and in its domestic affairs. No government, despite a disclaimer to the contrary, likes to be portrayed in the eyes of the world as disrespectful of the fundamental rights and protections of its people and a violator of the rule of law. Such an image seriously affects its standing and esteem. Under the new international order which reigns the domestic human rights record of every country is a legitimate concern of the whole international community.

It was just such international concern that initiated the holding of the Abuja meeting, brokered by Nigeria, on 6 September 2001. It was attended by representatives from Australia, Canada, Jamaica, Kenya, Nigeria, South Africa, the United Kingdom and Zimbabwe. The agreement reached, while recognising that the land reform programme was at the core of the current crisis, ties funding by Britain and other international donors to compliance by Zimbabwe with the rule of law, an end to state instigated violence and intimidation, and to an observance of human rights standards and democracy. It also stipulates that there will be "no further occupation of farms" and "on undesignated farms occupiers will be moved to legally acquired land".

There followed, almost immediately, the summit of the Southern African Development Community (SADC), which increased African pressure on Zimbabwe. The Presidents of South Africa, Malawi, Botswana, Mozambique, Namibia, and representatives from Angola and Tanzania, issued an ultimatum to the government of Zimbabwe to cease political violence and lawlessness, as well as insisting on the establishment of a regional committee to monitor the restoration of the rule of law. The summit marked a turning point in relations between Zimbabwe and regional countries.

If Zimbabwe is found to have reneged on these accords it is likely that punitive measures will be taken. The European Union, a grouping of fifteen powerful European countries including Britain, was already moving towards that position, but has now held its hand. It had adopted a resolution calling upon the European Commission and member states to suspend all

development assistance to Zimbabwe until democracy and the rule of law are fully restored. Even at the present time some member states, led by Sweden, are pressing for immediate tough sanctions against Zimbabwe for its refusal to embrace the rule of law; while others, led by France, feel that more time to reform should be allowed. Honouring its Abuja commitments is probably Zimbabwe's last hope of reestablishing relations with the European Union.

Only three weeks after the terror attack on the United States, the Acting Assistant Secretary for African Affairs said that "concern in the United States over events in Zimbabwe remains high". The Zimbabwe Democracy and Economic Recovery Bill still pends consideration by the United States Congress. It has been passed by the Senate.

From 25 to 27 October 2001 a seven member Commonwealth Ministerial Committee, headed by the Secretary-General, were in Zimbabwe to see for themselves whether the terms of the Abuja agreement were being adhered to. There had been conflicting reports. No positive findings were announced. The Committee is to report in due course to the Presidents of Zimbabwe and Nigeria. What was arranged was for a technical team to visit Zimbabwe in mid-November, to assess whether the land reform programme was being carried out consistently with the laws of the country. It was also stated that dialogue with all stakeholders was to be resumed in accordance with the United Nations Development Programme proposals of December 2000. These proposals mirror the requirements of the 1998 Harare donors conference on land as agreed by the United Nations Development Programme and the Zimbabwe government.

All these events evidence a strong international resolve to solve the ongoing crisis in Zimbabwe, which poses a threat to socio-economic stability in the entire sub-region if not to the continent of Africa at large.

In conclusion, let me stress that today it is the human rights performance of a government - which implies observance of the rule of law - that provides the most material criterion of its legitimacy. And if that legitimacy begins to wane significantly, it is liable to be transferred to the government's opponents.