

Zimbabwe and its courts¹

AR Gubbay
Chief Justice of Zimbabwe

Early history

The area now covered by Zimbabwe was inhabited by descendants of the great southern migration of Bantu people. They occupied most of central and southern Africa. By the end of the 19th century there were two main tribes in the country, the Matabele and the Mashona. Lobengula, the King of the Matabele, asserted sovereignty over the whole country.

In 1890 the country was occupied by the British South Africa Company operating under a Royal Charter which enabled the company to exercise powers of governance. In 1923 the country became a self-governing British colony. It finally achieved full independence on 18 April 1980, following upon a fourteen-year civil war against the unlawful declaration of independence by the white minority government.

Development of the high court

For a few years after occupation there was no high court. The administrator, in his capacity as chief magistrate, however, possessed the jurisdiction of a superior court of record in all cases, both civil and criminal. He was also empowered to hear appeals from, and review the proceedings of, magistrates' courts.

The judicial system of the country was put on a proper basis in 1894 when the Matabeleland Order in Council was promulgated. Under this Order, the High Court of Matabeleland was established, with full jurisdiction over inferior courts. Notwithstanding its title, this court's jurisdiction extended over the entire country. The provisions for the appointment of judges were very simple. They were to be appointed by the British South Africa Company with the approval of the Secretary of State and would hold office "during pleasure". Salaries could not be increased or diminished without the approval of the Secretary of State. No qualification for judicial office was prescribed. At first only one judge was appointed, but in 1896 a second appointment was made. Both came from the Cape

of Good Hope.

At the beginning of 1899 the High Court of Matabeleland was reconstituted as the High Court of Southern Rhodesia under the Southern Rhodesian Order in Council, 1898. The appointment and tenure of office of judges were provided for much as before, save that appointments were now made by the Secretary of State on the nomination of the British South Africa Company, which was required to nominate "a fit and proper person".

Between 1923 and 1962 there was no alteration of any significance in the composition, structure or jurisdiction of the High Court. It was only in 1933 that it became necessary to increase the judicial establishment from two to three. Since then, of course, the number of judges has increased steadily over the years.

Towards the end of 1962, the Constitution of Southern Rhodesia 1961 came into effect. The old high court which had sat both in the capital (then named Salisbury) and the second largest city, Bulawayo, continued in existence as the new high court provided for in Chapter V of the Constitution, and existing judges, who then numbered six, continued in office. A feature of the new Constitution was that more elaborate provision was made for the appointment, qualification and removal of judges. A person would not be qualified for appointment as a judge unless he or she was or had been a judge of a superior court in a country in which the common law was Roman-Dutch, with English as the official language; or if he or she had been qualified to practise as an advocate in Southern Rhodesia or in a country in which the common law was Roman-Dutch with English as the official language. Appointments were made by the Governor on the advice of the Prime Minister, with the latter being obliged to consult the Chief Justice and the puisne judges. The retirement age was set at sixty-five years with an extension to seventy. Removal from office was by the Governor on the recommendation of an independent judicial tribunal of inquiry.

The next major development to the situation of the high court came as a result of the dissolution of the Federation of Rhodesia and Nyasaland at the end of 1963. With the cessation of the Federal Supreme Court as a court of appeal from decisions of the high court, it became necessary to put in place a substitute local appellate system for the country. The system devised was to split the high court (until then at all times a single-decision court) into two divisions: the Appellate Division and the General Division (or trial division). The Appellate Division dealt with the bulk of the appellate work of the former high court and also heard appeals from the General Division. The General Division dealt with the trial work of the former high court and also retained some minor appellate and review jurisdiction. The chief justice could sit in both divisions.

The same structure continued until 28 April 1981 – a year after independence – when the High Court Act and Supreme Court Act became operative.

The system of appeals

Prior to 1964 the country was served by a number of different courts of appeal. It did not have the system of appeals from a high court decision to a full bench of the high court – which would have been impossible because for so many years the high court had had only two judges.

From occupation in 1890 until the unilateral assumption of independence on 11 November 1965, the Privy Council was the ultimate court of appeal. During most of this period appeals lay by special leave only.

