

Seminar on Reform of the Legal System in Zimbabwe

1 August, 2009

Johannesburg, South Africa

CONCLUDING STATEMENT

At a meeting of members of the legal profession from Zimbabwe comprising judges, lawyers and prosecutors convened by the International Bar Association, The International Commission of Jurists and the Open Society Initiative, and also attended by members of the legal profession from South Africa and Swaziland, the following concluding statement was adopted¹.

ON THE JUDICIARY

TAKING NOTE THAT The independence of the judiciary is critical to the enforcement of the rule of law in any democracy.

NOTING THAT the constitution of Zimbabwe provides in s 79B that *"In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary."*[Section as inserted by section 10 of Act 30 of 1990 - Amendment No. 11]

COGNISANT THAT The **Bangalore Principles on Judicial Independence** state that: *"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects..."*

AWARE THAT the **UN's Basic Principles on the Independence of the Judiciary** state that "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

REAFFIRMING as do **the Bangalore Principles that:** "Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made."

¹ For more information on this, contact Arnold Tsunga on arnold.tsunga@icj.org or Tererai Mafukidze on tereraimafukidze@yahoo.co.uk

ON THE PROSECUTION OFFICE²

NOTING THAT the African Commission has stated that it is the duty of the state to ensure that the Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures

(a) In the performance of their duties, prosecutors shall:

1. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;
2. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the provisions below relating to victims.

ON THE LEGAL PROFESSION³

TAKING NOTE that the **Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa** provide that

(a) States shall ensure that lawyers:

1. are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
2. are able to travel and to consult with their clients freely both within their own country and abroad;

² The components of the preamble about the prosecution office are paraphrased from the **PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA** by the African Commission on Human and Peoples Rights (ACHPR) www.achpr.org

³ The components of the preamble about the legal profession are paraphrased from the **PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA** by the African Commission on Human and Peoples Rights (ACHPR) www.achpr.org

3. shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
- (b) States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.
- (c) ...
- (d) Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
- (e) Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.**

THE PARTICIPANTS OBSERVED THAT

1. The Rule of Law has been under constant attack in Zimbabwe in the last 9 years. Central to this attack has been the negation of the independence of the Judiciary, independence of the legal profession and the independence and professionalism of the office of the Attorney-General and the prosecution service. This has manifested itself in many ways including:
 - The removal of independent and impartial judges from office through threats of violence or other covert means;
 - The appointment of judges who are partial and are believed to serve the interests of the Executive;
 - The harassment of judges, lawyers and magistrates who seek to perform their work independently and impartially;
 - Harassment and assault of state legal representatives by state agents for practising their job in an independent and impartial manner.
 - The refusal by Government to follow court orders;
 - The publication of statements vilifying judges and lawyers who seek to protect the rights of victims of political persecution;
 - The failure to provide adequate resources to courts with the result that they cannot perform their work efficiently or at all;
 - The payment of rewards and donations to judges outside the provisions of the Constitution such as the payments and donations by the Central Bank;
 - The distribution to some judges of compulsorily expropriated assets such as land by Government.

