

JUDICIAL SERVICE COMMISSION



"THE RIGHT TO A FAIR TRIAL"

**A PRESENTATION BY THE HONOURABLE
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INTRODUCTION

The choice of the topic “The Right to a Fair Trial” for discussion at this Symposium was influenced by the events that occurred in Zimbabwe at the beginning of the year. On 14 January 2019 the country woke up to widespread public protests in different cities across the country. Harare and Bulawayo were the worst affected. The public demonstrations unfortunately resulted in the loss of lives, the vandalism of property of substantial value, looting of shops, injury to innocent citizens and general inconvenience to many who did not wish to participate in the demonstrations.

The events which followed the demonstrations gave rise to questions, which form the basis of this discussion paper. Allow me, Honourable Judges and distinguished delegates, to add some detail to those events in order to place my paper in context.

483 cases of public violence were reported involving 1181 persons, who appeared in various magistrates’ courts across the country. The majority of the cases were promptly heard and decisions on various issues, such as applications for bail, challenges of placement on

remand, the actual guilt or innocence of the accused, and the assessment of appropriate penalties were rendered. Of that total, 373 persons were convicted and sentenced to different forms of punishment, while 744 were acquitted. This discharge of duty by magistrates surprisingly drew criticism from certain sections of the society, the media and some legal practitioners.

In summary, the concerns that related to the courts and forming the bases for criticism levelled against judicial officers were the following

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That magistrates dismissed bail applications in a pattern that suggested extra-curial influence on their decisions;

That the courts sanctioned “fast-track” trials without affording the accused persons adequate time to prepare their defences;

That magistrates were dismissing pre-trial applications made by the accused persons; and

That the courts were denying legal practitioners opportunity to take instructions from clients.

The issues relate to both procedural and substantive decisions made by judicial officers in the course of court proceedings. As is clear from the summary above, the imputation of breach of accused persons' rights to a fair trial formed the core of the complaints. It is only logical then that we must all take this opportunity to self-introspect and reflect on what is meant by the right to a fair trial.

THE RIGHT TO A FAIR TRIAL

A fair trial entails a trial by a neutral and fair court, conducted in terms of principles which accord each party the due process rights required by applicable law. It ensures respect for the defendant's constitutional rights. A fair trial is the best means of separating the guilty from the innocent and protecting against injustice. Without this right, the rule of law and public faith in the justice system collapse.¹

The Lawyers Committee for Human Rights, a United States based body, defines the right to a fair trial as “*a norm of international human*

¹ See 'The Right to a Fair Trial' available at <https://www.fairtrials.org/right-fair-trial>

rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person”.

A fair trial is the only way to prevent miscarriage of justice and is an essential part of a just and democratic society. Every person accused of a crime should have his or her guilt or innocence determined by a fair and effective legal process.² The right to a fair trial includes several other rights and principles that regulate the procedural and substantive processes of a trial. In this sense, the right is therefore a very broad one. For instance, it may encompass the right to equality, the right to human dignity, the right to a trial within a reasonable time, the right to counsel, the presumption of innocence, etcetera.

This right depends, in a lot of ways, on the practical availability at all times of access to competent, independent and impartial courts of law which can, and will, administer justice fairly.³ In that regard, the right

² *Ibid*

³ United Nations Office of the High Commissioner for Human Rights (UNOHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (United Nations Publications 2003)

to a fair trial extends beyond the accused person to also cover the judicial officer. He or she has a duty to take the right beyond abstract concepts to make it a substantive reality.

The right is recognised internationally as a fundamental human right and countries are required to respect it. Different countries have developed a variety of ways of giving effect to the right but, regardless of how a particular legal system operates, the right remains core to all fair justice delivery systems.⁴

It is, however, important to note that the concept of fairness entails being “just and equitable”. (*Concise Oxford Dictionary* 510 (10th ed))

It does not require perfection. This position has been confirmed time and again. The International Criminal Tribunal for the former Yugoslavia (ICTY), for instance, in the well celebrated dissenting opinion by JUDGE SHAHABUDEEN in *Prosecutor v Slobodan Milošević* Case No. IT-02-54-AR 73.4, held as follows:

Chapter 6 The Right to a Fair Trial Part 1 - From Investigation to Trial, at p 215

⁴ See note 1 above

“... the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him.”

