The rule of law in a constitutional democracy: the Zimbabwean experience

Mr Justice Enoch Dumbutshena, Chief Justice of Zimbabwe

It can hardly be gainsaid that the best safeguard for the protection and respect of personal liberty is an enlightened democracy. A representative, democratically elected parliament, public discussion, a free press, fair operation of the radio and television systems and an educated public opinion are basic attributes of democracy. But even in a well-regulated democracy abuse of powers by the executive and the parliament may and do occur. Such abuses may be incidental; they may not have been contemplated when a particular law was enacted. Or they may have been anticipated but deliberately disregarded because they affected only a small number of people. They may have been motivated by an honest but mistaken view of what was for the common good. Such abuses have to be guarded against.

In a democratic country the discharge of the State's duty to look to the needs of the weakest, poorest and most disadvantaged sections of the population, while providing essential social services, may also increase the occasions for State interference in the life of the individual. Accordingly, no matter how democratic the State may be, it is nonetheless necessary to provide the effective machinery of an independent and courageous judiciary, coupled with constitutional safeguards for the protection of the rights of the individual. Such are essential to the proper maintenance of the rule of law.

The independence of the judiciary is an indispensable requisite of a free society, especially in those countries which do not have deeply rooted constitutional conventions and traditions; where there is no public opinion capable of making itself felt. A government that is not sure of itself or is still finding its feet panics in the face of critical judicial pronouncements that are meant to do justice to ordinary people. Conflicts arise between the executive and the legislature on the one hand and the judiciary on the other because, more often than not, the executive branch of government perceives a challenge from the judiciary on every occasion the government loses a case. It is insecurity that breeds a hostile reaction and prompts government to deal with suspected sources of insecurity irrationally.

At the best of times, and particularly in that atmosphere, the judge's duty in the rendering of an honest, unbiased opinion based on the law and the facts is far from easy. It has been described correctly as (R MacGregor Dawson The Government of Canada, Toronto 3 ed 470)

"one of the most difficult tasks which can be imposed on fallible men [for] it demands wisdom as well as knowledge, conscience as well as insight, a sense of balance and proportion and, if not an absolute freedom from bias and prejudice, at least the ability to detect and discount such feelings so that they do not cloud the fairness of the judgment".

To be able to render such an opinion a judge must have the qualities described in Hindu scriptures, which were cited by Mr Justice Bhagwati, former Mr Justice Enoch Dumbutshena, Chief Justice of Zimbabwe, addressing the Legal Resources Centre conference on "Law in a Changing Society".

The Legal Resources Centre recently marked its tenth anniversary with a public conference on "Law in a Changing Society" at the University of the Witwatersrand. The Chief Justice of Zimbabwe, Mr Justice Enoch Dumbutshena, was one of the distinguished guest speakers. This is the major part of his address. See also 1988 DR 735.
Chief Justice of India, in a paper he delivered at Caracas early this year:

"He should be learned, sagacious, eloquent, dispassionate, impartial; he should pronounce judgment only after due deliberation and enquiry; he should be a guardian to the weak; a terror to the wicked; his heart should covet nothing; his mind should be intenton nothing but equity and truth."

Unless the judiciary is given a special sphere, clearly separated from that of the legislature and executive and so protected against political, economic and other influences, the value of the qualities of detachment and impartiality which are indispensable prerequisites for the proper performance of the judicial functions will be substantially endangered.

This state of mind is greatly enhanced by the judiciary acquiring fiscal independence. Ideally the judiciary should have its own budget and thus be free from control by civil servants. In this regard appropriations for the judiciary should not be reduced by the legislature below the amount appropriated for the previous year and, after approval, should be automatically and regularly increased. This fiscal independence is sadly missing, not only in Zimbabwe, but also in many other countries. We are trying to persuade the government to accept the principle of a judiciary that controls its own budget. We have planted the idea. We appreciate that sometimes germination takes a little longer, especially in dry soil.

There is nothing more important for the rule of law in a changing society than an independent judiciary. In this regard the method of appointing judges is crucial. Judges must never be appointed because of their political affiliations. In Zimbabwe we have a mixed grill. Some of our judges were former supporters of Ian Smith, Bishop Muzorewa and others.

In terms of the Constitution of Zimbabwe, the years back the former Minister of Justice, Legal and Parliamentary Affairs, the Hon Eddison Zvobgo, gave an answer in a speech delivered abroad. He said this:

“We tend to think that the independence of the judiciary means just independence from the legislature and the executive. But it means much more than that. It means independence from political influence, whether exerted by the political organs of government or by the public or brought in by the judges themselves through their involvement in politics. Judicial involvement in politics (that is organized politics) has taken two main forms:

(a) Decisions biased in favour of a ruling party ...
(b) Judicial membership of political parties.

