The Role of the Judge in Advancing Human Rights Norms

by

The Hon Justice Enoch Dumbutshena

The list of participants is impressive. This must be the highest number of participants of all the Judicial Colloquia so far held. I congratulate the Government of Nigeria and the convenor, Chief Justice Bello.

This Colloquium marks a significant turning point in the thinking of judges of this region. In Banjul, Gambia, there was a moment when I thought judges in West Africa were immovably settled in their judicial thinking. I was wrong.

It used to be thought that judges were a different species of humanity. They were serious, dressed in dark suits and black or red robes. They neither saw nor heard what was going on outside their courtrooms and chambers.

Times are changing. Judges were required, at least by me during my time as Chief Justice, to look out through the windows and see what is happening outside there. It is there that their judgments have an effect. It is outside there where justice is seen to be done or to be denied to the real people.

The world in which we live is shrinking. Political ideologies are converging. One cannot pretend that the world is not dominated by one political philosophy and one economic ideology. Under these circumstances there is no justification any more to divide judges into political and social compartments. We, judges, are being driven by force of circumstances to creating an international justice system unencumbered by international boundaries and social and political ideologies. One unifying force is the Universal Declaration of Human Rights. We all believe that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-selfgoverning or under any other limitation of sovereignty."

Because of information technology the world belongs to us all. We know what is happening around the globe. We know countries that deny their people justice. We know countries that deny their people fundamental human rights.

There are few countries without Bills of Human Rights. The majority of countries have them. They may not be used but they are there to be used. It may be said some governments feel threatened by provisions of Bills of Rights entrenched in their constitutions. Let me in this regard refer to Section 15 of the Constitution of Zimbabwe.

Section 15(1) stated as follows before it was amended: "No person shall be subjected to torture or inhuman or degrading punishment or treatment". Article 5 of the Universal Declaration of Human Rights states: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". There are many Constitutions which have this provision in identical words.

The Zimbabwe Government did not pay heed to those immortal words when it amended Section 15 (1) in order to allow the imposition of judicial corporal punishment which the Supreme Court had declared unconstitutional in S v Juvenile 1990(4) SA 151 (ZS).

The Government in its amendment gave authority to inflict moderate corporal punishment on juveniles under the age of eighteen years to parents, guardians or to people in loco parentis and by the courts.

The Government of Zimbabwe was party to the Banjul Charter. Article 5 of the Charter (the African Charter on Human and People's Rights) which prohibits cruel, inhuman or degrading punishment and treatment, does not permit the derogation of this provision. Gino J Naldi, Lecturer in Law at the University of East Anglia wrote on Zimbabwe's position in the African Society of International and Comparative Law Journal, Volume 3. The article was entitled: "Constitutional Developments in Zimbabwe and their compatibility with International Human Rights". The learned author remarked: "... Zimbabwe is a party to the Banjul Charter; Article 5 of the Charter, from which no derogation is permitted, prohibits cruel, inhuman or degrading punishment and treatment. The principles invoked as interpretation aids to Article 5 of the Banjul Charter, and given that Zimbabwe has ratified the Banjul Charter it would seem that Section 15(3) (b) as amended could be regarded as incompatible with the said Charter.

Subsection (3)(b) of Section 15 reads:

> "(3) No moderate corporal punishment inflicted - (b) in execution of the judgment or order of a court upon a male person under the age of eighteen years as a penalty for breach of any law, shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading".

It is instructive to look at the position in Namibia whose Constitution has a similar provision. Article 8(2) (b) of the Namibian Constitution reads:

> "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

The Attorney-General of Namibia requested the Supreme Court "to

determine whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in any legislation is:

1. per se; or

2. in respect of certain categories of persons; or

3. in respect of certain crimes or offences or misbehaviours; or

4. in respect of the procedure employed during the infliction thereof in conflict with any article provision of the Constitution of the Republic of Namibia and more in particular Article 8 thereof and, if so, to deal with such laws as contemplated in Article 25(1) of the Namibian Constitution".