Therefore, in considering the right to a fair trial, sight should not be lost of the fact that the right is not accorded to a legal system that is infallible but to one that is fair. (See *Maharaj v Attorney-General of Trinidad and Tobago, Privy Council*, (1979) AZ 385; (1978) 2 AER 670; (1978) 2 WLR 902).

In principle, the right to a fair trial applies with similar effect to civil and criminal matters. However, it has an inherent inclination towards criminal trials by according specific guarantees to the accused person, constituting definitive elements of the right.⁵

LEGAL FRAMEWORK GOVERNING THE RIGHT TO A FAIR TRIAL

INTERNATIONAL INSTRUMENTS/GLOBAL NORMS

⁵ Namakula C S *The Court Record and the Right to a Fair Trial: Botswana and Uganda*, African Human Rights Law Journal 2016, Vol.16, N.1, pp.175-203. ISSN 1996-2096. <http://dx.doi.org/10.17159/1996-2096/2016/v16n1a8>.

The right to a fair trial is not a novel concept. It has long been recognised by the international community as a basic human right. In this regard, several international instruments entrench this right as one of the fundamental human rights.

The *Universal Declaration of Human Rights* (“the UDHR”) is a milestone document in the history of human rights. Drafted by representatives with diverse legal and cultural backgrounds from all regions of the world, the UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations.⁶ It set out, for the first time, fundamental human rights to be universally protected.

Article 10 of the UDHR provides as follows:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

⁶ <https://www.un.org/>

Subsequent to the adoption of the UDHR, the right to a fair trial was defined in more detail in the International Covenant on Civil and Political Rights (“the ICCPR”) adopted by the General Assembly of the United Nations on 19 December 1966. The ICCPR was the first international human rights instrument to officially prescribe the specific details of the extent of application of this right.

The right can generally be divided into two main categories: procedural rights during the trial process, and substantive rights in relation to the general administration of justice by States. Articles 14 and 16 of the ICCPR enshrine the right to a fair trial. The rights protected by this instrument include:

1. General rights of procedural fairness, including a public hearing before an independent and impartial tribunal which gives reasoned judgment – Article 14(1);
2. The presumption of innocence in criminal proceedings - Article 14(2);

3. Specific rights for those accused of criminal offences, including rights to be informed of the charge, to trial within reasonable time, to legal assistance and to cross-examine witnesses - Article 14(3);
4. The right to be free from any retrospective application of criminal laws – Article 15;
5. The right to appeal - Article 14(5); and
6. The right of compensation for wrongful conviction – Article 14(6).

According to the United Nations Human Rights Committee (“the UNHRC”), *General Comment No. 32 of 2007*, the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the ICCPR aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

Regionally, the African Charter on Human and Peoples' Rights (“the ACHPR”) further guarantees the right to a fair trial, albeit in an African context. In this regard, Articles 7 and 26 are important and worthy of note. Article 7 states the following -

Every individual shall have the right to have his cause heard. This comprises -

The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

The right to be presumed innocent until proved guilty by a competent court or tribunal;

The right to defence, including the right to be defended by counsel of his choice;

The right to be tried within a reasonable time by an impartial court or tribunal.

No-one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No

penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 26 of the ACHPR places an obligation upon State parties to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ACHPR.

In September 1999 the *Dakar Declaration on the Right to a Fair Trial in Africa* (“the Dakar Declaration”) was adopted. It sought to consolidate the standards on the right to a fair trial under the ACHPR, as well as taking into account the relevant jurisprudence from the African Commission and other international human rights bodies.⁷ In terms of the Dakar Declaration, the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights.⁸

⁷ The Right to a Fair Trial: The Dakar Declaration. (2001). *Journal of African Law*, 45(1), 140-142. Retrieved from <http://www.jstor.org/stable/3558976>

⁸ *Ibid*

The adoption of multiple international conventions safeguarding the right to a fair trial cements its status as one of the basic and fundamental human rights that accrue to a person by virtue of his or her humanity.