In Zimbabwe, shortly after independence, Enoch Dumbutshena, a Zimbabwean lawyer who has never been a member of the ruling party ZANU (PF), was appointed a high court judge.

In York and another v Minister of Home Affairs and another, a vital case concerning the interpretation of the constitutional provisions relating to preventive detention, Dumbutshena J ruled against the executive. This decision, which was upheld by the supreme court, caused some anti-judicial feelings in Zimbabwe. However, when the time came in 1983 to appoint a new Judge-President of the high court, the executive chose Dumbutshena J for the very qualities, inter alia, of courage and independence which
Yet in Southern Rhodesia when the government of the executive tries to trim its powers. When the executive through some indiscretion infringes on the legislative functions of parliament. Some countries welcome this while less democratic countries see it as judicial interference in the legislative process. If the judiciary is conceived to be powerful the executive tries to trim its powers. When the executive through some indiscretion infringes on the independence of the judiciary there are protests from judges.

Yet in Southern Rhodesia when the government of Ian Smith unilaterally declared independence from the United Kingdom and established a new Constitution which required them to swear a new "loyalty" and a new judicial oath, under pain of deprivation of their offices without compensation, all the judges refused to take the new oath, although most of the judges went along with that illegality. They were, however, independent. Some believe that they should have resigned. Those judges said the Queen asked them not to resign.

In a paper I prepared for the International Commission of Jurists, I considered the proper attitude to be adopted by judges when there is a violent change of government. I concluded that the overriding consideration for a judge faced with such a change of regime was whether he or she could do justice to all manner of people without fear or favour in that situation. If one cannot, I said, the best thing to do was to resign or to retire conveniently. One cannot lay down hard and fast rules, because it may happen that justice in a revolutionary situation may be better than no justice.

We are all more than familiar with the abuse of power by the President of the United States which led to the 'Watergate'. That abuse of executive power brought about a clear elucidation of the relationship between the judiciary, the executive and the legislature. Warren Burger, CJ, as he then was, commented on the separation of powers as follows (see United States v Nixon 418 US 683, 41 L Ed 1039 at 1045):

"Notwithstanding the deference each branch of the government must accord the others, the judicial power of the United States vested in the federal courts by art III, S1 of the Federal Constitution can no more be shared with the executive branch than the chief executive, for example, can share with the judiciary the veto power, or the Congress share with the judiciary the power to override a presidential veto; any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government."

Unfortunately many newly-independent countries do not respect the separation of powers. And although the Zimbabwe Constitution does not define in clear and precise language the separation of powers, the judiciary tries to maintain as between itself and the executive an uncompromising stance in the upholding of the judicial power. In this way we have tried to maintain the separation of powers embodied in our Constitution. I tend to think that we have succeeded.

In the majority of countries the separation of powers is blurred and in some countries with military regimes. Under such a regime the constitution is suspended and the rights and duties of judges disappear with it. In some other countries the constitution may say one thing while the autocratic executives deny the sharing of power with the legislature and the judiciary.

In Patriotic Front - ZAPU v Minister of Justice Legal and Parliamentary Affairs 1986 (1) SA 532 (Z) the Supreme Court of Zimbabwe was seized with the question as to whether the courts could enquire into an act of State and executive prerogatives in areas in which executive prerogatives oust the jurisdiction of the courts. Patriotic Front - ZAPU, a political party, felt 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 voters' rolls and to study the newly defined constituencies. The question before the high court was whether it could redress Patriotic Front - ZAPU's grievances or whether its hands were tied by the doctrine of an act of State or executive prerogative.

At issue was the question of the court's power to review a decision of the President fixing the date of the sitting of the nomination court. The high court said it had no power to review the President's prerogative. The supreme court held that it had the requisite power to review. The supreme court said (542G):

"[T]hе arbitrary exercise by the executive of a prerogative, regardless of its effects 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."

Our attitude is that whenever the exercise of executive prerogatives affects private rights, interest and legitimate expectations of the citizens, the jurisdiction of the courts is not ousted and the act
in question is subject to judicial review. I believe that judges in Zimbabwe have a duty to protect the rights of the citizens. It is only by doing that the rule of law can be maintained. When it comes to the maintenance of the rule of law, it is the judiciary, more than any other organ of government, which is the effective instrument. It is the judiciary which, in a manner of speaking, is on top of the pile.

As I have said, it is we, the judges, that are the effective instrument of the rule of law. Thus in Zimbabwe we have gone some way in protecting the rights of the individual and the minorities and in encouraging the principle of fair play in administrative law and action. Somehow I think our people, all our people, have confidence in the judiciary.