- Conflict between lawyers and judges in a manner that has now fragmented the legal profession.
2. The State has lost capacity to provide resources and its main preoccupation has been to control the institutions of the state using any means necessary and notwithstanding the consequences.
 3. The current Supreme Court has failed to act as the guarantor and protector of fundamental freedoms and rights as exemplified by its insistence that potentially unconstitutional legislation be complied with before it is challenged.
 4. Government has, through a system of patronage all but corroded the independence of the legal profession in Zimbabwe.
 5. In the absence of an independent commission to decide appropriate levels and rates, Judges' salaries and allowances have been unsatisfactory for years.
 6. Despite the main political parties coming up with an inclusive government pursuant to a SADC mediated political agreement, they have failed to resolve the dispute around the appointment of the Attorney General, which has created instability in this key institution in the administration of justice. The situation has been exacerbated by the well publicized loyalty of the incumbent Attorney General to one of the main political parties thereby undermining the independence, impartiality and integrity of the AG's office.
 7. Lawyers have complained of frequent cases of denial of access to their clients, selective application of the law, being associated with the causes of their clients, defiance of court orders by the state, assaults, arbitrary arrests and detention and general persecution merely for practicing their profession.
 8. The State has shown disrespect for African and SADC institutions and frequently defied and ignored decisions from Africa Union and SADC judicial and quasi judicial organs such as the African Commission on Human and Peoples Rights and the SADC Tribunal.
 9. The State has lost capacity to offer continuous legal education and professional development for the judiciary and the prosecution authority, as it is preoccupied with its own survival.
 10. The State as the main economic player has used its economic leverage to target independent and impartial lawyers through depriving them of government or quasi-government legal business.

THE PARTICIPANTS ADOPTED THE FOLLOWING RECOMMENDATIONS

ON THE JUDICIARY

1. That in the new constitution of Zimbabwe the state must incorporate the following rights as constitutional rights

- An independent and impartial judiciary is a fundamental right of the people of Zimbabwe.
 - The JSC shall be independent in word and in practice and shall be responsible for the recruitment and selection of members of the judiciary.
 - An independent and impartial legal profession is a fundamental right of the people of Zimbabwe.
 - A legal practitioner shall have the right to represent a client or clients without impediment.
 - No one shall be subjected to abduction and or enforced disappearance.
2. In order to restore the rule of law in Zimbabwe, an Independent Committee of judges from the SADC and AU be established to inquire into the state of the judiciary and the rule of law in Zimbabwe and come up with appropriate recommendations to assist the country to return to the rule of law.
 3. The government of Zimbabwe should to develop and implement a programme of continuous legal education or professional development of the bench and to seek support for this if it is unable to do so in order to strengthen the independence and competence of the judiciary.
 4. The state needs to carry out legislative reform to repeal repressive legislation that has increased administrative discretion while undermining judicial oversight resulting in higher incidence of rights violations.
 5. A Committee of AU and SADC judges be set up to look at the judiciary and the land issue in Zimbabwe and the extent that the judicial institution has been damaged by the allocation to some judges of expropriated land and thereafter to come up with appropriate recommendations.
 6. Presidential pardons, which fuel impunity, need to be discontinued. It is desirable that if the clemency is to be maintained as a practice then an Independent Committee be set up to consider such cases and the President only acts on the recommendations of such a committee.
 7. The state establish an Apex or Constitutional Court to deal as a court of first instance on any case involving breach or protection of fundamental rights as enshrined in the constitution and international and regional standards to which Zimbabwe is a signatory.
 8. The law must require aspirants to judicial office to declare their assets and interests before assumption of office.
 9. The law must disqualify any person engaged in work that is incompatible with judicial responsibilities.
 10. A Code of conduct for judges needs to be immediately finalized and adopted in order to enhance judicial accountability.
 11. Limitations of tenure of the state Presidential office must be built into the constitution to restore the balance of authority with the judiciary.
 12. There is need for transparency and integrity in the appointment process of the judiciary.
 13. Networking between the legal profession, judges from neighbouring countries and other jurisdictions with Zimbabwean judges should be re-established and sustained, to develop consensus on judicial values.

14. Institutions to which the judiciary is accountable should be established or fortified.
15. There is need to build in the new constitution an express constitutional provision requiring that all administrative expenses, including salaries, allowances, gratuities and pensions payable to or in respect to persons serving in the judiciary be charged upon the Consolidated Fund and no other source whatsoever.
16. There is need for re-establishment of sustained networking of members of the legal profession, judges from neighbouring countries and other jurisdictions with Zimbabwean judges to develop consensus on judicial values.
17. There is need to break the cycle of impunity through a process that places the victim at the centre while retaining key features of justice such as the right to a fair trial.
18. In egregious cases of serious human rights violations consideration should be given to referring appropriate cases to the ICC failing which through the setting up of an ad hoc tribunal to deal with such cases.
19. There is need for the new constitution to define what constitutes the laws of Zimbabwe and include SADC laws, customary international law and international agreements applicable to Zimbabwe.
20. There is need for an audit to be done of all cases of failure to comply with supra-national judicial and quasi-judicial organs of the AU and SADC and for the government of Zimbabwe to take immediate and demonstrable measures to comply with all such decisions and recommendations fully.