The fundamental importance of the right to a fair trial is illustrated not only by the extensive body of interpretation it has generated, but also by the several instruments which protect it.

CONSTITUTIONAL FRAMEWORK

The application of international law in Zimbabwe is governed by sections 326 and 327 of the Constitution. Section 326 recognises that customary international law is part of the law of Zimbabwe to the extent of its consistency with the laws of the country. This provision is an affirmation of the long-standing judicial precedent by GEORGES JA in *Barker McComarc (Pvt) Ltd v Government of Kenya* 1983 (4) SA 817 (ZS) where he stated that customary international law is part of the law of Zimbabwe.⁹

⁹ Saki O and Chiware T *The Law in Zimbabwe* (2017) available at <http://www.nyulawglobal.org/globalex/Zimbabwe1.html>

That Article 14 of the ICCPR, which guarantees the right to a fair trial to an accused, reflects customary international law is beyond dispute. There is a widespread State practice supported by *opinion juris* to warrant this conclusion, as shall be shown on the comparative analysis part below on how different States have taken it as binding upon themselves to constitutionally guarantee the right to a fair trial in line with international human rights instruments. In customary international law, *opinion juris* is the second element necessary to establish a legally binding custom. The concept denotes a subjective obligation, a sense on behalf of a State that it is bound by the law in question. In *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* 1969 I.C.J. 3, at para 77 (Feb. 20) (Continental Shelf Case) the following was said in this regard:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the

very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.”

In entrenching the right to a fair trial, there is an abundance of State practice which depicts the subjective acceptance by the different States of a legal obligation to protect and enforce the right to a fair trial. Therefore, the right to a fair trial is part of customary international law and the Zimbabwean law by virtue of section 326 of the Constitution. Section 327 of the Constitution directly addresses the application of international law in Zimbabwe. It states that any international treaty which has been concluded or executed by the President, or under the President’s authority, does not bind Zimbabwe unless it has been approved by Parliament. The section further provides that the treaty does not form part of the law unless it has been incorporated into the law through an Act of Parliament.

Section 34 of the Constitution places an obligation upon the State to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

Zimbabwe as a jurisdiction is part of a universal standard of norms that are given recognition worldwide. One such norm is the protection of the right to a fair trial as a fundamental human right. The importance of the right to a fair trial was emphasised in the case of *Banana v The Attorney General* 1998 (1) ZLR 309 (S) where the court found, when balancing the right to a fair trial and the right to freedom of expression, that, in the hierarchy of constitutional rights, the right to a fair trial must be given priority over freedom of expression. This shows the importance of the right to a fair trial in Zimbabwe.

Zimbabwe is a party to and has ratified the ICCPR and the ACHPR. The right to a fair trial which is contained in these instruments is given constitutional significance through its entrenchment in the Constitution. The right to a fair hearing is part of *Chapter 4* of the Constitution, which contains the Bill of Rights. It is guaranteed in section 69 of the Constitution, which provides as follows:

“69 Right to a fair hearing

(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.

(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.”

This provision contains the right of an accused person to a fair and public trial within a reasonable time. It is therefore important to note

that the trial ought to be fair, it must be public and it must be held within a reasonable time. A contravention of any of these rights or principles compromises the accused person's right to a fair trial. More importantly, section 69 of the Constitution places an obligation upon the court to be independent and impartial. It is that independence which guarantees and protects the right to a fair trial. Section 69 places an institutional obligation or responsibility upon the justice system, particularly the courts, to respect and protect the right to a fair trial. By extension, those obligations are imposed upon the individual judicial officers who preside over matters.

Section 70 of the Constitution encompasses the rights of accused persons. It guarantees an array of rights that accrue to any person who is accused of an offence. It is important to note that the rights of accused persons are the constituent rights that make up the right to a fair trial enshrined in section 69. Some are procedural and others relate to the substance of the right to a fair trial.