The first intermediate appeal court was the old Cape Supreme Court. An appeal to it lay from the high court, initially in civil matters and, from 1898, against conviction by way of a question of law reserved by the high court.

The South Africa Act of 1909, which provided for the Union of South Africa, set up the Appellate Division of the South African Supreme Court, at Bloemfontein, and made special provision for appeals from the High Court of Southern Rhodesia to that court. Civil appeals, except in certain minor matters in which appeals still lay to the old Cape Supreme Court (which then became the Cape Provincial Division), lay direct to the Appellate Division of the Supreme Court of South Africa. In criminal matters appeals still lay to the

Cape Provincial Division, with no further right of appeal from a decision of that court. But in 1931 the Cape Provincial Division ceased entirely to be an appeal court for Southern Rhodesia. All appeals lay to the Appellate Division of the Supreme Court of South Africa. In civil matters an appeal lay where the dispute exceeded £100 in value, or with leave of the high court. In criminal cases there was no full appeal on fact, and no appeal against sentence as such.

An alternative right of appeal was granted to persons convicted before the high court under the Rhodesian Court of Appeal Act 1938. The Act established a local court of appeal for Southern Rhodesia and what was then Northern Rhodesia (now Zambia). In 1947 Nyasaland (now Malawi) was added, and from then on the court was known as the Rhodesia and Nyasaland Court of Appeal. A person convicted by the high court who elected to appeal to this court lost his right to appeal to the appellate division in Bloemfontein. The significant feature about the right of appeal to the Rhodesia and Nyasaland Court of Appeal was its wider scope. For the first time there was a full appeal on fact with leave of the court. There was a right of appeal from it to the Privy Council with special leave of that body.

Common law applicable

In the 17th century Dutch settlers had established a colony in the Cape of Good Hope. They applied the law current in the Netherlands at the time. That law was Roman-Dutch, a fusion of Roman law and the customary law of the Netherlands. Roman-Dutch law was still the common law of the Cape when Southern Rhodesia was founded. Because of its close geographical, historical, political and judicial association with the Cape, the Roman-Dutch system became the common law of Southern Rhodesia. It has remained the common law ever since. Its development has been influenced strongly by the decisions of the South African courts.

Independence and after

At independence the General Division of the High Court consisted of the chief justice and nine puisne judges, and one acting judge. The appellate division consisted of the chief justice, the judge president and one full-time judge of appeal. All the judges were white. The self-same chief

justice who had indicated an unwillingness to serve under a nationalist government represented the judiciary at the granting of independence and swore into office Robert Mugabe as prime minister. As part of the process of reconciliation the Mugabe government left in office all the members of the judiciary who had served under the white minority government of Ian Smith. However, during May 1980 the chief justice and one judge of appeal retired, having both reached sixty-five years of age. On 8 May 1980 the first black judge was appointed to the General Division of the High Court. He was Enoch Dumbutshena. The first chief justice of Zimbabwe was John Fieldsend (who had left the Bench in 1968 in protest against the decision of the court to accord judicial recognition to the government of Ian Smith).

During the early years of independence many of the white judges resigned. By mid-1984 only two remained with one retiring at the end of 1986. The government was obliged to recruit on contract four expatriate judges from Ghana and Tanzania. One of them later took permanent appointment and remained in office until he retired at the end of 1997.

At present the supreme court (the successor of the Appellate Division of the High Court) has five judges and the high court has nineteen judges; fifteen, including the judge president, are assigned to the high court at Harare, and four at Bulawayo. The composition of both courts is non-racial. All the judges are citizens of Zimbabwe although this is not a specific requirement for appointment.

Under the Constitution of Zimbabwe, the chief justice and other judges of the supreme court and the high court are appointed by the president after consultation with the Judicial Service Commission. If any proposed appointment is not in accord with the recommendation made by the Judicial Service Commission, the president is enjoined to cause parliament to be informed of the reasons as soon as is practicable. This has never happened. The Judicial Service Commission has as its members the chief justice, the judge president of the high court, the attorney-general, the chairman of the Public Service Commission, and two senior and experienced legal practitioners from the private sector. This composition ensures that judicial office is open to all.