In a democratic State there need be no conflict between the executive, the legislature and the judiciary. This, of course, is the ideal situation. In the ordinary run of things both the legislature and the executive try to whittle down the power of the judiciary. However, for interdependence to develop between the three organs of State there must be an appreciation of the relative functions of each organ, followed by a desire to co-operate. This would avoid frictions caused by, for instance, the desire of the legislature to restrict the jurisdiction and power of the courts and the tendency by the executive to ignore court orders. But in an emergent nation in search of identity and protection, an independent judiciary may be frustrated in its ideal to uphold the rule of law without the constitutional back-up of a justiciable declaration of rights.

In the case of Zimbabwe this was recognized at the Lancaster House Conference at the end of 1979. In consequence the Constitution of Zimbabwe contains in ch 3 a declaration of fundamental human rights which are enforceable through the courts. These rights are entrenched for ten years, the Constitution requiring a 100% vote in the House of Assembly to change them at any time during the first ten years. That entrenchment comes to an end on 18 April 1990. It is my hope that parliament will see it fit to preserve the Bill of Rights.

In my view a bill of rights improves the quality of justice. I have no doubt in my mind that the judges derive a great deal of assistance and guidance from the Declaration of Human Rights. The Bill makes it possible for judges to apply international human rights norms to domestic human rights.

The Constitution goes on to specify certain rights which a person placed in preventive detention has. These rights include:

- The right to be informed not later than seven days after his detention of the reasons for the detention in a language which he understands.
- The right to have his case referred to the Detainees' Review Tribunal for review within thirty days of his detention.
- The right to have his case heard "forthwith" by the tribunal after referral of the case to it.
- The right to employ a lawyer at his own expense to represent him, the right of access to this lawyer and the right to appear in person before the Detainees' Review Tribunal or to be represented at his own expense by his lawyer.
- The right to have his case reviewed at intervals of 180 days after the first review.

The Constitution of Zimbabwe permits preventive detention. If the review tribunal recommends the release of a detainee, the minister is obliged to follow this recommendation unless the President directs otherwise, which direction must be published in the Government Gazette.

The review tribunal makes recommendations on the necessity of continued detention or the release of the detainee to the Minister of Home Affairs. There is no appeal to the courts. The courts are, however, able to investigate on review whether, for instance, the minister's decision to detain was taken after he had applied his mind or whether the decision to detain was irrational. Because the Detainees' Review Tribunal's proceedings are quasi-judicial in character and the review tribunal must observe the principles of natural justice and act fairly, the courts, if there is a disregard of these principles, review its proceedings. The courts may award a relief where the review tribunal has acted without authority or has acted irrationally or has failed to perform its duties. The court can require the review tribunal to act in accordance with the rules of natural justice.

In Minister of Home Affairs v Austin and another 1986 (4) SA 281 (ZS) the appellant's counsel argued that the wording of s 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations, "if it appears to the minister ...", excluded the court's jurisdiction to review the minister's decision to detain. The supreme court rejected that argument. The judges held that those words did not exclude the court's power to review the minister's decision and we said the duty of the court "is ... to decide on the rights, according to law, of all people including those who are charged with the onerous duty of managing the affairs of the State for the good and benefit of its citizens; and to decide whether, as between the individual and the State, the individual is right or wrong or the State is right or wrong".

The court was firmly on the side of judicial review. The judges' attitude is illustrative of the extent of judicial independence in Zimbabwe. The Supreme Court of Zimbabwe is empowered to issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights provisions.

Unfortunately, conditions prevailing since independence have not allowed the government to dispense with the system of detention without trial. Quite a number of cases have been brought to the higher courts on behalf of detainees and the courts have adopted an approach which ensures the fullest possible protection of the rights of the persons who are detained. Thus the following things have been established in this series of judgments:

1. The detention provisions cannot be used for an illegitimate purpose such as for the purpose of investigating ordinary criminal offences or for the purpose, not of preventing a threat to security, but simply as a device for imposing further punishment for past activities which the minister considers to be deserving of such further penalty.
2. If a prerequisite for the making of a valid detention order is not observed and the detention is thus invalid ab initio, then the court will order the release of the detainee.

3. If a detainee, after being validly detained, is thereafter not accorded the rights set out in the Constitution, the court will order the responsible authority to comply with the constitutional provisions and grant the detainee his rights. The detaining authority could thus be ordered to allow the detainee proper access to his lawyer or to provide adequate reasons for the detention or to refer the matter for review to the Detainees' Review Tribunal and so on. As regards the obligation to provide reasons to the detainee for his detention, the supreme court in a number of judgments has ruled that the detainee is entitled to be provided with sufficient information to enable him to know what it is that is alleged against him so that he can make meaningful representations when the case comes before the review tribunal. It has stated that he cannot defend himself unless he has been appraised properly of the allegations against him and the detainee must thus be provided with the basic facts and all material particulars which form the foundation of the detention. The reasons which are provided must not be so vague that the detainee is unable to make any meaningful representations before the review tribunal.

