



# **ZIMBABWE • LAW • REVIEW**

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**TOWARDS A STRONGER HUMAN RIGHTS CULTURE IN ZIMBABWE :  
THE SPECIAL ROLE OF LAWYERS**

by  
**Geoffrey Feltoe<sup>1</sup>**

**Introduction**

After consulting with the various security authorities, the Government decided in the middle of 1990 that in the light of the improved security situation, the state of emergency which had been continuously in effect since Independence (and which had been continuously in operation for some fifteen years before Independence) would not be renewed. The ending of the state of emergency meant that the rule of law was put back into full force. No person may now be detained without trial. All persons who are accused of any form of criminal activity, including subversive activity, must be brought before the criminal courts to answer to specific criminal charges and, if the courts decide that their guilt has not been proven, they must go free. No person may now be placed in preventive detention simply because the Central Intelligence Organisation or any other security agency believes that that person poses some sort of danger to State security or that they shouldn't have been acquitted by the courts.

The ending of the state of emergency has rightly been applauded both inside and outside the country. (To its credit, the Law Society had issued a public statement exhorting the authorities to take this step). The new environment which has been created by the ending of the state of emergency is more congenial for the establishment of a strong human rights culture and lawyers should play a pivotal role in the building up of this culture.

**Categories of fundamental rights**

Human rights can be divided into two broad categories, namely civil and political rights and economic and social rights. In this presentation the species of human rights upon which I will mostly concentrate is civil and political rights, rather than social and economic rights. The reason for this is that lawyers are directly involved in their professional work in asserting and protecting the various civil and political rights guaranteed in *Chapter 3* of our Constitution. These rights are:

- the right to life, liberty, security of person and privacy in one's home;
  - the right to protection of the law;
  - the right to freedom of conscience, of expression and of assembly and association;
  - the right to not have property compulsorily acquired without adequate compensation.
- (This last right is likely to undergo:

**Taking stock of the past**

Before looking into the future, I think it is necessary to look back over the last decade to see how we have fared in the field of human rights. We need to start by reminding ourselves of the situation pertaining to human rights in the pre-Independence period. Colonial rule was characterised by massive violation of the fundamental rights of the majority of the people. Minority rule itself was a complete negation of democratic rights. Over the fifteen year period preceding Independence the intensification of the liberation struggle, the minority regime had a continual state of emergency which enabled it to invoke ever more draconian measures. Large numbers of persons were rounded up and held without trial for long periods; substantial numbers of persons were prosecuted under security legislation such as the Law and Order (Maintenance) Act and were sentenced to death and executed or served lengthy prison sentences in the regime's jails; thousands of liberation fighters were killed, together with large numbers of innocent civilians.

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At time of Independence the huge network of oppressive security laws remained on the statute book. The British administration took no steps to repeal these laws before handing over the reins of power to the democratically elected Government of Zimbabwe. Most of these laws are still intact to this day, although the ending of the state of emergency means that the Emergency Powers Act can no longer be invoked but the Presidential Powers (Temporary Measures) Act can.

Over the last ten years the lives of the mass of the people have been dramatically improved by such things as the massive extension of health care facilities, the general development of rural areas and by huge expansion in the field of education. However, the economy has not expanded at anything like the rate required to create sufficient jobs for the large number of educated youths coming onto the job market. This has been a major contributing factor in the escalating crime rate.

There have been various abuses of individual human rights over the last decade. Many of these occurred in the aftermath of South African instigated sabotage and banditry. Particularly during the first few years of our Independence, South Africa did all in its power to undermine the Independent State of Zimbabwe. The seven million dollars worth of destruction at the Thornhill Air base in 1982 is just one example. A number of persons, mostly whites, were rounded up after these incidents and some were tortured in order to try to extract information from them. Some were brought before the courts and some were held in indefinite detention. Some of those acquitted by the courts were placed in preventive detention. As most of these people were legally represented, there were many cases brought to court seeking various remedies on behalf of the detainees. Probably the most litigated case in Zimbabwe was the case of the detained customs officials.

By far the worst human rights abuses occurred when the army was sent into the Matabeleland region to deal militarily with the so-called dissident activity. *Parade Magazine* in its June, 1990 number shows how a number of "Rhodesian" spies and double agents in security positions in Zimbabwe after Independence manipulated CIO intelligence and helped to sow the seeds of the dissident war. It is claimed that these agents, such as Geoffrey Price and Malcolm Calloway, masterminded the discovery of arms caches in Matabeleland in order to create distrust between Zanu(PF) and Zapu and assisted in forming "Super Zapu" in order to promote Renamo type insurgency. Whatever its origins, however, Government's response was unrestrained military action which resulted in the deaths of hundreds of innocent civilians.

Some people simply disappeared and were never seen again. Large numbers of persons were beaten and some women were raped by the troops. Many people were rounded up and held in detention. Some of these were tortured and there were reports of prisoners dying as a result of the torture. One prisoner was shot and killed by a CIO officer, one Robert Masikini. This officer was subsequently convicted of murder by the Bulawayo High Court and sentenced to death but he was soon thereafter released under an amnesty. The dissidents also committed a whole range of atrocities such as killing or maiming civilians. (For details of these events see the report of the Lawyers Committee for Human Rights entitled *Zimbabwe: Wages of War* and chapter 2 of the Africa Watch report *Zimbabwe A Break with the Past?*) The devastating military action really only served to worsen the situation and ultimately the problem was solved by political dialogue.

During this dark period there was very little internal protest apart from that from the Churches. Nothing was heard from professional lawyers' associations. A Commission of Inquiry was set up to investigate the allegations of atrocities. However, its findings were never made public. It is assumed that it made a report to Government and Government did not see fit to publish its report.