To assist the Supreme Court the Government of Namibia engaged counsel to argue on both sides of the issue. The Supreme Court in a judgment prepared by Mohamed AJA, made the following order:

"1. It is declared that the imposition of any sentence by judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with Article 8 of the Namibian Constitution.

2. It is further declared that the infliction of corporal punishment in Government Schools pursuant to the existing Code formulated by the Ministry of Education, Culture and Sport or any other direction by the said Ministry or any organ of the Government, is unconstitutional and unlawful and in conflict with Article 8 of the Namibian Constitution."

In Namibia the Government referred the constitutionality of corporal punishment to the Supreme Court. There was no appeal by an aggrieved party. The judgment of the Supreme Court was well received. In Zimbabwe the first reaction to the judgments on corporal punishment was favourable. It appears the Zimbabwe Government developed cold feet and amended the Constitution in order for the Courts to continue imposing moderate corporal punishment on juveniles. Parents were granted a constitutional right to beat their children.

It is interesting to note that the question of the legality of corporal punishment in schools which seemed to worry the Zimbabwe Government did not worry the Namibian Government. It is difficult to guess the reasons for different reactions. In Zimbabwe girls under the age of 18 years and adults are not subjected to corporal punishment. In the case of male adults the Supreme Court declared corporal punishment unconstitutional. There is here discrimination against male juveniles. In my view provisions of Bills of Rights should never be amended. And if they are to be amended the amendment must be supported by all members of the House of Assembly. In my country there are some members of Parliament who do not seem to understand why they were elected. In their hands Bills of Rights are not safe because they do not understand them. I am sure there are many members of Parliament

in Africa who think that whatever the Government wants to accomplish is right.

In S v Juvenile 1990 (4) SA 151 the reaction of Government was directed against an obiter dictum on corporal punishment in schools. In Namibia the Court decided that corporal punishment in Government schools was unconstitutional for the reasons I gave in S v Juvenile (supra). I cite below what Mohammed AJA said in:

See Exparte Attorney-General, Namibia: In Re Corporal Punishment 1991 (3) SA 76 at 94 A-H.

> "The real distinction between corporal punishment imposed in government schools and corporal punishment inflicted on offenders in consequence of a sentence imposed by a judicial or quasi-judicial tribunal is said however to be based on legal grounds.
>
> "The judicial tribunal which imposes a sentence of corporal punishment, it is argued, obtains its authority to do so from governmental legislation or regulations, whereas the school authorities who do so obtain their authority from the common law just as parents do. It is accordingly argued that the rights of the school authorities to impose corporal punishment are no more subject to review in terms of art 8(2) (b) of the Constitution than the rights of parents to do so. If punishment is so excessive as to be unlawful at common law it could be assailed in terms of art 8(2) (b) as being inhuman or degrading, but corporal punishment per se at schools, it is argued, cannot be unconstitutional.
>
> "The Courts outside Namibia which have addressed themselves to the issue of corporal punishment in Government Schools have expressed divergent views. In the case of S v Juvenile (supra) Dumbutshena CJ expressed himself strongly against corporal punishment inflicted on school children but the Court in that case was not called upon to decide that issue and his remarks were therefore obiter. The remarks of Dumbutshena CJ however are supported by German Constitutional law which holds that the imposition of corporal punishment on children at schools violates the German Constitution. (Ingo von Munch Grundgesetz- Kommentar 3rd ed vol. 1 at 154.) The approach of Dumbutshena CJ also finds support in the dissenting opinion of Mr. Klecker in the case of Campbell and Cosans v United Kingdom (1980) 3 EHRR 531 at 556 and in the dissenting opinion of Mr. Justice White in the case of Ingraham v Wright 430 US 651 and in the opinion of the European Commission of Human Rights in the case of Canecom Warwick v United Kingdom report dated 18 July 1986 referred to in the case of S v A Juvenile at 161G-H.
>
> "Support for the contrary view appears from the remarks of McNally JA in the case of S v Juvenile at 169J and in various observations of the majority in the case of Campbell and Cosans v United Kingdom (1980) 3 EHRR 531

and (1982) 4 EHRR to 93.

