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THE CHALLENGE OF INDEPENDENCE

There is general acceptance that a society in which the rule of law is meticulously observed is one in which a climate of legitimacy and a strong, vibrant and independent judiciary and bar, are evident. The rule of law is a celebration of the concept of separation of powers and the checks and balances that form part of such a concept. Through the mechanism of judicial review, executive and administrative decisions, as well as legislative enactments, outside the framework of the law, or in violation of constitutional protections, are declared invalid. Such judicial intervention compels submission to enjoyment by the individual of all rights and liberties constitutionally guaranteed or inherent in the justice system of a democratic state. Yet, clearly, the power to control excesses is maintainable only in a situation in which an independent judiciary and bar exists. A judiciary that is not independent from the executive and legislature, renders the checks and balances implicit in the concept of separation of powers ineffectual. And a bar which is loath to challenge before the courts enactments and actions viewed as in conflict with the rule of law, because of political pressure, an unwillingness to attract criticism from the government or the public, or from fear of an adverse impact upon livelihood, fails in its allied duty and function to ensure that the rights of the individual are respected and enforced. In short, lawyers owe a special responsibility to oppose and condemn by protest and action, all threats to the rule of law and judicial independence. It is this that lies at the very core of the legal profession.

What are the basic requirements that make a judiciary independent? Foremost, judicial office demands of its incumbents not merely a sound knowledge of the law but conscience and insight – a sense of balance and proportion; and if not absolute freedom from bias and prejudice, then at least the ability to detect and discount such feelings so that they do not becloud the fairness of the judgment. It is essential also, that there never be the motivation to appoint someone, however able he or she is, because of avowed political affiliations. Not to be overlooked as well is a guarantee of security of tenure during good behaviour and ability to perform the necessary function. Irrespective of the displeasure with which the government may view a decision pronounced by a particular judge, it must be powerless to remove him or her. Finally, unless judges are protected economically by the receipt of adequate remuneration and conducive working conditions, there is a distinct danger that they may feel reliant upon the executive. The work and thinking of a judge must not be frustrated by a lack of means. Absent these imperatives and the public perception may well be that its judiciary is lacking of independence.

The judiciary of Zimbabwe has faced two types of challenge to its independence: the first by legislative abuse, the second by unlawful action.

During the period 1991 – 2000 the Parliament of Zimbabwe, by means of the vote of at least two-thirds of its members, passed several amendments to the Declaration of Rights in the Constitution to the disadvantage of the individual. Several of these amendments manifestly overruled judgments of the Supreme Court. I mention three instances. It enacted that judicial corporal punishment imposed upon a male offender under the age of eighteen years was not to be held inhuman or degrading under section 15(1) of the Constitution. Two years later, in 1993, it passed a further amendment to section 15(1) in order to overcome the judgment that an inordinate delay in the carrying out of a death sentence amounted to inhuman treatment. Then yet another decision that permitted the foreign husband of a Zimbabwean citizen to

reside permanently in the country and engage in employment or other gainful activity, was nullified. Now both the foreign husband and the foreign wife, who previously had enjoyed permanent residence by virtue of her marriage to a citizen, have no absolute right thereto.

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 so as to remove 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.

A further manner in which the judiciary of Zimbabwe has been undermined is by the unreasonable utilisation of the Presidential Pardon. In terms of section 31I 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 thereof, abuse has been inevitable. What has happened over the years is that the President has employed this pardon to free those from his political party, or members of the Central Intelligence Organisation, convicted of serious political crimes. There are many instances of this on record.

The issue by the President of a Clemency Order, some fifteen months ago, granted amnesty to those who had kidnapped, tortured, assaulted people and burnt people's houses and other possessions, as a way of politically intimidating them during periods preceding the Constitutional Referendum and Parliamentary Election. This amnesty has meant that those arrested and facing trial for such grave offences have had to be released and no new investigations and prosecutions can take place with respect to them.

Certainly, the gravest abuses of the rule of law, without any hint of legitimacy, have occurred over the past three 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 weekly 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, acknowledged that the action of the military authority was in violation of the law. There was no statement that the power to arrest and detain civilians vested solely in the police working with the courts. The impression was, therefore, that the military authority may operate beyond the reach of the law; and this, more especially, when the President publicly announced that the journalists had forfeited their right to legal protection by having acted in such a blatantly dishonest manner. The reason for non-intervention given 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'.

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. It declared that the occupation of farms by persons claiming a right to do so in pursuit of an entitlement to demonstrate against the inequity 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 to enforce the law. The order was not obeyed. The President criticized it as nonsensical. That it clearly was not. To have ruled any other way would have amounted to a violation of the law. These unlawful occupations, with the encouragement of the government, have since proceeded at an accelerated pace.

Then there was another similar order by consent. This time granted by the Supreme Court. The ratio was that land resettlement must be carried out within the framework of the Constitution or in compliance with the provisions of the Land Acquisition Act; and not by unlawful invasion.

A month later, on 21 December 2000, the Supreme Court once more declared that the relevant Ministers and the Commissioner of Police should comply immediately with the two previous orders. Again that order was ignored. The official stance was that land distribution is a political and not a legal matter; the courts must keep out of the arena.

