

THE PROGRESSIVE EROSION OF THE RULE OF LAW IN INDEPENDENT ZIMBABWE

THIRD INTERNATIONAL RULE OF LAW LECTURE: BAR OF ENGLAND AND WALES

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THE HONOURABLE JUSTICE ANTHONY R GUBBAY

When several months ago I received an invitation to deliver the third annual International Rule of Law lecture, I was not only surprised, but extremely delighted. It is an honour and a privilege for one whose career in the law began, and ended, in a country many thousands of miles away, whose system of law is founded on old Roman Dutch principles, to have been chosen to grace this auspicious occasion. Yet, it is an undeniable fact that whatever system of law is applicable, whether it is the English common law, the Napoleonic Code, my own, or that of other countries, the rule of law forms an essential foundation in any democratic system of governance. It is a concept of universal validity and application. It embraces those institutions and principles of justice which are considered minimal to the assurance of human rights, and the dignity of man.

Although there is a wide variety of jurisprudential thought on the complex concept of the rule of law, it is generally accepted that a society in which the rule of law prevails is one in which a climate of legality, observance of the law and an effective judiciary, are evident. It is a society in which no man is punishable, or can be made to suffer bodily or proprietary loss, except for a breach of the law as established by ordinary courts of the land. It does not mean the protection of vested interests, or unfair exploitation in society. It means the emancipation of the spirit of humankind from coercive constraints of fear, inequality and want. It requires that everyone should be subject to the law equally, and that no one should be above the law; that law enforcement agencies and the courts enforce and apply the law impartially.

The rule of law is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive. It is a celebration of individual rights and liberties, and all the values of a constitutional democracy, characterized by the

absence of unregulated executive or legislative power. It is a society in which the rule of law is observed, through the mechanism of judicial review. Executive decisions and legislative enactments, outside the framework of the law, are declared invalid, thereby compelling both the executive and the legislature to submit to enjoyment, by the individual, of all rights and liberties guaranteed by the constitution.

An independent judiciary and legal profession are critical elements of the rule of law. The bedrock of a constitutional democracy is an independent judiciary. A judiciary which is not independent from the executive and legislature renders the checks and balances inherent in the concept of separation of powers ineffective.

It is a matter of concern that during the eight year period preceding the recent formation of the coalition government in Zimbabwe, the avowed policy of the executive was to appoint as judges to both the Supreme and High Courts, persons known to be sympathetic to its political ideals. In this it has been successful. The Supreme Court soon lost four of its five judges, with its composition being increased to eight; it is now six. The High Court lost eight of its judges, most of who resigned in the face of personal adversity. The vast majority of all the judges, including the Chief Justice, perceiving the unending land invasions as a political and not a legal issue, have gratefully accepted free occupation of large tracts of the most productive agricultural land, expropriated from white commercial farmers. In so doing they have compromised their judicial independence, seemingly pre-judged the legality of the fast-track land programme and associated issues, and seriously breached the rule of law, which they are oath bound to protect and enforce.

Moreover, about two years ago, it was widely reported that the Reserve Bank of Zimbabwe had supplied judges with flat screen television sets, satellite decoders and generators, at no charge. A payment or perquisite accepted by a judge from any source other than the treasury, inevitably raises the taint of undue influence. (Political interference with the judiciary was confirmed in the 2004 report to the International Council of Advocates and Barristers, entitled 'The State of Justice in Zimbabwe', by a team of eminent jurists, chaired by Stephen Irwin QC).

The Constitution of Zimbabwe places particular significance on the rule of law, specifically in the context of Chapter III rights. So, for instance, the rule of law is encapsulated in the preamble to the Declaration of Rights. Section eleven, which constitutes the 'the key or umbrella provision' of Chapter III, provides:

'Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of the Chapter shall have effect for the purpose of affording protection of those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons'.

This means that conduct negatively impacting on the constitutional rights of an individual may only be embarked upon in so far as such impacting is constitutionally permitted, and subject to the Constitution and other laws of Zimbabwe. Conduct that infringes constitutional rights, but which is not constitutionally authorized is, therefore, unlawful.