Judges are the custodians of the Constitution of Zimbabwe. This means that the courts have the power, and the duty in the first place to ensure that all the provisions of the Constitution – which is the supreme and overriding law of the land – are observed by all the instrumentalities of government; and secondly to declare as invalid any excess of power or Act of Parliament or presidential or ministerial regulation which contravenes a provision in the Constitution. Anyone who alleges that a fundamental right or freedom has been, or is likely to be, violated in relation to himself or herself, may apply directly to the supreme court for determination of the matter. In this respect the supreme court functions as a court of first instance besides exercising appellate jurisdiction. And the high court, and any inferior court, are required to refer any such issue to the supreme court if requested by the parties. Referrals may also be made *mero motu* by the courts.

The Constitution contains a justiciable Declaration of Rights which specifies a number of fundamental human rights and freedoms which are not to be breached. These rights were effectively entrenched for the initial ten years; the Constitution requiring a 100% vote in the then House of Assembly to derogate from them. That entrenchment came to an end on 18 April 1990. The provisions of the Declaration of Rights may now be amended upon a two-thirds majority vote by the members of parliament.

The supreme court is empowered in terms of the Constitution to “make such orders, 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”.¹ It was said of this provision in *In Re Mlambo* that “it is difficult to imagine language which would give this Court a wider and less fettered discretion”.² The Supreme Court utilised this wide discretion in *Catholic Commission of Justice and Peace in Zimbabwe v Attorney-General*.³ In that case, notwithstanding that executive clemency had been refused, the sentence of death passed upon four condemned prisoners was quashed and replaced, in each instance, with imprisonment for life. In another matter that followed shortly thereafter, the supreme court again substituted life imprisonment for sentence of death, even though the exer-

cise of executive clemency had yet to be considered.⁴

Over the last eighteen years the supreme court and the high court have developed a strong human rights jurisprudence. That this has been achieved, either through the striking down of offending legislation or by a declaration of invalidity of governmental action, evidences the true independence of the judiciary. A few examples reflect this approach:

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

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

The impact of this provision was considered by the supreme court in relation to the constitutionality of a judicial whipping upon male adults and juveniles.⁵ Both forms of whipping (they differed only in respect to the length and thickness of the cane used) had been in force under the Criminal Procedure and Evidence Act for well in excess of half a century. The punishments were struck down on the ground that, having regard to the sensitivities which emerge as civilisation advances, they were inhuman and degrading. In the course of the judgment it was remarked:

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

In the *Catholic Commission* case³ the supreme court considered that delays of fifty-two months and seventy-two months from the date of imposition of sentence of death to the proposed date of execution, fell foul of the condemned prisoners’ rights under section 15(1). It is important to note that the supreme court was not seeking to disturb its earlier judgments in which the appeals of the condemned prisoners were dismissed. Rather, it was functioning as a constitutional court and so was obliged to determine whether, even though the death sentence was the only fit and proper punishment to have been imposed, supervening events, namely the “death row phenomenon”, was so adverse that the execution of the sentences on the appointed dates would constitute inhuman treatment.

In *Minister of Home Affairs v Bickle*⁶ the supreme court had to decide whether a person whose property had been declared forfeit in terms of an order made pursuant to the Emergency Powers (Forfeiture of Enemy Property) Regulations, because he appeared to the Minister to be an enemy of the state, was *in fact* an enemy. Section 16 of the Declaration of Rights protects the individual against compulsory acquisition of his property by the state save in certain prescribed circumstances, one of which is specified as “property belonging to or used by or on behalf of an enemy”. At issue was whether the definition of “enemy” as contained in the Regulations, namely a person “who is or has been acting as the agent of, or on behalf of, or in the interests of, any foreign country or foreign organisation, and in a manner prejudicial to the public safety of Zimbabwe or which is subversive to the authority and the lawfully established Government of Zimbabwe”, was in accordance with the proper meaning to be ascribed to the word “enemy” in section 16. In confirming the decision of the high court, the supreme court held that it was not and that, accordingly, the forfeiture order was unconstitutional. The ratio was that the word “enemy” in section 16 means an enemy of the state with whom Zimbabwe is at war, either because of a declaration of war or because of armed conflict between that state and Zimbabwe of such a scale as to amount to a state of war.

