

**Paper prepared by**  
**The Honourable Mr Justice Enoch Dumbutshena**  
**Chief Justice of Zimbabwe**

I would like to deal with the role of the people, the ordinary citizens, in the promotion of human rights. My concern is confined to people who might not even know that their rights are protected by Declarations of Human Rights enshrined in their Constitutions.

It has been our experience in Zimbabwe that only those people who are educated and financially well-off challenge in the Courts any breaches of their rights. They do so because they know that their rights are protected by the Constitution of Zimbabwe.

The most important duty of those citizens who know their rights is the imparting of education to those who do not know. It is only those who are equipped with knowledge who can influence governments, through the democratic process, to be effective and to be capable of yielding the best results in the political, social and economic fields.

It is therefore "necessary that the people should not only be literate, but should have a proper understanding and appreciation of the principles of democracy, the functions of the different branches of the government and the rights and duties of the citizen vis-a-vis the State. An opportunity should therefore be provided to every citizen for an adequate civic education, equipping him to exercise his political rights on the basis of informed political judgment rather than emotional considerations" (The Dynamic Aspects of the Rule of Law in the Modern Age, page 49).

The same applies to education in human rights. To achieve an understanding of the rights of the citizens of Zimbabwe we have set up The Legal Resources Foundation, with at present two operative arms: the Harare Legal Projects Centre, and the Bulawayo Legal Projects Centre. The Centres have libraries for the use of the public and legal practitioners. Paralegals explain to citizens their rights and advise them on legal practitioners who can assist them defend or protect their rights. The Legal Projects Centres have established advice centres in high density suburbs. The Legal Resources Foundation has a Publications Unit, which has published a number of legal books and pamphlets explaining legislation and the rights of the individual.

We hope that the efforts of The Legal Resources Foundation will supplement the enormous strides made by the government in advancing the social and economic rights of the black majority population. It is an enlightened population that appreciates human rights and fundamental freedoms.

The Courts of Zimbabwe have in no small measure furthered the development of a human rights jurisdiction. Judges have applied international human rights norms in the interpretation of domestic human rights provisions.

In a speech I delivered recently I said of the rights of detainees:

"The Constitution [specifies] certain rights which a person placed in preventive detention has. These rights include:

- The right to be informed not later than seven days after his detention of the reasons for the detention in a language which he understands.

- The right to have his case referred to the Detainees' Review Tribunal for review within 30 days of his detention.
- The right to have his case heard 'forthwith' by the Tribunal after referral of the case to it.
- The right to employ a lawyer at his own expense to represent him, the right of access to this lawyer and the right to appear in person before the Detainees' Review Tribunal or to be represented at his own expense by his lawyer.
- The right to have his case reviewed at intervals of 180 days after the first review."

Unfortunately, conditions prevailing since Independence have not allowed the government to dispense with the system of detention without trial. Quite a number of cases have been brought to the higher courts on behalf of detainees and the courts have adopted an approach which ensures the fullest possible protection of the rights of the persons who are detained. Thus the following principles have been established in this series of judgments:

1. The detention provisions cannot be used for an illegitimate purpose such as for the purpose of investigating ordinary criminal offences or for the purpose, not of preventing a threat to security, but simply as a device for imposing further punishment for past activities which the Minister considers to be deserving of such further penalty.
2. If a prerequisite for the making of a valid detention order is not observed and the detention is thus invalid ab initio, then the court will order the release of the detainee.
3. If a detainee, after being validly detained, is thereafter not accorded the rights set out in the Constitution, the Court will order the responsible authority to comply with the Constitutional provisions and grant the detainee his rights. The detaining authority could thus be ordered to allow the detainee proper access to his lawyer or to provide adequate reasons for the detention or to refer the matter for review to the Detainees' Review Tribunal and so on.

As regards the obligation to provide reasons to the detainee for his detention, the Supreme Court in a number of judgments has ruled that the detainee is entitled to be provided with sufficient information to enable him to know what it is that is alleged against him so that he can make meaningful representations when the case comes before the Review Tribunal. It has stated that he cannot defend himself unless he has been appraised properly of the allegations against him and the detainee must thus be provided with the basic facts and all material particulars which form the foundation of the detention. The reasons which are provided must not be so vague that the detainee is unable to make any meaningful representations before the Review Tribunal.

As regards the right of access to a lawyer, the Courts have stressed the importance of this right and have taken firm action to stop any denial of this right.

So, too, on the actual decision to detain, the Supreme Court has ruled that, despite the fact that this decision-making capacity is couched in subjective terms, the Courts are still entitled to investigate on review whether there

were facts which were reasonably capable of supporting the decision taken, whether the Minister had applied his mind to the decision, whether the decision was entirely irrational or was arrived at in bad faith. If therefore it found, for instance, that the decision was not taken on the basis of any facts which were reasonably capable of supporting the decision, the court could rule that the decision was invalid and could then order the release of the person wrongly detained.