The importance of curial supervision and compliance with court orders is likewise deeply entrenched in Zimbabwean law. As the Supreme Court held over two decades ago:

'When the executive ignores the orders and judgments of the courts there is the inevitable breakdown of law and order, resulting in uncivilized chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgment. The history of this case leans more towards that which is undesirable than that which is desirable in order to uphold the rule of law'.

In Rhodesia (as Zimbabwe was known prior to independence), especially under the Smith government, the rule of law was often not observed. The declaration of rights, in a series of constitutional enactments, was not justiciable. Fundamental human rights were violated with impunity. The legislature and the executive were able to deny indigenous people their political rights. A system of inequality, similar to apartheid, was in existence. Many legislative enactments were instruments of violation of human rights. Elaborate legislation, which seriously infringed rights, freedoms and liberties, was in place. The law lacked legitimacy in that it was not enacted by representatives of the population as a whole. Although judicial review existed, its reach and significance were limited. The legislature, not the law, was supreme. It was not rooted in democratic values. Accordingly, the fundamental basis for a constitutional democracy and observance of the rule of law was absent.

Zimbabwe attained legitimate independence from Britain, and became a Republic in the British Commonwealth, on 18 April 1980. On the same day the Constitution (created at the Lancaster House Conference, towards the end of the previous year) came into force. 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 on the ground of race; and the right to protection from deprivation of property.

In the early years of independence 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.

The first blatant failure to comply with court orders 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.

It was only after this third attempt that the High Court ruled that the detention orders were validly made. The spurious 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'. He went on to attack the legal profession as a whole in the following paranoid 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’.

The statement clearly represented a threat to both the independence of the judiciary and the rule of law. Members of the Law Society met the minister of justice to express their concern. The Chief Justice, after consulting the minister of justice, also issued a statement expressing 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 the issue. This was because a few days earlier the Prime Minister had said in parliament:

‘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 measure meant disobeying the law. The words clearly conveyed that it was government’s policy to disobey the law whenever it considered 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 a lengthy 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 air force base. The only evidence against them was signed confessions which they alleged were obtained as a result of torture. The trial judge 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 acquitted. They were placed in preventive detention immediately upon release, but only for a short period. They were then deported from the country.

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 by 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 circumvent the judicial process, 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. Furthermore, damage awards cannot be enforced through contempt orders. Thus, whether or not to compensate is left to the state's discretion.

In 1988 the case that brought the judiciary into conflict with the legislature was that involving the former prime minister of Rhodesia, Ian Smith. The facts were simply that, as a member of parliament, Smith had been found guilty 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 parliament for one year and, in

addition, declared disentitled to receive salary and allowances during that period. 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. First, it was 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; and secondly, that the monetary deprivation imposed was illegal and in conflict with the Constitution. 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 Smith unless parliament 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. The Supreme Court judges, the Bar Council and the Law Society, expressed concern at the attitude of the speaker which sought to undermine the authority of the court. It was said:

'The judiciary is the watchdog of the country's constitution. 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'.

It was only after he had sought and obtained the authority of parliament that the speaker paid Smith. He refused to back down. So the conflict was finally resolved.

Clearly, the gravest abuse of law and order, during the first decade of the country's independence, occurred in the Matabeleland and Midlands provinces. A purported

threat of 'dissident' ex-guerrilla fighters led to a counter-insurgency war, commonly known as the 'Gukurahundi' (the word refers to the first rain of summer that washes away the chaff from the previous season). In official operations by the national army's notorious North Korean trained fifth brigade, which was directly responsible to Robert Mugabe, several thousands of innocent civilians were massacred or simply disappeared. Some estimates put the number at up to 10 000 civilians. Thousands more were arbitrarily detained, brutally assaulted and often tortured. In a 1982 speech to parliament, Mugabe accurately presaged the violence in these words:

'An eye for an eye and an ear for an ear may not be adequate in our circumstances. We might very well demand two ears for one ear and two eyes for one eye.'

