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You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review"!

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7/8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9/10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.
In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

Issue Editors for Volume 9-10:

Professor G Feltoe, Mr B Hlatshwayo and Professor W Ncube

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.
COMRADE SHEPHARD

by

Ben Hlatshwayo, December, 1992

Shephard Nzombe tragically died at a young age in a car accident on 7 December 1992. My fellow members of the Law Faculty and I wish to pay tribute to this fine colleague.

Shephard was born in Shurugwi, Zimbabwe on 7 March, 1961 and completed his primary education at St Georges School, Banket, "O" levels at St Ignatius College and "A" levels at Highfield High School. He went on to obtain the Bachelor of Law degree from the University of Zimbabwe in 1983. In 1985 he obtained the Master of Laws from the University of London in England. He immediately joined the University of Zimbabwe as a law lecturer specialising in Labour Law and Constitutional Law and History. He had a distinguished career at the University. He was appointed as Chairman of the Department of Public Law in 1987 and was subsequently appointed as Dean of Students in 1990.

Cde Nzombe worked closely with the trade union movement advising on labour law issues and holding numerous seminars on a variety of topics affecting the labour movement — from trade union democracy to collective bargaining, from the position of women in trade unions to applicability of International Labour Organisation (ILO) Conventions in the domestic law of Zimbabwe.

In a public lecture delivered about a month before he passed away entitled "Labour Laws in Zimbabwe: Legal Targets and Reality" a transcript of which will be published in the 1993 Zimbabwe Law Review, Cde Nzombe critically summed up the labour laws and practice in Zimbabwe. He concluded that some provisions of the Labour Relations Act of 1985 violate the constitution and that the law in existence is not being fully mobilized to advance trade union rights for a variety of reasons including low legal and political consciousness in the Zimbabwean society as a whole.

Cde Nzombe’s death has left a yawning void in the field of labour law and the trade union movement. However, he also leaves behind a shining legacy of legal scholarship and trade union activism. His example serves as a challenge to academics and trade unionists — a challenge he prophetically posed in his characteristically charming (but in retrospect tragic) manner at the end of the presentation referred to above in this way:

"Mr Chairman, I think I can take it easy now and pass it on ..."

The challenge must be taken up. Hamba kahle, shamwari!
JUDICIAL ACTIVISM AND DEVELOPMENT — WARNING SIGNALS FROM ZIMBABWE

by

Ben Hlatshwayo

Introduction

In January, 1991 the Zimbabwe government was on the brink of enacting into law a fundamental amendment to the country's constitution: the Eleventh Amendment. This amendment would have the effect of denying the courts the power to declare as unconstitutional, on the basis that the compensation provided by that law is not fair, an enabling Act fixing the amount of compensation payable and the period within which it had to be paid, for land compulsorily acquired by the state from individuals. There was disquiet in some quarters and quiet expectation in others.

Then, suddenly, all hell broke loose. The Zimbabwe Chief Justice, Mr Justice Gubbay, in a speech marking the opening of the 1991 Legal Year, declared that the Supreme Court would hold the proposed amendment invalid since according to him there was an implied limitation in the amending section of the constitution which precluded parliament from abrogating or changing the identity of the constitution or its basic features. The Attorney- General fumed, attacking the Chief Justice's statement as "unwarranted, unprecedented and disappointing." The President "replied with a public invitation to the Chief Justice to resign." The above episode clearly dramatises the conflicting perspectives about the role of the judiciary in development. On the one hand, there is the view that the judiciary has or should have unrestricted law-making and law-reviewing powers in the exercise of its functions, especially in developing countries. On the other hand, there is the positivist belief in the formal precedence of the law and judicial subordination to the law which is characterised by the aphorism: "Judges do not make law; they merely apply it."

Since the notion that judges do make law is no longer seriously contested, the question of judicial passivism falls away. Therefore the focus of this paper is going

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Lecturer, Public Law Department, University of Zimbabwe.