Before and after elections some human rights abuses have also occurred. For instance

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members of political parties other than the ruling parties have been attacked or harassed or taken into custody without good cause and reprisals have been taken against such people after the elections.

With the ending of the state of emergency, it is an opportune time for us to reflect upon the role played by lawyers in enhancing respect for human rights.

### **Reactive and proactive strategies in the protection of fundamental rights**

The professional duties of lawyers include the protection of their individual clients against human rights abuses by the authorities. Where their clients' human rights have been violated they damages lawyers will seek redress on their behalf. The cumulative effect of the intervention of lawyers in this context, particularly where substantial damages are recovered for the victims of such abuses, has been to make the police more cautious about running roughshod over people's rights. But this caution will often only extend to the more affluent members of society whom the police will think will be likely to employ lawyers to assert their rights and to sue for damages if their rights are infringed. Persons of little financial substance may often be subjected to searches without warrants in cases where there are no valid reasons why search warrants could not have been obtained. They may be arrested where there are no reasonable grounds for suspecting that they have committed crimes. They may also be held in custody for inordinately long periods of time before they are finally brought for trial for offences which in many cases will be petty ones. These sort of things will not normally happen to persons who have lawyers. Unjustified searches without warrant and arrest and detention in the absence of reasonable suspicion will lead to actions for release and for damages. Lawyers will fight hard to have their clients released on bail. If their clients are in custody, their lawyers will agitate for their cases to be dealt brought for trial as soon as possible.

Most people cannot afford to employ lawyers protect their rights. In relation to this group of people, lawyers have a social duty to take active steps to disseminate information about fundamental rights so that these persons can assert their rights themselves. More lawyers should come forward and volunteer to assist such organisations as the Legal Resources Foundation and the Catholic Commission for Justice and Peace in their endeavours to spread awareness of rights and of the processes for asserting these rights. As part of a legal education programme in the schools the Foundation is planning to include a component dealing with the fundamental human rights provisions in our Constitution.

### **The importance of criticism of and protest about abuses**

People must speak out when they know that abuses of human rights are occurring because if the abuses are not revealed and something done about them they will continue to take place and will probably become more prevalent. If the persons know that their abuses will not be publicly revealed and no action will be taken against them, they will believe that they can continue with such activities with impunity. A chilling confirmation of this is the recent Africa Watch report *Where Silence Rules The Supression of Dissent in Malawi*.

Before Independence there was often a deafening silence from individual lawyers and professional associations of lawyers even in where widespread abuses of the most appalling nature were well known to be taking place. There were only a few exceptions to the rule of acquiescence such as the forthright condemnation of the Law and Order (Maintenance) Act by Sir Robert Tredgold at the time of his resignation in protest over the passing of this draconian legislation.

Since Independence up until the last couple of years, very little has been heard from lawyers when one would have expected some sort of protest. As far as I am aware no statement was ever made by the Law Society about the way in which the anti-dissident campaign was waged. Over the last couple of year, however, the Law Society have been far more prepared to take up with Government cases of human rights abuses which have been brought to their attention. This

is as it should be. The aim should, of course, be to put a stop to such abuses. The Society has thus brought such cases to the attention of Government and requested it to take action to prevent such abuses. In many cases this will have positive consequences, especially where the persons guilty of such abuses can be identified. The problem arises, however, where the representations fall on deaf ears and no remedial action is taken. Where the Law Society knows that serious abuses are continuing despite its efforts behind the scenes to get the authorities to do something about these, it is obliged to do something further. Sometimes if all other mechanisms have failed, the action will have to take the form of a public statement condemning the continued abuses.

One recent case in which one would perhaps have expected a public statement to have been issued was in response to the most unfortunate utterances of the Minister of Foreign Affairs over the case in Karoi involving public violence and assaults by youth league members. The Minister attacked the Magistrate dealing with the case and in effect condoned the violent actions and encouraged to further lawlessness by making the culprits believe that they are above the law.

#### **Persuading the authorities to ensure that fundamental rights are respected**

The best way of protecting fundamental rights is for the Government itself to make a clear commitment to uphold these rights and for it to take active measures to ensure that rights are not violated and in the event of violations occurring to take steps to punish the violators. The pre-Independence government had no such commitment, but on the contrary it went as far as to afford immunity to the violators. The track record of the Government of Zimbabwe in regard to individual fundamental rights has been mixed. In many areas fundamental rights have been far better safeguarded and respected than before Independence. On the other hand, particularly when there have been security problems, some actions have been taken which grossly offend against fundamental rights. Zimbabwe is signatory to the United Nations and to the African Charter on Human and People's Rights and we must continue to work to establish a strong human rights culture. Such a culture must include toleration for political groups other than the ruling party which engage in democratic political activity. When members of one party use violence against members of another party, this should be dealt with by the law.

It should also be noted that there is an international trend which is increasingly emerging is for aid donors to attach human rights conditions in aid packages and to make continued assistance conditional upon improving human rights performance. Whether or not we like this development, if we wish to attract this sort of aid we will have to take steps to ensure that we make progress in this field.