For the initial ten year of its life the Declaration of Rights in the Constitution of Zimbabwe could only amended by a unanimous vote in parliament. Not surprisingly there were no amendments to any of the rights provisions. From 11 May 1990, however, amendments to the Declaration of Rights, as well as any other provision of the Constitution, may be passed upon a vote by two-thirds of the members of 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 Constitution of Zimbabwe Amendment (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 effectively overruled the 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 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 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 an inordinate delay in carrying out a death sentence amounted to inhuman treatment.

Constitutional Amendment Act (No. 14), promulgated on 6 December 1996, amends section 22 (which had been interpreted by the Supreme Court to permit 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 Act (No. 16) 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 compensate for improvements effected upon the land, though, unfairly, such compensation may be paid in instalments over a period of time'.

But the ultimate prohibition of access by commercial farmers to the courts came in the form of Constitutional Amendment Act (No.17), promulgated on 14 September

2005. It effectively vests the ownership of agricultural land, compulsorily acquired for resettlement purposes in conformity with the land reform programme, in the state; and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisition.

Constitutional Amendments 16 & 17 have been roundly, and aptly, condemned as being:

‘...without modern parallel in any constitutional democracy worthy of its name. They set Zimbabwe apart from all member states of SADC, the British Commonwealth and the African Union, which function as constitutional democracies. They violate Zimbabwe’s international law obligations, most immediately through its membership of the African Union. They entail the abrogation of constitutionalism and elevate the fiat of the executive and legislature over the entrenched core provisions of the Constitution. They certify the existence of a totalitarian state.’

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, whenever it considers it politically expedient to do so.

Yet another manner in which the rule of law has been undermined, is by the unreasonable utilisation of the Presidential Pardon. In terms of section 311 of the Constitution, the President has a right to grant a pardon, amnesty or clemency, to convicted prisoners. There are 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 of his political party, or members of the Central Intelligence Organisation (CIO), convicted of politically motivated crimes.

An instance of the flagrant abuse of the Presidential Pardon is the Kombayi case. 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, 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 party loyalist. 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 proclamation pardoning the two criminals.

More unforgivably, Clemency Order of 1998 pardoned all human rights violations and atrocities perpetrated by all parties during the so-called Gukurahundi war.

A gross breach of the rule of law, absent any hint of legitimacy, occurred in January 1999, with the arrest, detention, interrogation and torture, 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 any minister, nor the commissioner of police, openly complained 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; this more especially when the President announced publicly that the journalists had forfeited their right to legal protection by having acted in such a grossly 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. Regretfully, nothing was done to bring the offenders to justice. The

commissioner of police simply refused to perform a duty imposed upon the police force by the law of the land.

Undoubtedly the pivotal event of the year 2000 was the rejection of the government sponsored draft constitution, in mid February, by 54 % of the voters in a referendum. It sparked off a series of extreme responses from government that all but destroyed the rule of law, and has had ruinous international and economic consequences for the country.

A few days after the referendum results were announced, there were large-scale, synchronized invasions of white owned agricultural land, 86% of which had changed hands since independence, and only after government had declined to exercise options to purchase.

The initial invasions were followed by a massive and rapid expansion of the process, which required considerable pre-planning and logistical support. There was substantial government involvement in carrying out the invasions. Prospective occupiers were transported in an assortment of government vehicles to the farms which had been targeted. Once in place, the occupiers received monthly payments and regular food supplies which were delivered in government vehicles.

Only a small number of the invaders were actually war veterans; most were too young to have taken part in the liberation struggle. Many probably participated in the exercise primarily because they were unemployed and had been offered payment; although some did so because they wished to obtain land. There is little doubt that government orchestrated the initial farm invasions, and once underway, condoned and supported them.

The unlawful countrywide occupation of white owned productive agricultural land 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. This it clearly 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, proceeded at an accelerated pace.

Then there was another order by consent, this time granted by the Supreme Court. 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, 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 had been fulfilled. The order was not meant to prevent the government from pursuing land resettlement. Certainly, that was neither the objective nor the 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, the Supreme Court once more declared that the relevant ministers and the commissioner of police should comply immediately with the prior orders. 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 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 on to farms. They have been supported, encouraged, transported and financed, by party official, 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 was, likewise, ignored. The official stance taken up was 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 were to keep out of the arena. The President said that he would 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 suites 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.