As regards the right of access to a lawyer, the courts...
have stressed the importance of this right and have taken firm action to stop any denial of this right. So too on the actual decision to detain, the supreme court has ruled that, despite the fact that this decision-making capacity is couched in subjective terms, the courts are still entitled to investigate on review whether there were facts which were reasonably capable of supporting the decision taken, whether the minister had applied his mind to the decision, whether the decision was entirely irrational or was arrived at in bad faith.

If, therefore, it found, for instance, that the decision was not taken on the basis of any facts which were reasonably capable of supporting the decision, the court could rule that the decision was invalid and could then order the release of the person wrongly detained.

In an interesting judgment the high court decided that despite the regulations being silent as to the conditions under which a detained person was to be held, there were certain basic rights to which he was entitled in the absence of statutory authority to the contrary. These rights included proper housing and clothing, adequate food and medical aid, protection against assault, the right not to be held in solitary confinement and the right to adequate exercise. Thus the court was able to establish and enforce certain minimum standards of detention. The court then proceeded to order that the detainees in question should not be transferred to a detention centre where these minimum conditions could not be met.

On an overall basis, perhaps the most strongly worded comment from the bench regarding the need for strict observance of the constitutional rights of the detainee was made in a supreme court decision in which we said (see Minister of Home Affairs v Austin and another supra 284):

"Preventive detentions, in those states which either by legislative authority or through brute force resort to them, are a matter of constant worry. Sometimes they create unnecessary conflict between the judiciary, which is the custodian of the rights of the citizens who seek protection in the courts, and the executive, the guardian of the security of the State.

"When the executive ignores the orders and judgments of the courts there is an inevitable breakdown of law and order, resulting in uncivilized chaos because the courts cannot enforce their orders. Their jurisdiction and duty end after delivery of judgment."

These strong words were necessary to emphasize the need for cooperation from the authorities in ensuring respect for detainees’ rights. In a number of cases these rights had been flouted and litigation, sometimes repeated litigation, was necessary to enforce compliance. However, in all cases so far the executive have complied with court orders aimed at ensuring observance of the constitutional provisions. Thus confrontation between the courts and the executive has always finally been avoided. This clearly illustrates the independent nature of the courts which have asserted their authority to rule on these issues even though their rulings are contrary to government intentions.

The various statements made by the judges in various cases further establish the determination of the courts to uphold individual rights in the face of wrongful government action.

In December 1987 the supreme court ruled that the whipping of an adult offender breached s 15(1) of the Constitution as constituting a punishment which in its very nature was inhuman and degrading. And only the other week it was faced with the issue of whether the imposition of a moderate correction of cuts upon a juvenile offender likewise violated the prohibition against inhuman and degrading punishment. Judgment has not yet been handed down in that appeal but during the course of his argument the Attorney-General’s representative conceded that, apart from the size of the cane used, the method of administration of the punishment was the same as in the case of the adult offender; that there was little room to distinguish between the inherent nature of the two punishments.

One of the key issues in respect of which the liberation war was fought was the issue of land rights. The Lancaster House Constitution sought to protect private property rights possessed at the time of independence. This acted as a barrier to the programme of full scale redistribution of land and the restructuring of the economy which government would have wished to institute as soon as possible. When government sought to take certain measures which interfered with property rights the aggrieved parties brought cases in courts.

In the case of Minister of Home Affairs v Bickle 1983 (2) ZLR 400 the supreme court had to decide whether a person whose property had been declared forfeit was in fact an enemy of the State which would then have allowed the government lawfully to have expropriated his property.

However, in achieving equality in every sphere for the disadvantaged sector of our society, the Zimbabwe Constitution does not permit the government to deprive anyone of his property, without compensation. Ownership of property is thus protected. Bickle remained with his property.

Any appraisal of human rights and the rule of law in Zimbabwe since independence would be totally incomplete without reference to the enormous strides made by the Mugabe administration in advancing the social and economic rights of the black majority population. As the African Charter on Human and People’s Rights points out in the preamble (and also at various places in the main body of the text) civil and political rights and freedoms cannot be dissociated from economic, social and cultural rights and the satisfaction of these latter rights helps to guarantee the enjoyment of civil and political rights.

In a developing country, the right to development is one of the most vital rights. For persons who live in abject poverty, the right to food is by far the most important issue. (Zimbabwe is a signatory to this important document.) Zimbabwe practises the policy of reconciliation. For that reason alone it would be wrong for the judiciary to discriminate between members of different racial groups, or between the rich and the poor, or between the ignorant and the educated. I sincerely believe that the judiciary in Zimbabwe has succeeded in doing justice to all manner of people. Our people know it and the government has come to appreciate it. And, more importantly, we in the judiciary are determined to make the rule of law the guiding light in a society that is in transition, a changing society.