1 Although passed by Parliament in 1990, the 11th Amendment (Act 11 of 1990) only became law in 1991 after receiving Presidential assent.

2 Act 11 of 1990 amended section 16 of the Zimbabwe Constitution (Declaration of Rights) protecting the right to property.


to be on the merits and limits of judicial activism. The phenomenon of judicial activism will be examined in a historical perspective and in the light of urgent efforts necessary to uplift the standard of living of the vast majority of working people in the developing countries, in general, and in Zimbabwe, in particular.

**Historical Background**

The idea of unrestricted judicial law-making is traceable to the age of primitive law when the personal character of the king or magistrate played a decisive role in the actual workings of legal justice. But even at this primitive stage such excessively discretionary powers were viewed with disquiet. For example, Aristotle's solution was to separate the administrative and the judicial roles and allow discretion in the one and not in the other. But perhaps again the picture of judges as "living oracles" and "depositories" of the law at this stage was a bit exaggerated since they could not ignore the economic and social patterns which gave rise to the law they were "making." However, the point still remains that this period represents the unqualified and highest expression of judicial law-making.

It is very interesting to note that Bentham and Austin both of whom roundly dismissed the idea of judges doing no more than declare the law, "were by no means in agreement as to the merit of this type of law-making". Bentham put much store on rational codification as a lever against judicial legislation. In this regard Dennis Lloyd comments thus:

> His hostility to the uncertainty created by judicial law-making is shown by his comparing it to the way a man makes law for his dog, namely to wait until it does something of which he disapproves and then to beat it and thereby teach it that what it did was wrong.

Austin, on the other hand, recognised that judicial law-making was not only inevitable but desirable even under a codified system and deplored "the piecemeal manner in which English judges had actually legislated and their mode of doing so under cover of vague and indeterminate phrases"

Looking at the two views historically, though, one is struck by the fact that the movement seems to have been from the arbitrary primitive tribunals "to the subordination of the judge to law, and thereafter, by way of synthesis, back once more to "free judicial discretion."

Historically, therefore, judicial activism diminished in importance in direct proportion as democratic government increased and legislation became more comprehensive. Montesquieu in *The Spirit of Law* aptly remarked:

> In despotic governments there are no laws; the judge himself is his own rule. In republics the very nature of the constitution requires the judge to follow the letter of the law.

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The "revival" of judicial activism has been premised on the assumption that the modern court is more balanced in its assessment of various conflicting interests in society. Reference is usually made to the sound decisions of the United States of America Supreme Court, especially with regard to segregation and political rights. But what is often overlooked is the use of the same Supreme Court as a last-ditch defender of property rights and as a mechanism for watering down or nullifying democratic legislation. The Indian Supreme Court has followed the U.S. Supreme Court lead in the judicial review of laws.

It is not surprising therefore that the Zimbabwe Chief Justice based himself squarely on the Indian "essential features doctrine" in his 1991 Legal Year Speech. The United States Supreme Court and the Indian Supreme Court experiences will be examined later in this article.

Another basis for the revival of judicial activism is to be found in the "revival" or spread of certain legal philosophical schools of thought: natural law and American sociological and realist schools of jurisprudence. The fortunes of these legal theories have accrued at the expense of legal positivism and the Marxist theory of law.

**Legal Positivism**

The basic concepts of legal positivism are:

1. A view of law as the product of the sovereign state authority;
2. Separation of law from social evaluative criteria — humanity, morality and democracy;
3. Formalistic conception of rule of law;
4. Judicial subordination to law.

Perhaps the most serious weakness of legal positivism is to be found in its second basic concept above, i.e. "its wholesale rejection of any social criteria from which one could deduce a social evaluation of the norms and institutions of the law... in force." From this standpoint of positivism it is impossible to disqualify apartheid legislation as indeed it was impossible to disqualify Nazi legislation as law.