In October 2000 the President issued Clemency Order No.1. 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 12 and 13 February Constitutional Referendum, and 24 and 25 June elections). The amnesty meant that those arrested and facing trial for such serious offences were released, and no new investigations and prosecutions may take place into their crimes.

In the main, these crimes were committed by loyalists of the ruling party against supporters, actual or perceived, of opposition political parties. The effect of the amnesty created the belief that political violence will be condoned and those responsible for it are above the law, and 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. 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:

‘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’.

Other disturbing conduct at about this time was the harassment of the High Court and Supreme Court judges by war veterans and followers. They called upon judges to resign or face removal by force. The minister of information spearheaded this campaign by accusing the Supreme Court of being biased in favour of white landowners at the expense of the landless majority. He called on me to resign.

Such attacks show total disrespect for the rule of law and 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 2000, by close to two hundred war veterans and followers, was nothing but 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 gesture 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 adhered to. The invasion lasted an hour. It disrupted, as it was intended to do, the proceedings of the court. There is good reason to believe that it had been instigated and organised by the minister of information.

Disappointingly, yet 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.

On 14 December 2000, President Mugabe, speaking at his party's congress, disowned the courts. With reference to 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.’

One year later the present Chief Justice, with the concurrence of three newly appointed judges, predictably set aside the Supreme Court's earlier judgment, and endorsed the government land acquisition policy. There was one dissention. The majority found that the government had taken sufficient steps to restore the rule of law on commercial farms. It had achieved this by passing the Rural Land Occupiers (Protection from Eviction) Act, which legalised the unlawful occupations of land that had taken place; and the facts established that the police were adopting adequate measures to prevent crime in the commercial farming areas. The ratio for this volte face is highly questionable. Non-the-less, the majority decision provided the legal legitimacy from the highest court that the government had been seeking for its 'land' programme. It allowed the government to claim that the entire programme is lawful, constitutional and in accordance with the rule of law. This is blatantly not so.

The fast-track land reform programme remains much in force today. In theory it was meant to correct “historical imbalances”, and to hand land to landless black Zimbabweans, through a one-man one farm policy. Pursued in a most chaotic, ruthless, uncontrolled and violent manner, it has resulted in about 4500 white commercial farmers being forced off their land, and 350 000 farm labourers being deprived of their livelihood. The grave atrocities committed against white farmers are legend. In 2000 alone seven suffered violent deaths at the hands of the invaders (the deaths now total 16). Many others have been subjected to acts of attempted murder, grievous assaults, torture and abduction; their homesteads looted and often set on fire, valuable farm equipment and crops stolen or destroyed, and productive land senselessly ravaged. Farm labourers have been intimidated, threatened and beaten mercilessly. The victims have been denied the protection of the police; the pretext being that the occupation of land is a political and not a legal issue. Any intervention provided is solely to enable the invaders assume control of land. The reality is that in commercial farming areas throughout the country, the rule of law has become a myth.

There has been little improvement in the country’s steep economic decline, wide spread food shortages, high unemployment and politically motivated violence, since the formation of the unity government on 11 February of this year. And this, notwithstanding, that the Global Political Agreement, reached on 15 September 2008, committed the opposing political parties to a cessation of violence, the conduct of a comprehensive, transparent and nonpartisan land audit (which was not to reverse the land reform programme, but to do away with multiple farm ownership), and to ensuring security of tenure for all landholders, with land to be given irrespective of race.

Yet, in a document, dated as recently as 27 August 2009, the ministry of lands and resettlement effectively withdrew from the undertaking to compile a land audit, citing an expense problem. It now recommends that:

- (a). land acquisition and redistribution should continue given the incremental demand for land;
- (b). no foreigner should be allowed to own rural agricultural land;

- (c). agricultural land should be excluded from the protection afforded by Bilateral Investment Promotion and Protection agreements;
- (d). prosecutions of farmers resisting to move off acquired land should continue.