"In Simon Gregory John Bull v Minister of State (Security) and Others, 1987 (1) SA 422 (ZHC), the High Court decided that despite the Regulations being silent as to the conditions under which a detained person was to be held, there were certain basic rights to which he was entitled in the absence of any statutory authority to the contrary. These rights included proper housing and clothing, adequate food and medical aid, protection against assault, the right not to be held in solitary confinement and the right to adequate exercise. Thus the Court was able to establish and enforce certain minimum standards of detention. The Court then proceeded to order that the detainees in question should not be transferred to a detention centre where these minimum conditions could not be met".

I feel that the Judges are doing their best to uphold human rights, and in that process to apply international human rights norms to our domestic human rights. Judges have managed to do this in spite of the number of people who are ignorant of their rights and the lack of suitable human rights literature.

Chapter III of the Constitution of Zimbabwe contains a declaration of fundamental human rights which are enforceable through the Courts. There are detailed provisions on the following:

- The right to life, personal liberty, protection of the law, and freedom from arbitrary search and arrest.
- The right to freedom from slavery, forced labour and inhuman treatment.
- The right to freedom of conscience, expression, assembly, association and movement.
- The right to freedom from race discrimination.
- The right to protection against deprivation of property.

These rights are derived from the International Bill of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. These rights are of universal application. There are differences in some areas, dictated by local conditions and circumstances.

Article 17 of the International Bill of Human Rights reads:

- "1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property."

Article 17 forbids the arbitrary deprivation of another person's property. It does not spell out what happens if one's property is arbitrarily taken by government or other authority.

Section 16 of the Zimbabwe Declaration of Rights reads as follows:

"16. (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -

- (a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;
- (b) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilisation of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilised, the settlement of land for agricultural purposes;
- (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;
- (d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and
- (e) enables any claimant for compensation to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Supreme Court."

The American Convention on Human Rights, in Article 21, sets out the right to property in a different style and content. It states:

- "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
- 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.
- 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

What is important for the purposes of this Paper is the fact that it has a similar provision to the Zimbabwean Section 16, which allows deprivation of property only upon payment of a just or adequate compensation. This encourages transactions of property on a willing seller and willing buyer basis. It means that if an authority requires the property "for reasons of public utility or social interest", it must pay compensation to the owner who is being deprived of his property "according to the forms established by law".

The provisions of Section 16 of the Zimbabwe Constitution are set out in full because one of the key issues in respect of which the liberation war was fought was land rights. The Constitution of Zimbabwe sought to protect private property rights acquired before Independence under circumstances that discriminated against black people. Section 16 acts as a barrier to the full-

scale redistribution of land and restructuring of the economy which government would have wished to institute as soon as Independence was won.

When government sought to take certain measures which interfered with property rights the aggrieved parties brought cases to our Courts.

One case brought to the Courts was May v The Reserve Bank, (1986) (3), SA 107 (ZS). In that case residents of Zimbabwe had purchased shares in South African companies on the Zimbabwe Stock Exchange. From 1965, the first year of UDI, as a result of exchange control measures to prevent currency leaving the country, investors in foreign securities had to pay a premium for the right to participate in external securities plus the market value of the shares. In 1984 the Reserve Bank appropriated all external securities.

Subsection (6) of Section 12A of the Exchange Control Regulations, 399 of 1977 as amended by the Exchange Control Regulations, 1984 (No 3), as well as Section 16(1) of the Constitution of Zimbabwe, provided for payment of adequate compensation for external securities expropriated by the State in terms of subsection (6) of Section 12A of the Regulations, which required that the compensation paid "shall be the market value of the security".

At the time the external securities were expropriated the premium payable on external securities on the Zimbabwe Stock Exchange was 30%. The Reserve Bank paid compensation without taking into account the premium paid. The appellants said the compensation they were paid was inadequate.

In the High Court Smith, J said the compensation paid to the appellants was adequate in terms of Section 16 of the Constitution. The Supreme Court, by a majority of three to two, held that the premium was not part of the integral value of the shares. It was further held that Section 12A(6) of the Regulations bore an ordinary meaning and the term "market value" meant the best price which could be reasonably obtained on the open market, that is, the Johannesburg Stock Exchange. It was therefore held that the Reserve Bank had paid adequate compensation in terms of Section 16 of the Constitution. The compensation paid was held to have been adequate.

In Minister of Home Affairs v Bickle, (1983) (2) ZLR 400, the Supreme Court had to decide whether a person whose property had been declared forfeit because he was thought to be an enemy of the State was in fact an "enemy". Subsection (4) of Section 16 of the Constitution allows for the compulsory acquisition of property during a period of public emergency. Zimbabwe has been in a continuous state of emergency since 1965. The Supreme Court held that Bickle was not an "enemy" of the State and his property could not, therefore, be declared forfeit to the State.

The question of the distribution of land is a very important problem. The vast majority of our people have no land. They want land. Yet those who hold land are entitled to it and in most cases they are using it to the benefit of the country and its people. The right of protection from deprivation of property assumes, in my view, a greater significance than it does in more developed countries. The Courts of this country will therefore look for assistance in the interpretation of Section 16 of the Constitution of Zimbabwe to countries with the same colonial background and circumstance.