ON PROSECUTORIAL INDEPENDENCE

1. The state institutions of law and order need to be depoliticized in order to curb the practice of selective prosecution which fuels impunity.
2. There is need for the separation of the prosecuting from the investigating function to preserve checks and balances in criminal justice delivery.
3. Independence of the Prosecution Authority must be provided for constitutionally and complemented with appropriate legislation and administrative and policy practices and guidelines.
4. There is need to entrench a practice through appropriate legislation and administrative and policy practices and guidelines in terms of which only properly selected, prepared and completed cases are to be prosecuted.
5. There is need for clearly spelt out administrative and legal requirements/guidelines setting out steps to be followed where there is a decision not to prosecute or to withdraw charges after plea.
6. Police prosecutions should cease.
7. The office of the Director of Public Prosecutions must be provided for as an independent institution in the constitution and appropriate legislation and have its relationship with the office of the Attorney General clearly spelt out in order to protect its functional independence. The officer holder must be appointed by the President with the approval of Parliament.

ON THE LEGAL PROFESSION

1. There is need to create a regime of rights of lawyers, covering such key issues about effective representation of clients such as;
 - the right to consult clients,
 - the right to enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a judicial body or other legal or administrative authority
 - the right to personal security when threatened as a result of discharging their functions.
 - The right not to be identified with their clients or their clients' causes as a result of discharging their functions.
 - The right to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and the protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization.
 - The right to form and join self-governing professional associations to represent their interests promote their continuing education and training and protect their professional integrity.
 - The right of lawyers to elect an executive body, which shall exercise its functions without external interference.⁴
2. There is need for the legal profession to have an organic relationship with the rest of civil society to provide leadership in interventions that strengthen and entrench the rule of law and independence of the Judiciary and the legal profession.

PLAN OF ACTION

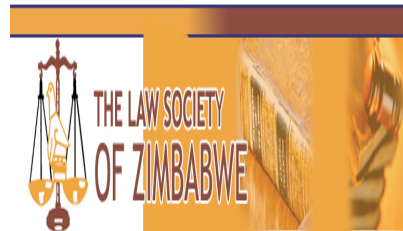
The participants adopted the following plan of action

1. The participants agreed to adopt the above concluding statement as the primary tool for lobby and advocacy with different stakeholders in order to agitate for the return to the rule of law and strengthening of

⁴ The recommendations on the rights of the legal profession were determined by the participants but the language in the recommendations is largely borrowed from the **PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA** by the African Commission on Human and Peoples Rights (ACHPR) www.achpr.org

the Judicial institution, the Legal Profession and the Prosecutions service in Zimbabwe

2. The participants agreed that this concluding statement shall be officially delivered to the following, the Zimbabwe government, the principals to the GPA in Zimbabwe, the Judiciary in Zimbabwe, The AG's office in Zimbabwe, the LSZ, The Parliamentary Select Committee in Zimbabwe, the SACJF, the SADC, the AU, the UN and other relevant interest groups.
3. The participants undertook to do lobby and advocacy work in appropriate domestic, regional and international stakeholders during the Constitution making process for the enactment of laws that protect judicial independence, create judicial accountability, promote independence of the legal profession and make justice more accessible to the public
4. The participants agreed and committed to work individually and/or collectively to realise some or all of the recommendations identified in this statement.



International Commission of Jurists