#### **Greater scope for constitutional challenge**

There is now increased scope for constitutional cases to be brought attacking forms of punishment and legislative provisions which may offend against the various human rights safeguards contained in our Constitution. The vitally important test cases of *S v Ncube & Ors* S-156-87 and *S v A Juvenile* 1990 (4)SA 151 (ZS) have shown the way. These two cases led to the elimination of whipping as a form of punishment for adults and juveniles convicted of crimes because this form of punishment was found to be inhuman or degrading in violation of *section 15(1)* of the Constitution.<sup>2</sup> These cases show the way in which fundamental rights guarantees

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<sup>2</sup> Since this talk was delivered last year Government has passed the Constitutional Amendment Act No.11 (Act 30 of 1990) Section 5 of this legislation amends section 15 of the Constitution so as to allow the reintroduction of the judicial punishment of juvenile whipping for male juvenile offenders. The amendment lays down that such punishment cannot be held now to be in contravention of section 15 of the Constitution on the ground that it is inhuman or degrading. This amendment which does away with the Supreme Court in the case of *S v A Juvenile* supra has been heavily criticised by the Law Society, the Faculty of Law at the local University and by both the current and previous Chief Justices. Nonetheless at the time of writing a bill has been circulated which will replace the provision in the Criminal Procedure and Evidence Act Chap.59 on corporal punishment for juveniles which had previously been taken out of this legislation following the Supreme Court

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can be invoked for very positive and constructive purposes. The recent case of *S v Masitere* S-140-90 in which the Supreme Court ruled that solitary confinement and spare diet are inhuman or degrading punishments which fall foul of *section 15(1)* is a further evidence of the scope of constitutional challenge.

Now that emergency has gone there is even greater scope for bringing a whole range of actions to protect human rights and establish the extent of these rights. Whilst there was a state of emergency important rights such as liberty and protection of the law could be derogated from in order to deal with the emergency. This was provided for in *Schedule 2* of the Constitution. Now that there is no state of emergency, the derogations provided for in *Schedule 2* no longer apply. Action taken which impinges upon these fundamental freedoms will only be permissible if it falls within the ambit of the exceptions which apply where there is no state of emergency. It is important to note that where impingement upon the fundamental rights is allowed in certain circumstances, it is often provided that the infringement on these grounds shall go no further than can be "shown to be reasonably justifiable in a democratic society." This applies the compulsory acquisition of property on the grounds provided for in *s.16(7)*, to and to the exceptions to the following rights: protection from arbitrary search or entry (*s.17(2)*), protection of freedom of conscience (*s.19(5)*), protection of freedom of expression (*s.20(2)*), protection of freedom of assembly and association (*s.21(2)*) and protection of freedom of movement (*s.22(3)*).

Although the notion of what is reasonably justifiable in a democratic society is inherently vague and rather difficult to interpret, in the hands of a court with the pro-human rights leanings of our present Supreme Court it is a useful device for cutting down to democratic size the various exceptions, which if not controlled can overreach themselves. This is particularly so with exceptions based upon the grounds of public security. Sometimes under the guise of taking action to protect State security, the State has ended up interfering with legitimate democratic rights. The yardstick of "what is reasonably justifiable in a democratic society" thus serves a useful purpose. It can be applied to test whether laws inherited from the colonial era and new laws impinging on fundamental rights, but which *prima facie* fall under the stated exceptions, detract from fundamental freedoms to an unacceptable extent. In this regard there are a plethora of offensive security provisions inherited from the Smith regime some of which the Government has been very tardy in doing away with since Independence. As part of the exercise to codify the criminal law recommendations have been made on how the various security laws should be altered to make them more acceptable.

Government should thoroughly overhaul these laws, many of which are not acceptable in a democratic society. Until Government does this, however, where these laws are invoked lawyers should be prepared to take test cases up to the Supreme Court in order to obtain rulings which will trim down some of these laws to more acceptable size. To give some concrete examples there are a variety of provisions in the Law and Order (Maintenance) *Act Chap.65* which drastically curtail the rights of freedom of expression and freedom of assembly. *Section 44* dealing with so-called subversive statements is a prime example. In this there are a number of extremely wide and vague provisions. These provisions are analysed in two articles in the latest number of the *Legal Forum Magazine*, entitled "*Freedom of Speech: When does criticism of Government become subversion?*" and "*The Right to Hold Meetings in Zimbabwe*". (*1990 Vol.2 No 3 Legal Forum 28 and 34*) The conclusion reached in both of these articles are that the constitutionality of certain of these laws individually and especially cumulatively is very doubtful as to restrictions certainly seem to go beyond what is acceptable in a democratic society.

The scope of various other fundamental rights provisions need to be further tested such as the right to a fair hearing. (See the article entitled "Fair trials for those who cannot afford

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ruling in the juvenile whipping case.

lawyers to defend them" 1989 Vol.1 No.4 Legal Forum 10) There is also the pending constitutional challenge<sup>3</sup> to the mode of carrying out the death penalty under s.15 of the Constitution. The constitutionality of the death penalty can only be attacked indirectly because the Constitution authorises the use of the death penalty as a criminal punishment. A further indirect method of attacking the death penalty is to use the argument which has been accepted in certain cases that it becomes cruel and inhuman to execute a prisoner who has spent an inordinate amount of time awaiting execution.

There are various other areas where the scope of the fundamental rights provisions should be tested. I will mention just two of these by way of illustration. The first is whether the present approach to bail pending trial, namely that it is not a basic right but that it will only be granted as a matter of discretion contravenes the s.18(2)(a) of the Constitution insofar as it is there provided that everyone is presumed to be innocent until he is proved to be guilty. (See 1989 Vol.No.6 Legal Forum 33) The second is whether the current defamation law as it applies to the press offends against s.20 of the Constitution insofar as it places unreasonable restrictions on freedom of expression. (See 1989 Vol.1 No.3 Legal Forum 39)

Overall it can be said that the fundamental rights provisions in our Constitution provide the tools for lawyers to safeguard and advance human rights. These provisions are not meant to remain as high sounding, rhetorical statements of theoretical rights. It is up to lawyers to give them practical and meaningful significance by using them creatively. We must therefore ask ourselves whether we have made sufficient use of these provisions. The Supreme Court is only able to give flesh to these provisions if cases are brought before it raising issues which involve the application of these provisions.<sup>4</sup>

*Onus of proof* where laws and measures challenged as being in violation of fundamental rights provisions.