In this year alone more than 80 commercial farms have been forcibly seized, in accord with the stated objective of the ZANU-PF party that every white farmer is to be removed from agricultural land. Over 6600 farm workers have been made homeless by new occupiers, who are not engaged in productive farming. Violence is rife, with little done to eradicate it. The number of white commercial farmers has shrunk to about 250. They are occupying land greatly reduced in size, and under constant and violent pressure of eviction. At a conference held in Pretoria at the end of September, the president of the Commercial Farmers Union, said:

‘The situation is that we’re receiving an even bigger hiding than before. Although everything seems to be fine on the outside, the rule of law just is not there. It’s applied very selectively.’

Despite enduring constant threats, intimidation, harassment, assaults and arrests, many commercial farmers have fearlessly continued to engage the government in legal proceedings in an endeavour either to retain, or regain, occupation of agricultural land, or their valuable personal possessions.

On 11 October 2007, and only after the courts in Zimbabwe had refused them relief, Mike Campbell (Private) Limited and William Michael Campbell, filed an application before the Southern African Development Community (SADC) Tribunal, contesting the acquisition by the Republic of Zimbabwe of agricultural land, pursuant to the country’s ‘fast-track’ land reform exercise. The challenge was based on the ground that the land reform policy, and compulsory acquisitions in terms thereof, breached the SADC Treaty, signed by President Mugabe on 17 August 1992, ratified by parliament on 17 November 1992, and operational as from 30 September 1993. The Tribunal comprised the former Chief Justice of Mauritius, as President, and four other eminent judges of the region.

The challenge gave rise to several interlocutory applications. The first concerned a successful claim for interim relief pending the final disposal of the matter. The

second involved the interventions of 77 additional individuals who faced similar interferences with agricultural land. That application was granted and interim relief extended also to those interveners.

In its judgment of 28 November 2008, the Tribunal found that it had jurisdiction to entertain the application. It further held, unanimously, that the applicants had been denied access to the courts of Zimbabwe, and that fair compensation was payable for the expropriation of the land. It was said:

‘It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation. Moreover, the respondent cannot rely on its national law, or its constitution, to avoid an international law obligation to pay compensation’.

By a majority of four to one, the Tribunal ruled that the applicants had been discriminated against on the ground of race. It unanimously directed that the government take:

‘all necessary measures, through its agents, to protect the possession, occupation and ownership of the land of the applicants and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the applicants.’

And that those applicants, whose property had already been expropriated, were to be paid fair compensation by the government, on or before 30 June 2009.

Despite the fact that in terms of article 32 (3) of the Treaty the judgment is final and binding, the government refuses to comply with it.

On 18 December 2008, the deputy attorney-general stated in writing that:

‘the policy decision taken by the government to the judgment is that all prosecutions of defaulting farmers should now be

resumed’.

The minister responsible for land reform and resettlement said that the Tribunal was ‘day dreaming’, and that the government was ‘not going to reverse the land reform exercise’.

A speech delivered by the Deputy Chief Justice on 12 January 2009, at the opening of the legal year, sought to impugn the judgment on the basis that the Tribunal lacked jurisdiction to hear and determine the case. The following month, in the course of his birthday celebrations, the President denigrated the Tribunal’s decision as ‘nonsense’ and ‘of no consequence’. Prosecutors and magistrates were coached by the ministry of justice and the attorney-general’s office, at various workshops around the country, on how to react to the judgment, which was disparaged as ‘not binding’. Eviction orders issued against white farmers were to be complied with, as in the past.

In the wake of the continued seizure of more land from the remaining few white farmers, and numerous serious and persistent threats to their very lives, some of the beneficiaries of the judgment again turned to the Tribunal for legal protection. (The Campbell family were badly assaulted after the Tribunal had granted an interim protection order in their favour, before the final hearing, in the course of which assaults they were given papers to sign seeking the abandonment of their case before the Tribunal).

On 5 June 2009, the Tribunal, recognising the urgency of the matter, issued an ex tempore order directing the government’s failure to comply with the judgment, to the SADC Summit for its attention, and granted an order for costs in favour of the applicants.