"The system of corporal punishment at schools sought to be protected in the present matter is regulated by a formal Code formulated and administered by a Government Ministry. This was also substantially the position in Zimbabwe and it was this distinction which influenced Dumbutshena CJ in Juvenile's case to state that

> '... in a system of education which has formal rules on corporal punishment drawn by a competent authority, the same consideration governing judicial corporal punishment must apply'.

"I am in respectful agreement with this approach.

"Whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster, it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which originates from and is formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who is in no position to revoke any presumed 'delegation'."

The point I want to make is this: The decisions of the Supreme Court of Zimbabwe in S v Ncube and Others 1988 (2) SA 702 (ZS) and S v A Juvenile (supra) have had a far reaching effect in different jurisdictions and more so in the Southern African region. These cases and those relating to the compulsory acquisition of land in terms of Section 16 (1) of the Constitution which were decided before Parliament amended sections 15 and 16 when it passed the Constitution of Zimbabwe Amendment (No. 11) Bill 1990 which made judicial corporal punishment on juveniles and the execution of the death penalty by hanging constitutional, have already had an impact in Southern Africa. I believe when South Africa comes on stream judicial corporal punishment in that country will be abolished.

The judges' opinions expressing different views on these important Human Rights provisions have been read by judges, lawyers and academics in the Commonwealth and elsewhere. The role of the judges in interpreting and in giving effect to Human Rights in Zimbabwe was enhanced by the controversy.

Because a Bill of Rights entrenched in a constitution gives power to the judiciary, judges become the most effective arm of Government. They make the rights of the citizens more meaningful by striking out provisions of statutes which are contrary to those of the Constitution.

No one doubts the power judges have in implementing procedural rights. Courts have absolute power in this regard. The Courts of Zimbabwe have in S v Slatter and Others 1983 (2) ZLR 144; 1984(1) ZLR 306 (ZS) emphasised the right of an accused person to access

to his legal advisers. It is a fundamental right enshrined in the Constitution. This right is also found in the Criminal Procedure and Evidence Act (Chapter 59). Section 101 reads as follows:

"101 (1) The Friends and legal advisers of an accused person shall have access to him, subject to the provisions of any enactments relating to the management of prisons.

(2) An accused person, while the preparatory examination is being held, shall be entitled to the assistance of his legal advisers."

What is more section 105C (1) reads:

"Where an accused has been brought before a magistrate, the prosecutor may apply to the magistrate for the confirmation of any statement alleged to have been made by the accused whether in writing or orally and reduced to writing."

In S v Slatter and Others (supra) the accused were Air Force officers. Slatter was an Air Vice-Marshall and the Chief of Staff of the Air Force. On 25 July 1982 saboteurs entered the Thornhill Air Force Base and destroyed or damaged by means of explosives, a number of aircraft. The estimated damage and loss was at over $7 million. The officers were arrested and charged with aiding, abetting, inciting or procuring the sabotage. In order to extract confessions from them the police moved them from one remote police station to another.

The police did not want them to see their lawyers before they had recorded confessions. Subsequently those confessions were confirmed by a magistrate in terms of section 105 of the Criminal Procedure and Evidence Act.

At the trial the accused challenged the admissibility of the statements on several grounds. One of the grounds was that they had been refused access to their lawyers until after confirmation proceedings. The Court ruled that the confirmation proceedings were irregular, and therefore unlawful and invalid, by reason of the denial of the accused's right to legal assistance.

This case established for the first time in Zimbabwe that confirmation proceedings should be attended by legal representatives, should an accused person ask for one. The early participation of lawyers from the time an arrest is made lays the foundation of justice. Both the Constitution and the Criminal Procedure and Evidence Act require access by lawyers to their clients. Procedural rights are the rockbed of justice. To me justice begins when police start their enquiries and ends when the Court pronounces its verdict.