The positivist view of law as a product of sovereign state authority has earned positivism the charge of being responsible for totalitarianism — in Nazi Germany, in apartheid South Africa and in third-world one-man dictatorships. However, a close examination of the conditions in totalitarian states indicates that chiefly unlawful methods of domination (unrestrained terror, physical destruction of the opposition,

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10 For example the *Dred Scott* case (1857) which elevated slave ownership into a constitutional right. See R. Bork, *The Political Seduction of Law* infra 21.
12 Tumanov, *op cit* p 128.
the omnipotence of the secret police, etc.) are used and even the formalistic positivist rule of law is discarded and the constitution is trampled under foot. The judiciary in such dictatorship is given wide discretionary powers and if it is subordinated to anything at all, it is to the dictator.

Historically, however, humanity owes it to legal positivism that law was established as a chief means of regulating public life. Legal regulation acted as a counter to arbitrary action, particularism and uncertainty in social relationships. But today humanity demands much more than just this. However, substituting a law-violating legislature with unaccountable courts would be a dangerous undertaking because in capitalist countries in general, and in developing countries in particular, the judiciary is, as a rule, less amenable to democratic influence than the legislative authority.13

Marxist Theory of Law

Both positivism and Marxism agree, as a base and point of departure, on the supremacy of law and subordination of judge to law. But the similarities end there. The Marxist thesis that law is always socially conditioned, that its relationship with the state as a superstructural phenomenon is conditioned, in the final analysis, by the economic system is opposed to the juridical positivist methodological base of studying law in its own right.

In the transition from capitalism to socialism, state-made law and not custom or precedent plays a great role. In the Soviet Union legal theory this led to special stress being put on the law-making role of the state and in the 1930s "the stressing of the law-making role of the state assumed a somewhat one-sided nature" because the "lack of any reference in the Vyshinsky definitions to Soviet law being conditioned by material factors (that is, insistence on its corresponding to the level of social and economic development achieved; to the fundamental principles of socialism, level of democracy, etc.) could not but lead and, in fact, did lead to justification of voluntarism in law-making".14

This distortion of Marxist theory of state and law in a particular place and period in time in the building of socialism should not detract from the basic correctness of the Marxist theory, the Marxist writings of Paskvandis, Stuvka and other Soviet jurists in the 1920s and other Marxist writers who were not affected by Vyshinsky's theories of the 1930s.

Natural Law

Natural law theory says that law must accord with reason or universally shared values15 But it is difficult to arrive at "universally shared values" using the "nature of man" as the basis.

Natural law supporters accuse Marxism of ignoring or failing to appreciate inalienable natural rights of man and citizen. This criticism is not well founded. Marxism

13 Ibid.
14 Tumanov p 142
associates the right of man with his social being — derived not from man’s “natural nature”, but from his “social nature”, that is, from his place in society and, above all, in the process of production. V.A. Tumanov sums up the differences between Marxism and natural law thus:

Natural-Law teaching regards as an absolute a particular system of rights (behind which stands man as property-owner and the citizen entrepreneur). Marxism advocates the constant development of man’s rights and freedoms, based on the social and economic development of society and on the transition from the capitalist formation to a formation of a higher order.16

The Realist School

According to American realism legislative law is nothing and judge-made law is everything. J. Gray, one of the leading realists, believed that law (statutes; precedent, custom) should be regarded as material with which the judge makes law, but not as law itself. Such a view does reflect “the actual widening of the judge’s freedom to use his discretion as bourgeois society moved into its imperialist phase and the crisis in bourgeois law and the legal order became evident”17. Or, as the English jurist Frederick Pollock commented in connection with the same period:18

... many judicial opinions are unintelligible save upon the assumption that the judges did not like the effect of the legislation they were asked to interpret, and did their best to construe it away.

If, prior to a judicial decision there is no law as the realists maintain, then the constitutional rights and freedoms are no longer “safeguarded” and “guaranteed” — the citizen is left defenceless in relation to the courts and other state agencies.

Through the above brief overview of legal theories it becomes clear that the legal philosophical basis of the revival of judicial activism is very weak indeed. But what about practical considerations? The answer to this question can only be found by examining the experiences of those countries whose constitutions enshrine the concept of judicial review.