Prior to the holding of the SADC Summit in early September 2009, at Kinshasa, the government decided to pull out of the SADC Tribunal after the minister of justice declared it ‘unlawful’. In a letter delivered to the Tribunal on 10 August 2009, the minister wrote:

'The purported application of the provisions of the Protocol on Zimbabwe is a serious violation of international law. There was never any basis upon which the Tribunal could seek or purport to found jurisdiction on Zimbabwe based on the Protocol which has not yet been ratified by two-thirds of the total membership of SADC. As we are unaware of any other basis upon which the Tribunal can exercise jurisdiction over Zimbabwe, we hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have or may make in future against the Republic of Zimbabwe, are null and void'.

The validity of the minister's opinion has been contested by senior counsel who appeared before the Tribunal on behalf of the applicants, on the following grounds:

- a) Zimbabwe is a signatory to the SADC Treaty.
- b) Zimbabwe is bound to the Protocol despite not ratifying it.
- c) Zimbabwe has conceded the SADC Tribunal's jurisdiction.
- d) The SADC Tribunal has held that Zimbabwe is subject to its jurisdiction. It is the designated SADC organ conferred by the Treaty with the authority to interpret the provisions of the Treaty; hence it is the body to decide whether a State is bound by the Treaty and the Protocol, and subject to its jurisdiction.

This view of the controversy is shared unequivocally by the organisation known as Zimbabwe Lawyers for Human Rights. It points out that articles 35 and 38 of the Tribunal Protocol, upon which the minister relied for the averment that the Tribunal was not properly constituted because it was not ratified by two-thirds of SADC members, were both repealed by article 16(2) of the Treaty. The effect was to make the Tribunal an integral part of both the Treaty and the Institution of SADC. The repeal specifically excluded the Tribunal Protocol from the usual requirement for ratification before it could come into force and effect.

On 15 and 16 September 2009, representatives of the premier bar associations and rule of law institutions on the African continent, met in Arusha, and issued a communiqué on the status of the Tribunal. It expressed disapproval of the reasons offered by the minister of justice justifying his contention that the Tribunal lacked legitimacy; and supported the grounds advanced for the opposing view. Furthermore, it observed:

‘The failure of the Government of Zimbabwe to comply with a court decision, whether of a domestic or international tribunal is consistent with its endemic culture of defiance of court orders that it dislikes.

In Zimbabwe the Government dismantled the Supreme Court and the High Court when they were seen as issuing decisions which the Government disliked through forcing out judges and hiring “politically correct” individuals. Its current thrust to destroy the SADC judicial organ is consistent with the Government’s conduct in dealing with judicial organs it dislikes’.

The application of Gramara (Private) Limited v Government of Zimbabwe is due to be argued in the High Court on 24 November 2009. The relief sought is a declaration that the ruling of the SADC Tribunal in the Campbell matter be registered with the High Court for the purpose of its enforcement in Zimbabwe. The crucial point the presiding judge will have to decide is whether the Tribunal lawfully exercised jurisdiction over Zimbabwe based on the Tribunal Protocol. Whatever determination is made, the overwhelming probability is an appeal to the Supreme Court by the losing party. (The Deputy Chief Justice has already revealed his hand, as has the High Court judge, whose nomination as a member of the SADC Tribunal has now been withdrawn). Inevitably there will be an inordinate delay before the issue is finally resolved. And the longer it remains alive domestically, the more advantage is to be gained by government. For in the situation obtaining, it is unlikely that SADC will entertain the Tribunal’s request to consider enforcement steps of its judgment against Zimbabwe as a SADC member.

A more definitive success was achieved by thirteen Dutch nationals, whose large commercial farms in Zimbabwe had been expropriated, despite the existence of a Bilateral Investment Treaty concluded by Zimbabwe and the Netherlands. On 22 April 2009, they received a total award of Euros 8 220 000 as compensatory damages from an arbitral panel, appointed by the International Centre for Settlement of Investment Disputes, Washington, D.C. No appeal is pending, but payment is still to be made.