Article 14 of The African Charter on Human and People's Rights says:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

It can be seen that the right to property under the African Charter is not as jealously guarded as it is in the Constitution of Zimbabwe. It guarantees the right to property. The word "guarantee" is not defined. It, however, connotes a whole or part indemnity for loss suffered through deprivation of property. The right of compensation is therefore assumed, and not certain, in terms of Article 14 of the Charter. There is, however, something more than is contained in Article 17 of The International Bill of Human Rights, in that infringement of Article 14 of The African Charter can be dealt with "in accordance with the provisions of appropriate laws".

In the case of Zimbabwe, if the property acquired is land, the person whose land has been acquired can apply for compensation in terms of Section 19 of the Land Acquisition Act, No 21 of 1985, and Section 16 of the Constitution of Zimbabwe. Section 19 of Act No 21 of 1985 reads as follows:

"19. (1) Subject to the provisions of this Part, an acquiring authority shall pay adequate compensation promptly to the owner of land and any other person who suffers loss or deprivation of rights by any action taken by the acquiring authority in terms of subsection (1) or (3) of section eleven or section fifteen or eighteen.

(2) Any person who wishes to claim compensation payable in terms of subsection (1) shall, subject to the provisions of subsection (3), submit a claim in writing to the acquiring authority specifying in detail:

- (a) the nature of his loss or deprivation of rights; and
- (b) the amount of the compensation claimed by him and the basis on which he has calculated such amount and any actual expense or loss which has been or may be reasonably incurred or suffered directly as a result of the action taken by the acquiring authority."

The African Charter provides regional protection which is not based on the nationality of the person whose rights have been breached. Whatever shortcomings there might be in the Charter, these can be supplemented or reinforced by the domestic law of the individual States.

In S v Ncube and Others, 1988 (2) SA 702 (ZS), the Supreme Court ruled that whipping of an adult offender was a contravention of Section 15(1) of the Constitution of Zimbabwe. Section 15(1) reads:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The Supreme Court held that such punishment was inherently brutal and cruel and was degrading to both the punished and the punisher alike. Now corporal punishment applied to adults is unconstitutional.

In arriving at this decision the Supreme Court relied on the judgment of the European Court of Human Rights in Tyrer v United Kingdom, (1978) 2 EHRR 1. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Inter-American Convention on Human Rights has a similar provision. Article 5(2) reads:

"No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Unfortunately Zimbabwe has no access to judgments of the Inter-American Court of Human Rights.

Article 3 of the European Convention for the Protection of Human Rights is almost in identical words to Section 15(1) of the Constitution of Zimbabwe. In Tyrer's case, supra, the court was of the view that:

"... in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph."

The Supreme Court of Zimbabwe was of the view that Section 15(1) of the Constitution of Zimbabwe does not permit or condone any punishments which are contrary to Section 15(1).

In Neube's case, supra, we applied international human rights norms to our domestic human rights law. In the session just past we were faced with the issue of whether the imposition of a moderate correction of cuts upon a juvenile offender likewise violated the prohibition against inhuman or degrading punishment contained in section 15(1). We have not yet handed down judgment. In that appeal it was common cause that the method of administering a moderate correction of cuts was the same as in the case of an adult offender, although the size of the cane was different. The State conceded that there was little room to distinguish between the inherent nature of the two punishments.

Zimbabwe is a developing country, the majority of whose people were denied by the colonial power their civil, political and economic rights. Because of its history there are no economic and cultural rights enshrined in the declaration of fundamental rights. Yet economic rights for a nation in a state of development are as essential as any other right.

The African Charter of Human and People's Rights fills the gap. Its preamble states:

"Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

These rights are repeated in the body of the Charter. It may be the protection of economic, social and cultural rights is a phenomenon of the Third World. One finds in the Inter-American Convention on Human Rights an undertaking to adopt these rights. Article 26 reads:

"The States Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively by legislation

or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific or cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires."

Domestic human rights norms are enforced by the courts of each member country. The Inter-American Convention on Human Rights has an Inter-American Court of Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms has a European Court of Human Rights. The jurisdiction of these Courts extends to all cases concerning the interpretation and application of their Conventions which are referred to them by the States Parties or the Commissions. The European Court of Human Rights has built up a substantial human rights jurisprudence through its decisions. Its judgments are widely known and renowned.

Sadly in my view, the African Charter has no Human Rights Court. The Commission is not a Court. One of its mandates is to "interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU." While one should not criticise unduly the omission without having seen or read the Commission's Rules of Procedure, I am however of the opinion that a Court of highly qualified and eminent Judges would, by its considered and impartial judgments, render to Africa a human rights jurisprudence which the States Parties would be compelled by its weight to follow and emulate. There are people at this Colloquium more qualified than I am to talk on the African Charter of Human Rights. My comment is only an observation and a passing shot.

Developing countries cannot afford to dissociate civil and political rights and freedoms from economic, social and cultural rights, because they guarantee the enjoyment of civil and political rights. I have said at other Conferences that "in a developing country, the right to development is one of the most vital rights. For persons who live in abject poverty, the right to food is by far the most important right."