The American Experience

Commenting on the case of Marbury v Madison,19 Burke Marshall makes the following assessment of the United States Supreme Court:

The enormous power of the Supreme Court in the American political system stems primarily, although obviously not solely, from its authority of judicial review. This means that in any case properly before it the Court can hold as unconstitutional, and therefore without legal effect, any action of the state or the federal government if the outcome of the particular case depends on it and which the Court finds the action to exceed the constitutional powers of the state or federal agency involved.20

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16 Tumanov, op.cit. p 208.
17 Tumanov, op cit p 245.
18 Ibid.
19 Cranch p137 (1903).
exercise of this power that has made possible the extraordinary and far-reaching decisions ...20

However, the activism of the U.S. Supreme Court has left behind a trail of Pyrrhic victories and bloody losses. The racial segregation and political rights cases are the ones that loom large in the assessment of the U.S. Supreme Court's achievements. What is never fully examined are the weak legal-philosophical grounds on which these decisions were based. For example the 1789 Calder v Bull case was based on nebulous contractarian-cum-natural law principles prompting one commentator to remark:

It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess the power to declare it so ... The ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed upon the subject.21

The racial segregation victories must also be balanced against serious defeats based on the same principles of judicial activism. The Dred Scott case (1857), for example, elevated slave ownership into a constitutional right and it took a civil war to overturn it22 and a succession of cases successfully harnessed judicial activism in the service of property and free enterprise.23

Today in the United States there is the spectre of judicial activism of the right in all its vengefulness committed to reversing not only civil rights gains won through judicial activism but also progressive legislation won in bitter struggles through the democratic process.

The lesson of the U.S. Supreme Court is that judicial activism is a double-edged sword which is sharper on the side which strikes in the interest of the ruling classes in any society. It is therefore in the interest of consistency and progress for the oppressed to demand that this sword be turned into a ploughshare.

The Indian Experience

As has already been noted, the Indian Supreme Court has followed the U.S. Supreme Court lead in the judicial review of laws. Kanyeihamba assesses the Indian experience as follows:

The foundations of the Indian judicial review were the recommendations of the Ad Hoc Committee on the Supreme Court before Independence and thereafter the decisions of the Indian Supreme Court ... The Indian Parliament's response to the courts' indulgence was the enactment of a series of Amendments to the Constitution which "struck the sledge-hammer on the possibility of judicial defiance of the legislative process, leaving a bitter trail of frustration for the judiciary."24

22 Bork op cit p 34.
23 Bork, op cit pp 36–49.
24 op cit (footnote 11) p 54.
and concludes:

Despite the disappointments, the Indian Supreme Court is probably the only Third World Court that continues to show boldness in upholding the constitution against an overzealous executive and timid legislature.\(^{25}

The Indian experience reached its high water mark with the decision in *Kesavananda v State of Kerala*\(^{26}\) when its Supreme Court adopted the “essential features” or “basic structure” doctrine. The doctrine states that, even if all the procedures for amendment are fulfilled, a constitution cannot be amended so as to abrogate any of its “essential features”.

The *Kesavananda* case was followed by the *Indira Gandhi v Raj Narai*\(^ {27}\) case which declared invalid an amendment to the Constitution which sought to exempt the Prime Minister and the speaker from the operation of the electoral law. The reasoning was that the amendment violated the principle of free and fair elections, a basic structure of the Constitution.

The Supreme Court of Bangladesh in *Anwar Hossain Chowdury v Bangladesh*\(^ {28}\) joined the essential features club and pronounced invalid an amendment to the constitution which purported to curtail the jurisdiction of the High Court over the whole country.

The essential features doctrine in particular and the activism of the Indian judiciary in general were “desperate remedies” to “desperate diseases”\(^ {29}\) The diseases are easily diagnosable as the overzealous Gandhi executive and its timid legislature.