In the first constitutional case (*S v Ncube & Ors* S-156-87) dealing with the legality of whipping as of punishment for criminal conduct, Adrian de Bourbon argued that when it is alleged that a law or measure violated a fundamental right laid down in the Constitution, the onus should be placed on the State to prove that the law or measure in question does not violate that right. Unfortunately in its judgment, the Supreme Court did not address and decide this issue. However, it is strongly arguable that *de Bourbon's* contention should be accepted.

In the Indian Supreme Court decision in the case of *Deena v Union of India & Ors* 1984 SCR 1 at 32B-F it was laid down that where a law depriving a person of his right to life or of his personal liberty is attacked as being unconstitutional, the onus is on the State to establish that it is constitutional. Placing the onus on the State is fair and appropriate. When a person maintains that he has been unlawfully arrested or detained, the onus is on the State to prove that the action taken was lawful. (See *Stamboli v Commissioner of Police* S-178-89 at p14) Similarly if for

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<sup>3</sup> This test case was due to be heard on 10th November, 1990. All the prisoners whose cases were certified for this argument were, however, released under an amnesty and the case did not take place on the set down date. Soon afterwards the Government passed the Constitution of Zimbabwe Amendment No.11 Act (Act 30 of 1990) Section 5 of this Act contained a provision purporting to preclude the Supreme Court from possibly ruling that execution by hanging is an inhuman or degrading form of punishment in violation of section 15 of the Constitution. This provision lays down that a violation of the inhuman or degrading punishment section may not be found solely on the ground that the manner of execution is by hanging. Like the amendment allowing for the reintroduction of juvenile whipping, the amendment in relation to execution by hanging has been the subject of widespread criticism.

<sup>4</sup> Government has, however, shown itself prepared to alter the fundamental rights provisions of the Constitution if it considers this necessary to overcome a ruling of the Supreme Court or to prevent the Supreme Court from ruling in a certain direction. This tendency to treat fundamental rights provisions as not being inviolable but as freely amendable could have highly unfortunate implications when it comes to the interpretation and enforcement of fundamental rights through the court process.

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instance the appellant argues that if a law or measure is applied against him, he will be subjected to torture or inhumane treatment, the State must surely establish that this will not be so.

### Reliance on provisions in international human rights instruments in arguing human rights cases.

In their 1989 Harare Declaration on Human Rights the Commonwealth Chief Justices states that the courts will refer to international human rights norms in order to give flesh to domestic legal provisions dealing with human rights and to resolve ambiguities and uncertainties in these domestic provisions. They will thus take into account in such cases both the provisions in the various international and regional human rights instruments and the interpretations given to these provisions by the courts in the various jurisdictions. The human rights instruments will be looked to for guidance even where these have not been incorporated into the domestic law. This approach is clearly manifested in the two constitutional cases on whipping. It is therefore important that lawyers representing clients in cases involving alleged infringements of human rights should research not only domestic law but also the body of relevant international human rights jurisprudence.

### Policing without a state of emergency

Before Independence in 1980, the minority regime had used the state of emergency to invoke a whole range of extreme powers to try to counteract the struggle to achieve majority rule. After Independence the Zimbabwean Government found it necessary to continue the state of emergency for the next decade because of various security problems stemming from the destabilization activities of the South African regime. With the ending of the state of emergency the extraordinary powers which for many years have been available to law enforcement agencies now no longer exist. One of the most extreme of the powers created by this Act were the powers given to the Minister of Home Affairs under *s.17* to order the indefinite detention without trial of persons where it appeared to the Minister that this was expedient in the interests of public safety or public order. The police were also given powers to arrest without warrant and detain persons for thirty days without having to bring them before courts of law. These powers which were heavily relied upon were contained in *sections 21 and 53*. Under these sections the police could so detain:

- pending enquiries, where they had reason to believe that there were grounds justifying indefinite detention by the Minister or where a person had failed to satisfy the police about his identity; or
- where the police had reasonable suspicion that a person has acted against public safety or public order or has committed or is about to commit an offence contrary to public safety or public order or against exchange control regulations.

*Under s.55* - the police were empowered to search without warrant persons and premises "for anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence under these regulations or any other law" and they could seize any such item which was found.

These powers were often relied upon in security related cases in order to give the law enforcement authorities a protracted period of time in which to carry out their investigations without having to bring the persons concerned before the courts during this time. They were also relied on in cases involving complex foreign currency dealings to allow leeway for the carrying out of uninterrupted investigations. Where at the end of these investigations the law enforcement agencies decided that there was not enough hard evidence to prove the cases before the ordinary courts but they nonetheless believed that these persons could not safely be released, they would approach the Minister Home Affairs to exercise his power to place the persons under indefinite detention. Sometimes after persons had been acquitted of security related charges by the courts, they were re-detained under the thirty day detention powers or placed in indefinite

detention. There were instances as well in which these powers were used illegally. There were cases in which persons were held under the thirty day provisions in connection with ordinary criminal cases which did not involve allegations related to State security or illegal dealing in foreign currency. There were also cases where people were held for far longer than the maximum period of thirty day without any Ministerial order for indefinite detention having been obtained.