Central to the right to a fair trial is the presumption of innocence, which is provided for under section 70(1)(a) of the Constitution. The

presumption of innocence, which is fundamental to the protection of the right to a fair trial, imposes on the prosecution the burden of proving the charge. It guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. This ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.¹⁰

The rationale for the presumption of innocence is wide and varied. The learned authors Currie I and de Waal J *The Bill of Rights Handbook* (6th edn, Juta & Co. (Pty) Ltd, 2013) at p 753 are of the view that the rationale for the presumption of innocence ranges from a concern that individual rights need to be protected from the potentially coercive authority of the State, at one end, to policy concerns directed at maintaining the legitimacy of the criminal justice system and the normative force of the criminal law, at the other.

Further, section 70 of the Constitution provides for the right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause

¹⁰ See n 3 above at p 219

of criminal charges brought against them. This right is one of the minimum guarantees of the right to a fair trial. It is important to convey the grounds of accusation in order to put the accused person on terms regarding the charges that he or she is facing.

It should be noted that fairness demands that an accused person should only be convicted of conduct that is criminal at the time it was committed. Therefore, an accused person cannot be convicted of an act or omission that was not an offence when it took place. This is the presumption against retrospectivity in criminal matters. In *The State and Another v Acting Regional Magistrate, Boksburg: Mr Phillip Venter and Another* [2011] ZACC 22, it was held as follows at p 11:

“However, in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This presumption is consistent with the fair trial provisions of the Constitution.” (My emphasis)

Further, section 70 of the Constitution provides for the right to legal representation or the right to counsel. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.¹¹ This right, however, is at the accused person's own expense. The rôle of the right to counsel, as ensuring respect for equality, the right to silence, the right against self-incrimination and the presumption of innocence, must guide the courts in the kind of protection to be offered to the unrepresented accused. This is the rationale behind section 70(1)(e) of the Constitution, which is to the effect that an accused person is entitled to State-funded legal representation if substantial injustice would otherwise result.

The right to legal representation at the expense of the State where substantial injustice would otherwise occur, enshrined in section 70(1)(e) of the Constitution, is an essential part of the right to a fair trial. This section provides a substantive right to an indigent

¹¹ United Nations Office on Drugs and Crime (UNODC) *Global Study on Legal Aid, Global Report* (2016) at p 15. See also Human Rights Committee, General Comment 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007 (CCPR/C/GC/32).

accused to be afforded legal representation at State expense where lack of such representation would occasion considerable injustice to him or her. LORD DENNING affirmed the essence of this right in *Pett v Greyhound Racing Association* (1968) 2 All ER 545. He stated as follows:

“... It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day ...”.

What would constitute substantial injustice leaves much to the discretion of the court seized with the matter. It should be noted, however, that no-one should be denied justice because he or she is poor and cannot afford a lawyer. This was illustrated by the decision of the Supreme Court of the United States in *Griffin v Illinois* (1956) 351 US 12, where JUSTICE BLACK stated that if justice in a country is dependent on one's financial muscle, then that creates anarchy where justice can

even be bought. Therefore, an indigent accused should enjoy the benefits and protection afforded by the law.

Additionally, section 70 of the Constitution also guarantees the accused person's right not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits. In other words, this is the prohibition on double jeopardy. This principle is derived from the maxim "*nemo debet vis vexari*", which means a man should not be put twice in peril for the same offence. The principle of double jeopardy is also based on the doctrine of *autrefois convict* and *autrefois acquit*. This doctrine implies that if a person is prosecuted and convicted or acquitted he or she cannot be prosecuted again for the same offence. See *Burt v The State* SC 204/98.

It is important to note that the right to a fair trial is buttressed by other legal remedies that are available to an accused person. These remedies relate to the right to appeal or apply for review. This is provided for under section 70(5) of the Constitution. The section provides that any person who has been tried and convicted of an offence has the right,

subject to reasonable restrictions that may be prescribed by law, to (a) have the case reviewed by a higher court, or (b) appeal to a higher court against the conviction and sentence. The right of appeal applies to all types of crimes regardless of the seriousness.