The right of an accused to legal advice or representation was emphasised by the Court of Appeal of England and Wales in the cases of Regina v Silcott; Regina v Braithwaite; Regina v Raghip reported by the Independent Newspaper on 6 December, 1991. The Court of Appeal in its judgment delivered on 5 December, 1991 allowed the appeals of the three appellants and set aside convic-

tions of murder. In the case of Braithwaite the ground of referral from the Home Secretary to the Court of Appeal related to whether his admissions should have been excluded since he had been denied access to legal advice. Legal authorities in England and Wales have established that access to legal advice pursuant to section 58 was an important and fundamental right. Police had extracted admissions from Braithwaite in the absence of his lawyer just as was the case in Slatter and Others. The Court of Appeal said that it did not matter how strongly or justifiably the police might feel their investigation was being hindered by the presence of a lawyer coupled with the right to silence, they were nevertheless confined to the narrow limits imposed by section 58(8) of the Police and Criminal Evidence Act 1984 on the right to delay access. The Court decided that there was a breach of section 58. The court should first consider whether section 76 dealing with confessions was applicable and if the confession was not excluded under section 76 the court should go on to consider section 78 which allows the exclusion of unfair evidence.

I have mentioned this case because criminal justice in England and Wales has received a battering. The system of justice seems not to be working well. However the Court of Appeal in this case emphasised the right of access to lawyers. Not only that the Court of Appeal had previously refused, in the case of Raghip, to allow evidence of a psychologist to be led. The Court of Appeal hearing the referral said that in assessing the reliability of a confession pursuant to section 76(2) (b), the trial judge should pose the question: was the mental condition of the defendant such that the jury would be assisted by an expert in assessing it? In Raghip's case the Court of Appeal admitted the fresh psychological evidence and decided that his conviction was unsafe and unsatisfactory.

What is interesting in England is that justice is being done, although belatedly, to people unfairly convicted albeit after spending a long time in prison. In this respect one has to mention the work done by two Law Lords, Lord Devlin and Lord Scarman in an attempt to expose the miscarriages of justice in the case of the Guildford Four and the Maguire family. I should mention other members of the team, Cardinal Hume, Merlyn Rees and Lord Jenkins, two former Home Secretaries. The important thing is judges were in it. One shudders to think of the many convicted prisoners in Commonwealth Africa convicted of murder and sentenced to death who might have been wrongly convicted and yet were executed because we do not have a system that reviews doubtful cases. This is an area in which retired judges can play a meaningful role and assist in upholding a fair and just system of justice.

This influence of judges has become more apparent in the Southern African region. With the political changes being negotiated in South Africa a sense of justice is beginning to manifest itself in recent judgments on the death sentence. Firstly the superior courts in South Africa have a discretion to impose the death sentence or a sentence of imprisonment. Secondly the Appellate Division can, when seized with an appeal involving a sentence of death, make up its own mind. If the judges believe that they themselves would not have imposed a sentence of death, they can

set aside that sentence and impose a sentence they consider proper, that is, a proper sentence.

This latitude is a creature of statute. South Africa is in the process of considering an appropriate Bill of Rights. It is my belief that when a new political dispensation does come, there will be a Bill of Rights and the judges will interpret it in a way that will bring justice to all the citizens of South Africa. At present the power to strike out legislation is denied to the judiciary because Parliament is supreme.

And with Botswana, Namibia and Zimbabwe firm in the belief that the judiciary is the custodian and guardian of the rights of the citizen, the Southern Africa region cannot fail to do justice to its various peoples. Yes judges have a role to play in the application of international human rights norms to domestic human rights. They are the only people who give effective and meaningful interpretation to human rights instruments, domestic and international.

Yet judges must speak out on human rights. Because in our work and in our judgments we reach a very few people, it is important that we speak to a wider audience. I see nothing wrong in talking to people about human rights. There must, in my view, be some honour in explaining to people what effect they have on one's life. In Zimbabwe, the Legal Resources Foundation, teaches the public about their rights. It runs a Human Rights Programme designed to explain to security agencies how an understanding of fundamental human rights would improve the quality of their work and their relationships with the public. They like the programme. Judges play a vital role in the Foundation. Some of them are trustees. I also play my part in the capacity of Chairman of the Foundation. When judges understand human rights and the people also do, the quality of justice improves.