When previously persons could be held for up to thirty days without being brought to court, there was a tendency to pick up persons on the basis of entirely flimsy evidence which would not have passed the test of being sufficient to create a reasonable suspicion. After such arrests, the way of trying to bolster completely tenuous case was sometimes to rely on vigorous interrogation, rather than going out and seeking to uncover tangible evidence of the commission of the alleged crime.

Certain of these cases when brought before the courts were thrown out on the basis that the confessions had been extracted unfairly were inadmissible and there was no other evidence apart from the confessions to prove the case. Some of these acquitted persons were then placed under indefinite detention and their cases eventually found their way to the *Detainees' Review Tribunal* on which I sat as a member. What was often conspicuous about these cases was the complete failure to follow up leads which would have possibly have led to the production of concrete evidence implicating the accused (and also possibly his accomplices). In many of these cases the sole evidence was a challenged confession. What was even more disconcerting was when the Tribunal, which was obviously mindful of considerations of State security, itself gave time for further investigations to take place, having itself intimated certain lines of investigation should followed, the security agency concerned seemed to make no effort at all to do such follow up investigations. The approach appeared to be that the detainee would remain in detention even if the Tribunal recommended release as such recommendation would be overridden on the instigation of the security agency.

It is vitally important that all police officers now undergo re-training. Previously throughout their entire careers there has been a state of emergency. All police officers need to be properly instructed in their responsibilities and the limits upon their powers now that there is no state of emergency. I believe that lawyers should take whatever opportunities present themselves to address the police on what the law lays down concerning what the police can and cannot do. The Legal Resources Foundation is running a series of courses for law enforcement agencies and I would urge lawyers to volunteer to give lectures in this programme.

When I spoke to the police recently I told them that not only is it illegal to arrest and hold a people where there are no reasonable grounds for believing that they have committed or are about to commit crimes, but it is also inefficient policing. I reminded them of the large amounts of money is having to be paid out in damages to persons who have sued the police because they have been illegally arrested or detained. I tried to stress to the police that people should thus not be picked up and held on the basis of vague, tenuous and entirely speculative information. Investigations should be carried out first to check the information and only if sufficient evidence is found to lead to a reasonable suspicion should suspects be arrested. I gave the example of where a person is arrested without any attempt being made to check the information when a quick check would have established that the information is entirely false. In such a case, I said an innocent person has suffered unnecessarily and he is understandably aggrieved. I drew their attention to the fact that in a number of cases the judges have said that the police should have carried out further investigations before arresting and detaining the suspects. I emphasised that in waging the battle against crime the police must respect the legitimate rights of all citizens whether they be rich or poor, legally represented or not legally represented. I said that it was clearly unacceptable that the police pay less respect to the rights of people who are unable to afford to employ lawyers to protect their rights.

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Finally I told the police that the post-emergency framework for dealing with security and currency crimes will not prejudice law enforcement in these areas provided that the police do their work efficiently. On the contrary, I said, by requiring the law enforcement agencies to have to produce evidence sufficient to prove the guilt of the suspects in a court of law and to complete their investigations within a reasonable period of time, especially where the suspect is being held in custody efficiency is likely to be increased and this will serve well the security and economic interests of Zimbabwe.

### **Transferring emergency provisions into other laws**

Sceptics would claim that really things will not change much with the lifting of state of emergency as many of the provisions contained in Emergency regulations, such as the provisions barring strikes in essential services, will simply be shuffled off into ordinary legislation and, even if they are not, the President has powers to pass special measures under the Presidential Powers (Temporary Measures) *Act No.1 of 1986* which powers are similar to those possessed by the President under the Emergency Powers Act. The sceptics' argument, however, overlooks the major difference between the current situation and the position when there was a state of emergency. This difference is that that both new legislative provisions and temporary Presidential measures must not violate the fundamental rights provisions, which provisions apply with full force without the extensive derogations permitted when there is a state of emergency.

Under the Presidential Powers Act the President may pass measures for purposes of such matters as defence, public safety, public order and the protection of the economic interests of Zimbabwe. Any such measures, however, may only be passed "subject to the Constitution". (s.2) Any temporary measure made by the President remains in force for six months only and a substantially identical measure may not be made for six months after the measure has lapsed. (s.6) Further, any measure made by the President has to be laid before Parliament and Parliament may amend or repeal any such measure. (s.4)

In terms of s.8(1) of the Act any regulations made under the Emergency Powers Act Chap.83 which were in force immediately before the ending of the state of emergency "shall, to the extent that they could have been made in terms of this Act, continue in force as if they had been so made on the date "of the ending of state of emergency. As for instance the President could not have passed measures allowing for preventive detention when there was no state of emergency in operation, all the provisions pertaining to preventive detention contained in the Emergency Powers (Maintenance of Law and Order) *Regulations SI 458 of 1983*. Have fallen away despite the fact that these regulations have not been repealed. The whole purpose of these particular Emergency Regulations was to arm the authorities with a whole range of extraordinary powers to deal with the security problems which led to the imposition of the state of emergency. The individual provisions serve this overall purpose.

Specifically on the Ministerial detention and thirty day police detention powers, I recently spoke to the Attorney-General who confirmed that these powers no longer existed and he said he had handed down an instruction to this effect. Additionally, in terms of the Constitution it is quite clear the section guaranteeing personal liberty can only be derogated from when there is a state of emergency and detention without trial is not permitted under s.13. This applies to both preventive and investigative detention, section 13(4) providing *inter alia* that when a person is arrested or detained when it is reasonably suspected of having committed a criminal offence, he must be brought before a court of law without undue delay. The President is thus not have been authorised to make temporary measures allowing for detention without trial as this would have been contrary to the Constitution.