In the latter half of 1994 the supreme court was concerned with the mobility rights of a woman citizen married to an alien.⁷ Immigration authorities were refusing to grant permanent residence to foreign husbands and were deporting them. Consequently, the wives were compelled to decide whether to accompany their husbands from the country in order to secure and maintain the marital relationship, or to remain in Zimbabwe, living apart in potential destruction of it. The effect of this situation was held to undermine and devalue the exercise of the fundamental and unqualified right of the citizen wife to remain living in Zimbabwe as guaranteed by section 22(1) of the Constitution. As a member of a family unit she was entitled to have her husband living with her and to look to him for partial or total support. Hence he was to be accorded permanent residence and be

allowed to engage in employment or other gainful activity in Zimbabwe.

These decisions (and there are many more) are proof of the preparedness of the judges of Zimbabwe to be active in asserting an individual’s fundamental rights against the might and authority of the state.

But it has not only been in the rôle of protector and enforcer of the Constitution that the courts have exercised and demonstrated their independence. In the case of *PF-ZAPU v Minister of Justice*⁸ the supreme court was seized with the question of 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. PF-ZAPU 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 the voters’ rolls and to study the newly defined constituencies. The question before the high court was whether it could redress PF-ZAPU’s grievances or whether its hands were tied by the doctrine of an act of state or executive prerogative. At issue was the court’s power to review a decision of the President fixing the date of the sitting of the nomination court. The high court held that it had no power to review the president’s prerogative. The supreme court disagreed. It was said:⁹

“... the 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.”

This was not, of course, the court taking sides between political parties, but rather striving to ensure fair play whatever the political opinions of those involved.

Nor have our courts simply been on the "defensive" in the exercise of their duties. Whenever the opportunity has presented itself, judges have seized it to develop the common law in accord with current trends and opinions. This approach is illustrative of the courts exercising their independence, yet nevertheless exercising it within judicial restraints. Courts cannot, of course, make new laws – that falls within the domain of the legislature – but they can, in keeping with public policy, extend the law to situations perhaps not covered by the strict letter of the statutory enactment.

A good example of this is to be found in the case of *Zimnat Insurance v Chiwanda*¹⁰ where it was ruled that a wife of a customary union was entitled to claim compensation when her husband had been killed through the negligence of another. The supreme court adopted a progressive approach to the prevailing common law and extended strict legal principles to areas where public policy, justice and fairness demanded it be extended. This is what was said:¹¹

"Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital rôle to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary rôle of effecting such development.


"It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

"The opportunity to play a meaningful and constructive rôle in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand."

Zimbabwe maintains a system in which the courts can and do uphold the rule of law. When the courts have declared the law, the other organs of the State almost invariably have abided by the decision however unpalatable it may be considered to be. It is very important that this should

be so, because the alternative is the ghastly dictatorships or rule by decree that the world has seen where the executive or any other organ takes complete control such as Hitler and Mussolini in modern Europe, Idi Amin in Uganda and Mobutu Sese Seko in Zaire. Sustaining and maintaining the balance of power as our Constitution requires is in the interests of us all.

Endnotes

1. This paper, as presently abbreviated, formed an address delivered at the Supreme and Federal Courts Judges' Conference, held at Sydney in January 1999.
2. 1991 (2) ZLR 339 (SC) at 355C; 1992 (4) SA 144 (ZSC) at 155J.
3. 1993 (1) ZLR 242 (SC); 1993 (4) SA 239 (ZSC).
4. *Nkomo v Attorney-General* 1993 (2) ZLR 442 (SC); 1994 (1) SA 34 (ZSC).
5. *S v Ncube* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZSC), and *S v A Juvenile* 1989 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZSC).
6. 1983 (2) ZLR 400 (SC); 1984 (2) SA 439 (ZSC).
7. *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (SC); 1995 (1) BCLR 78 (ZSC).
8. 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZSC).
9. *Ibid* at 318 B-C (ZLR) and 542 G-H (SA).
10. 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZSC).
11. *Ibid* at 154 C-E (ZLR) and 832H-833A (SA). 

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