Section 70 of the Constitution also includes several procedural rights that accrue to an accused person and make up the broad right to a fair trial. These rights include:

The right to be given adequate time and facilities to prepare a defence;

The right to remain silent or not to be compelled to give self-incriminating evidence;

The right to be present when being tried;

The right to adduce and challenge evidence; and

The right to have trial proceedings interpreted into a language that they understand.

As already shown above, the importance of these rights cannot be overemphasised. This is because the sum totality of these rights and principles gives rise to the right to a fair trial. This right is a basic fundamental human right, the protection of which is key in a democratic society.

However, most importantly, the right to a fair trial is an absolute right in Zimbabwe. Section 86(3) of the Constitution provides for the non-derogable fundamental rights and the right to a fair trial is one of the rights that cannot be limited by any means. The fact that the Constitution provides that no law can limit the right to a fair trial and that no one may violate it means that the State may not limit the right, either through legislation or other means. Consequently, even judicial officers who are tasked with ensuring the protection, fulfilment and realisation of the right to a fair trial cannot limit the right through their conduct.

Section 44 of the Constitution places a duty upon the State to respect fundamental human rights and freedoms. It provides thus:

“The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.”

Thus, it can be seen that the constitutional framework in Zimbabwe guarantees the right to a fair trial. The right is enshrined as one of the non-derogable fundamental rights. Further to that, the Constitution itself places a positive obligation on the State and its judicial officers to ensure the respect, protection, promotion and fulfilment of the right. Consequently, the Constitution provides adequate protection of the right to a fair trial.

RELATIONSHIP BETWEEN THE ACCUSED PERSON AND THE JUDICIAL OFFICER IN RELATION TO THE RIGHT TO A FAIR TRIAL

The right to a fair trial is two-dimensional, in the sense that it accrues to an accused person and, at the same time, the right is realised through the independence and impartiality of the judicial officer who is seized with the matter. The judicial officer has the constitutional mandate to

respect, protect and promote the right to a fair trial in terms of the Constitution. Denial of a fair trial is as much an injustice to the accused as it is to the victim and to society.¹² A fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried is eliminated.

THE ACCUSED PERSON

The right to a fair trial, as already shown, accrues to a person by virtue of him or her being a human being who is accused of an offence. The accordance of fundamental rights to an individual because he or she is human is closely linked with the fundamental right to dignity. This right entails the respect for the inherent worth or humanity of persons. In essence, human dignity is a central value of the objective, normative value system established by the Constitution.¹³ One of the founding values and principles that underlie the Constitution, as espoused in its section 3, is the recognition of the inherent dignity and worth of each human being.

¹² Soni, P *Fair Trial and its Principles* (2018) available at <https://lawtimesjournal.in/fair-trial-and-its-principles/>

¹³ *Carmichele v Minister of Security* 2001 (4) SA 938 (CC).

Therefore, an accused person ought to be afforded the right to a fair trial and the violation of this absolute right, or any of its constituent rights, not only impinges upon the right itself but also upon the right to human dignity. O'REGAN J in *S v Makwanyane* 1995 (3) SA 391 (CC) had the following to say regarding the importance of the right to human dignity in a democratic society:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in *Chapter 3.*”

The point was reiterated by CHASKALSON P as follows:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition

of human rights we are required to value these two rights above all others.”

The right to a fair trial is an objective one, which is measured against the objective standards that are set by the Constitution, international law and other sources of law. These standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving.

This means that the right accrues to every person regardless of extraneous considerations like race, creed or colour etcetera. As such, when an accused person appears before a court of law he or she expects justice to be done to his or her cause according to the said objective standard. This brings about the principle of fairness or equality, more specifically the concept of substantive equality. This concept entails that all persons accused of an offence be treated according to the same standard which cannot be compromised. Currie I and de Waal J *The Bill of Rights Handbook supra* at p 213 postulate that fairness simply requires that all persons are equal bearers of rights. Consequently, inequality is an aberration that can be eliminated by extending the same

rights and entitlements to all in accordance with the same neutral norm or standard of measurement.