### **Resisting the re-introduction of a state of emergency**

Hopefully the security situation will continue to improve and reign throughout Zimbabwe. A resolution of the Mocambique war and the end to MNR banditry which has spilt over into

Zimbabwe will eventually be achieved. However, even if we have renewed security problems arising out of external threats or internal disorder, it is submitted that we must only re-introduce a state of emergency as a last resort. A state of emergency inevitably leads to human rights abuses and once the authorities get used to using the extraordinary powers which can be relied upon during a state of emergency, they are very likely to want to cling onto those powers even after the situation which led to the state of emergency no longer exists. The tenuous reasons given for the continuation of the state of emergency over the last few years clearly illustrate this tendency. In terms of *section 68* of the Constitution, there is provision for a mini state of emergency which will last for six months, during which preventive detention will be allowed. Resort even to this should be resisted because the Zimbabwean experience during the first decade of Independence shows that preventive detention not only is open to abuse, but that it often harms rather than assists our security interests.

### **Conclusion**

In this paper it has been suggested that the struggle to ensure greater observance of fundamental rights must be waged on a variety of fronts. Not only must lawyers raise human rights issues in appropriate cases, but they must also help to disseminate information about fundamental rights to the general public. The Law Society and the Bar Association should play a leading role in this regard. Additionally these bodies should, in certain circumstances, be prepared to protest against human rights abuses of which they become aware.

**ANNEXURE 1**  
**Constitutional framework**

Now that the state of emergency has gone the constitutional provisions pertaining to such rights as protection of personal liberty and protection from arbitrary search or entry and protection of the law apply with full effect and may not be derogated from in legislation passed by Government. These provisions provide the overall framework within which criminal investigations and criminal prosecutions must take place. I will briefly summarise the major provisions which are of interest to us presently.

*Under s.13* it is provided:

- that a person may be arrested in connection with criminal activity only if there is a reasonable suspicion that he has committed or is about to commit a criminal offence.
- that after the arrest or detention of such a person he must be informed as soon as reasonably practicable in a language he understands of the reasons for his arrest or detention and must be permitted at his own expense to obtain and instruct without delay a lawyer of his own choice and to communicate with him.
- that if the arrested person is not released he must be brought before a court without undue delay.
- that if that person is not tried within a reasonable period of time he must be released from custody unconditionally or on conditions. (He may still of course be tried but he will remain out of custody until he is tried and sentenced).

*Under s.13(5)* - any person who has been unlawfully arrested or detained is entitled to compensation but a public officer who acted reasonably and in good faith may be protected by law from liability to pay such compensation to the aggrieved person.

*Under s.18* - it is laid down that a person charged with a criminal offence is entitled to a fair hearing within a reasonable period of time by an independent and impartial court of law and he shall be presumed to be innocent until his guilt is proven.

*Under s.17* - arbitrary search and entry is barred, but entry and search is permitted in the interests of such things as defence and public safety and for the enforcement of the law in circumstances where there are reasonable grounds for believing that the search or entry is necessary for the prevention, investigation or detection of a criminal offence, for the seizure of any property which is the subject-matter of a criminal offence or evidence relating to a criminal offence, for the lawful arrest of a person or for the enforcement of any tax or rate.

**ANNEXURE 2**  
**Relevant Case Law**

*Search:*

Requirements for valid warrant

*Elliott v Commissioner of ZRP HH-241-86*

(Warrant issued by Justice of Peace invalid as far to general and vague-no offence identified and no attempt made to identify documents to be seized and to relate such documents to any offence).

Requirements for seizure of property without warrant *Chizano v Commissioner of Police HH-392-88*

*Arrest*

Reasonable suspicion

*S v Purcell Gilpin 1971 (1) RLR 241* (suspicion not reasonable)

*S v Miller 1973 (2) RLR 387* (failure to take opportunity to confirm or allay suspicion) *Moll v Commissioner of Police & Ors 1983 (1) ZLR 238 (HB)*(care must be taken before arresting - if policeman has difficulties in deciding whether suspicion reasonable on the basis of information to hand should check with superior officer)

*Allan v Minister of Home Affairs 1985 (1) ZLR 339* (suspicion not reasonable) Actions for damages for unlawful arrest or detention

*Onus Stambolie v Commissioner of Police S-178-89 at p 14* (onus on person effecting arrest to prove lawfully justified)

Formalities for bringing action

Section 76 of the *Police Act Chap 54* provides that actions against the State or a police officer for unlawful arrest or detention must be commenced within eight months of the cause of action arising and if the State is being sued vicariously written notice must be given 60 days in advance and the notice must set out the grounds of the claim and, where appropriate and possible, details must be provided of the officials involved and copies of the documents relating to the claim must be attached.

General aspects of such actions

See *1987 Vol 5 ZLR 26*

Interrogation

Confession obtained by physical or psychological ill-treatment or by inducements *S v Slatter & Ors 1983 (2) ZLR 144 (HH)*.

*Bail*

Factors to be taken into account in deciding whether to grant *Attorney-General v Phiri HH-487-87 S v Gwatiringa HH-128-88 S v Chiadzwa S-120-88* See also *1990 Vol.2 No.1 Legal Forum 20*.