The persistent onslaught suffered by the rule of law and democracy in Zimbabwe cannot be underestimated. Legality and constitutionality have been cast aside. Forces of violence, intimidation and disorder have been unleashed, and allowed to prevail particularly, but certainly not exclusively, in the implementation of the fast-track land reform programme. A programme that has all to do with power politics; and nothing to do with the professed continuation of the liberation struggle to bring about economic emancipation for the landless majority. The timing of its introduction, after a delay of two decades since independence, proves the point. The law enforcement agencies have either actively collaborated in these lawless activities, or simply declined to afford protection, sanctuary and good order, in the fulfilment of their fundamental duties.

There is urgent need to witness real progress on the part of the inclusive government on critical issues like restoring the rule of law, adhering to international treaty obligations, respecting human rights and guaranteeing freedom of speech, and freedom of assembly and association. Law enforcement agencies will have to be overhauled so that they again become professional, politically neutral forces that respect the human rights of all Zimbabweans, and enforce the law on a fair and impartial basis. Sham politically motivated prosecutions must cease. So must the unlawful detentions, arrests, torture and harassment, of human rights defenders and independent journalists. New private media should be licensed and international journalists allowed to practice openly.

That said, it would be remiss of me were I not to acknowledge and acclaim, the on-going courageous struggle against oppression and injustice, by local organisations such as, Zimbabwe Lawyers for Human Rights, Crisis in Zimbabwe Coalition, Justice

for Agriculture, Zimbabwe Peace Project, as well as by many prominent human rights lawyers; often to the detriment of their personal safety. Names that immediately come to mind (and there are many others) are Beatrice Mtetwa, Arnold Tsunga, Alec Muchadehama, Justina Mukoko and Jenny Williams, three of whom have received international awards.

In the last few months, the Supreme Court granted an order permanently staying the prosecution of Justina Mukoko on charges relating to terrorism. She had been abducted from the family home at daybreak, while in her nightgown and bare foot, and not seen for three weeks. She later testified that she was held at secret locations while being severely tortured by state security agents, in an attempt to extract a false confession.

More recently, a High Court judge, ordered the government to restore to the British company, African Consolidated Resources Limited, the right of title to claims in the Marange diamond fields, which had been seized in October 2006, and allocated to the state owned Zimbabwe Mining Development Corporation; and the return of 129 400 carats of diamonds confiscated by the police in January 2007. The learned judge ended by saying:

‘The papers before me paint a gloomy picture of the duty to protect our national heritage by those constitutionally charged with that responsibility’.

Regrettably, the police and the army continue to deny African Consolidated Resources access to the diamond fields (a site of grave military atrocities), and the Mining Corporation has not halted its drilling operations. Both activities are in breach of the judge’s order that the noting of an appeal would not suspend the operation of the judgment.

Time will tell whether these two judgments signify the beginning of a genuine shift in judicial approach. But, at the very least, they should be taken as a pointer that Zimbabwean courts will not rule invariably in favour of the state.

The formation of the power-sharing government was welcomed by most right-thinking Zimbabweans. It has resulted in an end to rampant inflation and in a fair

measure of economic stability. Though now threatened by policy differences, the slow pace of reforms, and feuding over top executive positions it, nevertheless, represents a glimmer of hope of a return to democracy, and with it international recognition and financial aid. So, it is critical that it holds together. For fragile as it is, it is a substantial improvement from the history of the past, and is stumbling forward on a road to recovery, although one beset by numerous potholes.

Zimbabwe's natural and human resources were once the envy of Africa; and they still could be. But no one will invest in the country until they are confident in the legal environment. It is simply basic economics. Capital is a coward, as the saying goes. Foreign investors, not to mention Zimbabwe businessmen, want to be assured that the rule of law will be observed and adhered to, and that their investments will be safe, before they put money into the economy. What this requires is positive political will to heal past wounds. It requires political leaders who place the interest of the people of Zimbabwe ahead of their own. Most of all it requires that all Zimbabweans stand up for their rights; and take responsibility for, and play a role in, the democratic changes and fundamental liberties they want to be able to enjoy. Meanwhile, as the Portuguese say, 'a luta continua': the struggle goes on...