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 issues as 'political' because it suits them, thereby violate 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 was the harassment of the High Court and Supreme Court judges by war veterans. They called upon judges to resign or face removal by force. The Minister of Information spearheaded the campaign by accusing the Supreme Court of being biased in favour of white land owners at the expense of the landless majority. The invasion of the Supreme Court building on the morning of 24 November 2000, by close to two hundred war veterans and followers, can only be described as disgraceful. It sent a clear message that the rule of law was not to be respected. There was no official condemnation of the incident. Not a word was heard from the President, the Minister of Justice or the Attorney General.

On 14 December 2000, speaking at his party's annual conference, the President disowned the courts, saying that 'they are not courts for our people and we shall not even be defending ourselves in these courts'.

All such attacks against the judiciary showed 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 become more compliant and rule in its favour. They should not face anything other than legitimate criticism arising from what was done in the discharge of judicial duty.

Throughout this regrettable saga the Council of the Law Society, headed by its elected President, responded boldly to the unprecedented violation of the rule of law and the condemnation of the judiciary. The Council proved to be the judiciary's staunchest and unwavering ally. In so recognizing its obligation to promote and protect the rule of the law, it put itself in the front line of attack by the government and its controlled news media. Some of the actions it took are these :

On 3 March 2000 the Council appealed to the Minister of Home Affairs to restore law and order on commercial farms affected by invasions, and prevent a deterioration into lawlessness. It said that a perception of abrogation by the state of its duty to maintain law and order, whether it arose from inaction, inadequate action or delayed action, was extremely dangerous. It emphasized further that in the relationship between the state and its subjects, legitimacy was deeply rooted in the effective maintenance of law and order.

Two weeks later the Council issued another statement indicating its concern at what was happening. It also addressed a letter to the Minister of Home Affairs pointing out that the situation continued to deteriorate and that crimes were being committed openly on commercial farms. It further condemned the making of intimidatory remarks that appeared to be aimed at denying the people of Zimbabwe their democratic right to vote for whomever they pleased in the forthcoming Parliamentary elections.

On 31 March 2000 the Council voiced disquiet at the failure of the government to implement the order of the High Court regarding the illegal invasion and occupation of commercial farms. It expressed concern at public statements attributed to the President that threatened violence or death to persons holding views contrary to those of the ruling party. It complained that the conduct of the executive at the time amounted to a blatant violation of the Constitution and other laws of Zimbabwe. It stressed that long term damage was being caused to the rule of law, to the fundamental rights enshrined in the Constitution and to the judiciary.

On 19 April 2000, in conjunction with the SADC Lawyers Association, the Law Society of Zimbabwe issued a statement marking concern at the crisis that was developing in the administration of justice. The two bodies encouraged the government to proceed with expedition and diligence to facilitate enforcement of the order of court made in connection with farm invasions and ensure that the land reform program was implemented within the framework of the law. It was said that SADC countries should resist any act which could serve to undermine the credibility of their courts and respect for the rule of law.

In August 2000 the Law Society organized countrywide processions and assemblies by its members to present a petition to the President. The petition highlighted its anxiety at the breakdown of law and order and the ongoing violations of the rule of law.

When members of the War Veterans' Association threatened judges of both the Supreme Court and High Court the Law Society once more went public. It sought to underscore the position that independence of the judiciary exists for the protection of the public and ought not to be interfered with. This is part of what was said :

> "When judges review executive acts and declare them to be unlawful or review legislative acts and declare them to be unconstitutional, their motivation is not to frustrate the executive or the legislature. They do so because they have a duty to interpret and apply the law. They have a duty to ensure that all executive and legislative acts are within the framework of the law. Their role in that regard is vital to the practice of checks and balances on which the concept of separation of powers between the executive, the legislature and the judiciary is anchored".

And

> "The Law Society had not seen any evidence of bias or predisposition on the part of our courts. It has confidence that courts in Zimbabwe will continue to uphold the constitution and other laws without fear or favour. In general, the judicial officers in Zimbabwe have rightly treated their appointments as a public trust. They have endeavoured to place their conduct beyond reproach. They have been impartial, fearless of public clamour, regardless of public praise and indifferent to private, political or partisan influences. They have administered justice according to the law".

Finally, when the Chief Justice and other judges were under pressure from the executive, the Law Society co-ordinated messages of support from lawyers throughout the world and received encouragement from such organisations as the SADC Lawyers Association, the Law Association of Zambia, the Law Societies of Namibia, South Africa and England and Wales, the General Councils of the Bar in South Africa and England and Wales, and the International Commission of Jurists.

Every judiciary has a critical part to play in enforcing the law. Attacks upon its integrity which are unjustified and unreasonable jeopardize that process. They undermine its constitutional role, erode confidence in its decisions and damage it as an institution. A judiciary is virtually defenceless against such disparagement. The tradition in Zimbabwe has been that judges should hold their tongues and that to speak out would be to sacrifice judicial independence or, at least, the perception of impartiality.

However, the tradition of judicial silence is paired with the equally strong tradition of support from the Bar. And there has been no finer example of its recognition and implementation than that afforded by the Law Society of Zimbabwe. Its spirited defence of the rule of law and of the challenge to the independence of the judiciary, has been magnificent. Not surprisingly such courageous activity has been acknowledged internationally. At the end of last year the Law Society, represented by its President, was jointly awarded the Inaugural Peter Gruber Foundation's Justice Prize. It was richly deserved.