*Bail pending appeal:*

*S v Kilpin 1978 RLR 282. S v Williams 1980 ZLR 466*

*S v Tengende & Ors 1981 ZLR 445* Ministerial certificate prohibiting bail In terms of s.106(2) of the Criminal Procedure and Evidence Act Chap.59 the Minister may prohibit the granting of bail on the grounds that public security would be prejudiced or, in respect of offences such as currency offences and offences relating to precious stones and metals, on the grounds that the administration of justice would be prejudiced if bail were to be granted. It used to be thought that such an order is immune from legal challenge. That this is not the case is shown by the decision in the case of *Mutambara & Ors v Minister of Home Affairs HH-231-89*. In that case the Ministerial order was set aside for various reasons. It was held that the decision taken was

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irrational given the nature of the information upon which it was based. Where the decision was taken in relation to a group of persons, each case had to be individually considered. Finally, before making this decision, the Minister was obliged to give the person who is applying for bail a chance to state his side of the story and must take account of what that person had said when arriving at his decision. The South African Appellate Division reached the same conclusion regarding the application of the *audi alteram partem* rule in the case of *AG, Eastern Cape v Blom & Ors 1988 (4) SA 645 (A)*. The earlier decision of *Carvahlo v Minister of Home Affairs HH-231-87* which laid down that the *audi alteram partem* rule does not apply in this context must now be considered to be wrong. (On the *Mutambara* case see 1989 Vol.1 No.6 *Legal Forum* p 38)

### **Self-incrimination**

The constitutional provision which lays down that a person cannot be compelled to give evidence at his trial for a criminal offence does not apply to the pre-trial stage *Poli v Minister of Finance, Economic Planning and Development S-167-87* (person under investigation for exchange control contraventions can be compelled to give evidence of foreign bank accounts) and *S v Mazorodze S-33-89* (driver may be required to undergo breath analysis test).

Trial within reasonable period of time Factors to consider when deciding whether such delay that release from custody pending trial must be ordered *Fikilini v Attorney-General S-21-90* (reasonableness of length of delay in light of particular circumstances of case, whether proper explanation given by State for delay, such as continued efforts to locate missing witness, whether accused has demanded that be brought for trial and how far the accused has been prejudiced by the pre-trial delay.) See also *S v Mhembere HH-55-90*.

### **Fair trial**

When person can only be afforded fair trial if legally represented-when free legal assistance must be given See *S v Chaerera S-152-88*, *S v Dube & Anor S-212-88* and *S v Khanyile & Anor 1988 (3) SA 795 (N)* and *S v Rudman 1989 (3) SA 368 (E)* See also 1989 Vol.1 No.4 *Legal Forum* 10 and 1989 Vol.5 No.5 *Responsa Meridiana* 414.

Undue delay in bringing case for trial - effect on sentence *S v Dube & Anor S-169-89*, *S v Rusario S-63-90*, *S v Kundishora S-70-90* Undue delay in hearing appeal- effect on sentence *S v Corbett S-33-90*, *S v Chilimanzi HH-39-90*, *S v Badze S-75-90*, *S v Mudadi S-125-90* *S v Tagwireyi S-10-90*, *S v Gufral HH-73-90* and *S v Kunzvarara HH-12-90* Punishments for criminal offences Whipping *Section 15(1)* of the Constitution prohibits torture or inhuman or degrading punishment. No person may be subjected to these things. In the Supreme Court cases of *S v Ncube & Ors S-156-87* and *S v A Juvenile S-64-89* it was held that whipping as a form of punishment for both adult and juvenile offenders was cruel, inhuman and degrading and was therefore a form of punishment which violated *s.15(1)* of the Constitution.

**NOTE.** Since this address was written, *section 15* of the Constitution has been amended so as to allow the imposition of corporal punishment on male juveniles.

### **Solitary confinement and spare diet**

In the recent case of *S v Masitere S-140-90* it was ruled that the placement of prisoners in solitary confinement and on spare diet was a form of punishment which violated *s.15(1)* of the Constitution as this is an inhuman or degrading form of punishment.

Whilst we continue to have the death penalty, although *s.12* of the Constitution permits the imposition of this penalty, certain modes of carrying out this penalty may be open to attack on the basis that they violate *s.15(1)*. **NOTE** - This ground for challenge has been cut out by a recent amendment to *section 15* of the Constitution. Another basis for indirect challenge still remains. If a person has been held for a long period of time before steps are commenced to carry out the sentence, then it is arguable that the punishment now violates *s.15(1)* and should not be carried

out. See the decision of the European Court of Human Rights in *Soering v UK* Case No.1\1989\161\217), the decision of the Privy Council in *Abbott v AG* [1979] WLR 1342 and the minority decision in *Riley & Ors v AG of Jamaica* [1982] 3 All ER 489.

Treatment of prisoners in jails and of inmates in institutions housing mentally ill persons, children or the elderly. Maltreatment and failure to care for inmates those guilty of maltreating inmates can be prosecuted for various crimes such as assault, indecent assault, rape, statutory rape and contravention of the provisions of the Children's Protection and Adoption Act Chap.33. Conditions of detention and rights of prisoners. In the case of *S v Ncube & Ors S-156-87 Gubbay JA* with reference to s.15(1) of the Constitution had this to say at p 22. "Treatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of imprisonment are now subject to proscription [against inhuman or degrading treatment]. The frequency and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prisons, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care, might afford examples."

See also *Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (HB)* Although this case dealt with conditions of detention of persons detained without trial, the same sort of principles would apply *a fortiori* to ordinary incarceration. Detainees, the court said, were entitled to reasonable access to their legal practitioners and their families and, as regards their conditions of incarceration, they were entitled to be provided with adequate accommodation, clothing, food, exercise and medical treatment and they had the right not to be held in solitary confinement and to be protected against being assaulted.

In the recent case of *S v Masitere S-140-90* the Supreme Court ruled that the placement of prisoners in solitary confinement and on spare diet was unconstitutional as this punishment violated s.15(1) of the Constitution.