The right to a fair trial therefore demands that judicial officers act according to the same objective standards that apply worldwide. The failure to apply the objective standards undermines the principle of equality before the law and thus the right to a fair trial is violated.

THE JUDICIAL OFFICER

Section 69 of the Constitution places an obligation upon the court to be independent and impartial. The independence and impartiality of the judicial officer is vital to the attainment and fulfilment of the right to a fair trial. It is through this independence and impartiality that the right to a fair trial is given life or realised. Thus, it is important to note that the right to a fair trial is meaningless without the guarantee of an independent and impartial judicial officer. Further, section 44 of the Constitution places a positive obligation upon the State (and by extension the judicial officer) to respect, protect, promote and fulfil fundamental rights.

Judicial independence and impartiality are implicit in the rule of law, which is foundational to the Constitution. Judicial officers must accordingly decide all matters on a fair, objective and impartial basis. They must keep open minds and refrain from anything that might undermine their independence.¹⁴

R v Valente [1985] 2 SCR 673 is a leading decision by the Supreme Court of Canada on protection of judicial independence under section 11(d) of the Canadian Charter of Rights and Freedoms. The requirements of independence and impartiality were defined as follows:

“Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word ‘impartial’, as Howland C.J.O. noted, connotes absence of bias, actual or

¹⁴ Reid Rowland *J Criminal Procedure in Zimbabwe* (Legal Resources Foundation, Harare, 1997)

perceived. The word ‘independent’ in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees.”

The function of a judicial officer in a criminal trial is not merely that of an umpire, to see that the rules of the game are observed by both parties. He or she must direct and control the trial according to recognised rules and procedures and strive to ascertain the truth in all cases which come before him or her. He or she should, however, not descend into the arena of a trial.¹⁵ It is of fundamental importance that justice is not only done but is plainly and undoubtedly seen to be done (*R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256; [1923] All ER Rep 233).

The Constitution not only recognises that courts are independent and impartial, but also provides important institutional protection for courts. Section 164 of the Constitution provides as follows:

¹⁵ Ibid

“164 Independence of judiciary

(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore -

- (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
- (b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.”

Section 165 of the Constitution is also vital in ensuring the independence and impartiality of the Judiciary. It states:

“165 Principles guiding judiciary

(1) In exercising judicial authority, members of the judiciary must be guided by the following principles -

- (a) justice must be done to all, irrespective of status;
- (b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness;
- (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.

(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.

(4) Members of the judiciary must not -

(a) engage in any political activities;

(b) hold office in or be members of any political organisation;

(c) solicit funds for or contribute towards any political organisation; or

(d) attend political meetings.

(5) Members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.

(6) Members of the judiciary must give their judicial duties precedence over all other activities, and must not engage

in any activities which interfere with or compromise their judicial duties.

(7) Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law.”

In the Canadian case of *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC), quoted with approval in *De Lange v Smuts N.O and Others* 1998 (3) SA 785 (CC), DICKSON CJC stated the following regarding what constitutes an independent and impartial court:

“Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider, be it government, pressure group, individual or even another judge, should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his

or her decision. This core continues to be central to the principle of judicial independence.”

The Judicial Service (Code of Ethics) Regulations (Statutory Instrument 107 of 2012) requires in section 5 that judicial officers be independent and perform their duties without fear or favour. Further, it is also a requirement that a judicial officer shall at all times exhibit and promote high standards of judicial conduct in order to foster public confidence, which is universally accepted as a fundamental ingredient to the maintenance of judicial independence. This bolsters the notion that justice must not only be done but must be seen to be done.

It is therefore critical to note that the judicial officer who is in charge of proceedings is also governed by the objective standards that apply to the right to a fair trial. This is in the sense that it applies to the judicial officer just as much as it applies to the accused person. The judicial officer’s independent and impartial rôle ensures the attainment of the right to a fair trial. Where the independence or impartiality of a judicial officer is potentially compromised, he or she ought to recuse himself

or herself. (See *S v Paradza* 2004 (3) ZLR 324 (H); *Paradza v Minister of Justice and Others* 2012 (1) ZLR 1 (S)).