The medicine, however, did not prove to be potent and only seemed to create more resistant strains of the disease: the Supreme Court was politically attacked as being an obstacle in the building of an egalitarian society and soon after the handing down of the judgment in *Kesavananda* the Chief Justice, one of the majority who upheld the doctrine, retired and, against tradition, as his successor was named the most senior member of the minority in *Kesavananda*.\(^ {30}\)

The doctrine itself is extremely nebulous as it requires the judges themselves to divine what are the “essential features” of the constitution and there is by no means complete agreement on this issue\(^ {31}\)

Penultimately the qualification of the judges to prescribe the medicine in the first place under the circumstances is questionable. The judiciary possesses neither the

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\(^{25}\) pp 54-55.

\(^{26}\) 1973 AIR SC 1461.

\(^{27}\) 1975 25 CR 347.

\(^{28}\) 1989 41 DLR (AD).

\(^{29}\) D Morgan, “The Indian “Essential Features” Case” 1981 *I CLQ* 335.

\(^{30}\) D. Morgan, *op cit* pp 335–6.

authority nor the qualifications to make large, policy changes.\textsuperscript{32}

Also, Morgan points out that constitutional democracy may not have been in such a desperate condition that the judiciary were obliged to step far from its usual constitutional position:

For, after 20 months of the Emergency, the Indian electorate was sufficiently emancipated to eject Mrs Gandhi. And at the following General Election, in 1979, the voters again chose to reject the government, and to recall Mrs. Gandhi.\textsuperscript{33}

The ultimate word on the Indian experience is from Mr Justice Khanna who had been superseded as the next Chief Justice, apparently for his dissenting judgment in the \textit{Habeas Corpus} case in which the majority of the Supreme Court held that the suspension of \textit{habeas corpus} during Emergency was constitutional:

There is no modern instance, it is said, in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny which have threatened liberty and free institutions. The attitude of a society and of its organised political forces rather than of its legal machinery, is the controlling force in the character of free institutions. The ramparts of defence against tyranny are ultimately in the hearts of the people. \textsuperscript{34}

\textbf{The Zimbabwean Experience}

The American and the Indian experiences should have sufficiently warned the judiciary in Zimbabwe to tread with extreme caution whenever it saw it fit to wander far from its constitutional boundaries. Barely six months before his 1991 Legal Year Speech referred to at the beginning of this essay, the Chief Justice raised dangerously high the double-edged sword of judicial activism:

\begin{quote}
\textit{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 and 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.\textsuperscript{35}
\end{quote}

(emphasis added)

Had the Chief Justice not gradually lowered the sword from the dangerous heights (indicated in the passage in bold) to the more acceptable levels in the remainder of his speech, the damage would have been phenomenal. At any rate enough damage had already been done. It is not necessary to try and refute the assertion that social and economic change can be reached more quickly through legal development by the judiciary than by the legislature because it is self-evident that that cannot be so. However, scholars like Aguda\textsuperscript{36} persist in this assertion without providing any iota of proof:

\begin{quote}
In developing countries, the position must be accepted that the goal of social and economic development can in some cases be reached more quickly through legal
\end{quote}


\textsuperscript{33} D. Morgan \textit{op cit} p 335.

\textsuperscript{34} Ibid.

\textsuperscript{35} \textit{Zimnat Insurance Co. Ltd v Loyce Chawanda} S- 107-90 p 13 of cyclostyle report. (Reported in 1989 (2) ZLR 352 and 1990 (1) SA 1019.)

\textsuperscript{36} "The Judiciary in a Developing Country" in Masinghe and Conklin, \textit{op cit} p139.
development by the judiciary than through legislation. The legislative process for
development is clearly by far more thorough and systematic than the judicial process:..but conceptually, development through judicial process is not only feasible but has, in some cases, been found to be effective.