Corporal punishment of children in schools. The common law recognises that parents, guardians and persons *in loco parentis* can inflict moderate corporal punishment upon children for disciplinary purposes. In Government and non-Government schools governed by Education (Disciplinary Powers) Regulations SI 298 of 1990. May only be inflicted on male pupils and only headmaster, teachers to whom authority delegated and housemasters of hostels. (See *S v Mangwarira S-194-88* female student teacher unlawfully inflicting)

Generally on the constitutionality of corporal punishment in schools, see *obiter* remarks of Dumbutshena CJ in *S v A Juvenile S-64-89* at pp 19-21.

Reference of constitutional question to Supreme Court  
*Zinyemba v Minister of Public Service & Anor S-196-89* (May only be referred to Supreme Court if no other remedy)

Freedom of expression and freedom of assembly. Regarding the constitutionality of various restrictions upon these rights in legislation such as the *Law and Order (Maintenance) Act*, see 1990 Vol.2 No.3 *Legal Forum* pp 28-38

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**ANNEXURE 3**  
**Rights in various Human Rights Conventions**

*The conventions will be referred to as follows :*

African Charter on Human and Peoples' Rights **A**  
European Convention for the Protection of Human Rights and Fundamental Freedoms **B**  
Inter-American Convention on Human Rights **C**  
International Covenant on Civil and Political Rights **D**  
International Covenant on Economic and Social Rights **E**  
Universal Declaration of Human Rights **F**

Right of peoples to self-determination *A20,D1(1),E1(1)*

Right of peoples to dispose of natural wealth and resources *A21,D1(2),E1(2)*

Right to equality and non-discrimination *A2&3,B14,C1(1)&24, D2(1).3&26.F1.2&7*

Right to effective judicial remedies *A7(1)(a)&26.B6&13, C25.D2(3)&F8*

Right to life *A4.B2.C4.D6.F3*

Protection from torture or cruel, inhuman or degrading treatment or punishment *A5,B3,C5(2)-(6), D7&10.F5*

Protection from servitude and forced labour *A5.B4.C6.D8.F4*

Right to liberty and security of the person *A6,B5.C7.D9.F3&9*

Protection from imprisonment for inability to fulfil contractual obligation *B Protocol4 Art1, C7(7),D11*

Freedom of movement *A12(1)-(3), B Protocol4Art2 C22(1)-(5),D12,F13*

Protection of alien against arbitrary expulsion (restricted to collective expulsions) *C22(6)-(8),D13, A12(4)&(5), B4 Art4 Protocol*

Fair and public hearing, presumption of innocence, procedural guarantees, protection from double jeopardy *A7(1),B5.C8,D14, F10&11(1)*

Non-retroactivity of offences and punishments *A7(2),B7.C9,D15, F11(2)*

Recognition as a person before the law	<i>A5,C3,D16,F6</i>
Protection of right to property	<i>A14,B1st Protocol Art 1,C21,F17</i>
Protection of privacy,family,home correspondence,honour and reputation <i>F12</i>	<i>A18&amp;27,B8&amp;10(2), 10&amp;14,D17&amp;19(3)(a).</i>
Freedom of thought,conscience and religion	<i>A8,B9,C12,D18,F18</i>
Freedom of opinion and expression and of seeking,receiving and imparting information	<i>A9,B10,C13,D19,F19</i>
Freedom of assembly	<i>B11,C15,D21,F20</i>
Freedom of association and to form and join trade unions	<i>A10,B11,C16,D22,F20</i>
Right to marry,equality of rights of spouses and protection of the family	<i>A18,B12,C17,D3&amp;23, F16</i>
Rights of the child International Covenant on Rights of Child,Draft African Charter on Rights of Child	<i>A18(3),C17(4) &amp; (5),18,19 &amp; 20.</i>
Political rights and access to public office	<i>A13,B 1st Protocol Art 3,C23,D25,F21</i>
Rights of ethnic,religious or linguistic minorities with regard to culture,religion or language	<i>D27</i>
Prohibition of war propaganda and protection from advocacy of racial or religious hatred	<i>D20</i>
Limitations on derogations in emergencies	<i>B15,C27,D4</i>

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*ANNEXURE 4*

*Accession of Zimbabwe to International Human Rights Instruments*

Of the 24 instruments listed below Zimbabwe as at October, 1990 had only become a party to four of these. (The four that we have acceded to or ratified are indicated with asterisks).

1. **International Covenant on Social and Cultural Rights.**
2. **International Covenant on Civil and Political Rights.**
3. **Optional Protocol to the International Covenant on Civil and Political Rights.**
4. **International Convention on the Elimination of All Forms of Racial Discrimination.**
5. **International Covenant on the Suppression and Punishment of the Crime of Apartheid.**
6. **International Convention against Apartheid in Sports.**
7. **Convention on the Elimination of All Forms of Discrimination against Women.**
  
8. Convention on the Prevention and Punishment of the Crime of Genocide.
9. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
10. Slavery Convention of 1926
11. 1953 Protocol amending the 1926 Convention
12. Slavery Convention of 1926 as amended
13. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
14. Convention for the Suppression of the in Persons and the Exploitation of the Prostitution of Others
15. Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment
16. Convention on the Nationality of Married Women.
17. Convention on the Reduction of Statelessness
18. Convention Relating to the Status of Stateless Persons
19. Convention Relating to the Status of Refugees
20. Protocol Relating to the Status of Refugees
21. Convention on the Political Rights of Women
22. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
23. Convention on the Rights of the Child

Zimbabwe is also a party to the African Charter on Human and Peoples' Rights



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