ALLEGATIONS OF MISCONDUCT BY JUDICIAL OFFICERS AND THE IMPACT ON THE RIGHT TO A FAIR TRIAL

In a statement which I issued in my capacity as CHIEF JUSTICE regarding the complaints on the handling of public violence cases by the Judiciary, especially the Magistrates' Court, I noted several issues.

As alluded to in my introduction, some decisions from the Magistrates' Courts drew notable criticism from certain sections of civic society, including, but not limited to, legal practitioners, the media and other social commentators. The criticism specifically related to judicial officers and the discharge of their duties. I have also already referred to the specific allegations.

I further indicated in that statement that it was not in doubt that the conduct impugned by these allegations constituted an affront to the absolute right to a fair trial. Judicial officers are constitutionally mandated to preside over a fair trial and they do so by maintaining their independence and impartiality. Over and above this, in terms of

section 86(3) of the Constitution, the right to a fair trial cannot be limited by any law or conduct.

The right to a fair trial underpins the rule of law, in that it serves as a procedural means to safeguard the rule of law. Without a fair trial, the rule of law collapses. The rule of law mandates that every person is subject to the same laws and no-one, however rich or powerful, is above the law. See *Chimakure and Ors v Attorney General* 2013 (2) ZLR 466 (S). This basic principle is crucial to the right to a fair trial. The principle also creates a level playing field and ensures equality before the law.¹⁶ The rule of law also demands that there be non-interference with the judicial process.

However, as I also noted, the allegations against the judicial officers were baseless and unsubstantiated. The public violence cases were handled by senior magistrates who are experienced in the law. These senior magistrates are judicial officers who are constitutionally mandated to uphold the rule of law and accord the accused person the

¹⁶ Maiese M *Principles of Justice and Fairness Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium (University of Colorado, Boulder. Posted: July 2003)
<http://www.beyondintractability.org/essay/principles-of-justice>.

procedural and substantive safeguards which underpin the right to a fair trial.

More importantly, the principle of non-interference also underpins the rule of law. In response to the earlier mentioned concerns, I maintained that the Judicial Service Commission (JSC) and the office of the Chief Magistrate are not empowered by the Constitution to interfere with the judicial decision-making process of judicial officers in courts, regardless of how distinctive the circumstances may be. I further indicated that once a decision has been made, only a court of competent jurisdiction can set it aside. Conversely, the petitioned intervention in decisions made by judicial officers in the course and scope of their work would amount to interference with the exercise of discretion and the independence of those judicial officers. Clearly, that was untenable. This speaks to non-interference with the judicial process which is a critical requirement of the right to a fair trial.

Having found that the allegations of the violation of the right to a fair trial were unfounded, I directed that any grievances that an accused person might have had against a decision of the court ought to have

been addressed in terms of the law. Once a decision has been made, only a court of competent jurisdiction can interfere with it and this is done in terms of appeal or review procedures as laid down by law.

Thus, an unfounded attack on the conduct of judicial officers attacks not only the judicial officers themselves or the right to a fair trial, but it also impugns the integrity of the justice delivery system itself.

The allegations of misconduct by judicial officers and the alleged consequent violation of an accused person's right to a fair trial have already been found to be baseless. Coupled with the constitutional mandate to respect, protect, promote and fulfil fundamental human rights, the judicial officer's independence and impartiality achieves this objective.

In any event, the numbers speak for themselves. The statistics below indicate what transpired.