Conceptually, development through the judicial process cannot be more effective than legislation for many reasons, one of which — that legislative process is more thorough and systematic than the judicial process — Aguda himself mentions in the above quotation. That thorough and systematic legislation is required to address the problems of social and economic development in a developing country cannot be disputed. Aguda does not give examples of cases where development through the judicial process has been found to be effective, so that the reader could test the accuracy of his assertion. Unlike Aguda, however, the Chief Justice of Zimbabwe, with respect, could not get away that easily though. No sooner had he waxed lyrical by saying that:

Today the expectations amongst people all over the world and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change;37

than he was confronted with a legislative attempt to fulfil the rising expectations for land through the eleventh Amendment to the constitution. He had to beat a hasty retreat and call into aid the nebulous "essential features" doctrine to prevent the erosion of the constitutional right to property, without providing a solution to the question of the propertyless. In all fairness to the Chief Justice, however, it was not and can never be his domain to solve the land question. And that is the precise point being made here: that the province of judicial activity should not be exaggerated through overzealous statements about judicial activism and development.
The proper sphere for the judiciary was the defence of constitutional rights — and here one criticises the efficacy of the defence proffered and not the locus standi of the judicial activist.

Conclusion

As has already been pointed out, the "essential features" doctrine is fundamentally flawed. What therefore should be done to curb the executive excesses and compensate for legislative passivity — both of which feature large and threateningly in independent Zimbabwe? One can offer the following solutions:

a) With regard to executive excesses:

Firstly, where excesses have manifested themselves in clearly illegal exercise of power, the Zimbabwean courts have courageously ruled against the executive38 until the executive complied with the law.39 Even where the executive has sought to oust their jurisdiction, the courts have been within their constitutional rights in declaring the ouster to be ineffective where it was ultra vires the constitution.

Where such ouster is effective and is carried out in full compliance with the

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37 Zimnat Insurance Co. Ltd v Loyce Chaanda op cit p 36.
38 Hatchard op cit p 93.
39 York & Anor v Minister of Home Affairs & Anor 1982 (2) ZLR 43 and Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (S).
constitution, it is submitted that the courts should not hark back to principles like the "essential features" doctrine. To do so would be to destroy the whole rule of law structure and allow tyranny to reign supreme. As has been argued earlier, the rule of law, even in the most formalistic sense, still acts as some check to dictatorship. Judges should therefore restrain their activism and avoid being accomplices in the destruction of the rule of law structure by tyranny.

(b) With regard to legislative passivity:

This is the most difficult area. The judiciary can do nothing about legislative passivity. It is to the electorate and the political system that one turns. Legislative passivity may be an indication of the failure of a particular system of representation which calls for a change of that system so that a higher level of democratic representation can be achieved. For example, proportional representation seems to result in more balanced parliaments in developing countries (this system resulted in a more balanced representation of political views in parliament in the 1980 Zimbabwe elections). Concepts such as the right of re-call should also be fully examined. (The Zimbabwean electorate has spontaneously demonstrated for the recall of MPs they claim were imposed on them by the ruling party leadership e.g. in Gutu against Mahofa, MP.)

The final solution to legislative passivity is a revolutionary change of the whole socio-economic system. It is pertinent to note that the legislature in Zimbabwe has busied itself for the past twelve years with issues pertaining to personal law (family law, etc.) and ignored pressing issues of economic development. The judiciary too has directed its efforts to the same issues. This may indicate an acceptance of the status quo, in which case only a totally new political dispensation can lead to an active legislature.

(c) On protection of the Declaration of Rights:

It is submitted that fundamental rights cannot be protected by the courts from amendment by Parliament if the constitution allows such amendments to take place. The fundamental rights must be entrenched in the constitution itself, for example:

(i) by a "double-lock system requiring a "special parliamentary majority and a referendum"40

(ii) by permanently entrenching the fundamental rights in the constitution as in the Namibian Constitution which makes it impossible for Parliament to diminish or dilute the fundamental rights.41

However, scope should be provided for the future inclusion and entrenchment of new fundamental rights as society develops.

40 Hatchard op cit p 98.
41 Section 131.
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