(A) Persons with finalised cases as at 22 March 2019

Total persons who appeared in courts	1181
Total persons convicted	373

Total persons acquitted	744
Total persons with matters finalised	1117
Total persons with pending matters	64

(B) Types of sentences imposed as at 22 March 2019

Total persons convicted	373
Persons with passing of sentences postponed	8
Persons sentenced to caning	3
Persons with non-custodial sentences	83
Persons sentenced to imprisonment	279

(C) Outstanding cases per province as at 22 March 2019

Harare	11 (8 are non-jurisdiction)
Bulawayo	22
Midlands	4 (2 are non-jurisdiction)
Total pending	37

An analysis of these statistics reveals one thing: The judicial officers seized with these matters applied their minds to the determination of the

cases. In doing so, they exercised judicial freedom or judicial discretion, which is an imperious principle in the administration of justice. Their conduct cannot be described as anything other than commendable and laudable. It cannot therefore be said that the judicial officers were subject to extraneous influences in the determination of these matters. For instance, the fact that there are more accused persons who were acquitted than those who were convicted effectively disproves the allegation that the judicial officers fell short of the requisite constitutional standard in the performance of their duties by allowing external influences to affect their decisions to the detriment of the accused persons.

The offence of public violence by its nature is committed by at least two people. However, the acts of public violence that occurred in January of this year involved masses of people who not only contributed to the loss of life, destruction of property but general anarchy. The inevitable result was that dozens of persons were charged with the offence in terms of section 36 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The subsequent

arraignment of these accused persons before the Magistrates' Court ensued.

It cannot be gainsaid that these multiple cases of public violence resulted in a heavy burden on the court system, the result of which was that the senior magistrates who were seized with these matters conducted expedited trials. Section 164(1) of the Constitution mandates the courts to dispense justice expeditiously. It cannot, however, be overemphasised that these expedited trials ought to be conducted with respect for due process, in particular the right to a fair trial. In the result, there is nothing peculiar about the conduct of expedited trials. In fact, this ought to be the norm and not the exception.

In *S v Chawira* 2011 (2) ZLR 210 (H) the court decided that the practice of “fast tracking” criminal trials is not specifically provided for by that name in the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“the CPEA”), but that does not mean it is an unlawful procedure. It is, in fact, a useful procedure which, if well managed, helps to contain and or reduce the courts' backlogs of criminal cases and ensures the delivery of timeous justice. All that has to be done is to ensure that it is

used in compliance with the provisions of the Act and other laws which provide for a fair trial.

As indicated in the statement referred to earlier, the conduct of expedited trials is not peculiar to Zimbabwe. In the United Kingdom pursuant to the 2011 London riots, thousands of rioters were arrested and arraigned before the courts. Their trials were fast tracked or expedited, with the result that at one point duty solicitors and court officials were clocking more than sixteen working hours per day.¹⁷ Subsequently, as more accused persons were brought before the courts, the courts were in session twenty-four hours a day until the cases were completed. The prosecutions included even juvenile offenders.¹⁸

A similar situation also obtains in India. Supreme Court Judge JUSTICE KRISHNAIYER, while dealing with a bail petition in *Babu Singh and Ors v State of UP* 1978 AIR 527; 1978 SCR (2) 777, remarked:

¹⁷ *England riots: justice grinds on as courts sit through the night* available at <https://www.theguardian.com/uk/2011/aug/14/riots-courts-justice-metropolitan-police>

¹⁸ *England riots: 24-hour criminal justice system after riots* available at <https://www.bbc.com/news/uk-england-14487636>

“Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to ‘fair trial’ whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.”

In India Fast Track Courts (“FTCs”) were established in the year 2000. This was an initiative of the Department of Justice designed to cut short delays in courts. The 6th Finance Commission of India recommended a scheme for creation of 1734 additional courts in the country for disposal of long pending sessions and other cases.¹⁹

The inescapable conclusion which can be drawn from a comparison of the Zimbabwean system with the two abovementioned jurisdictions is that the conduct of expedited trials is not peculiar to Zimbabwe and, more importantly, it is not illegal. The independence and impartiality of the senior magistrates who were seized with the public violence

¹⁹ <https://www.quora.com/What-is-fast-track-court-in-India>

cases has already been underscored. In the result, the fundamental right to a fair trial is guaranteed and protected in Zimbabwe. The constitutional and legal frameworks provide adequate protection of this fundamental right.

COMPARATIVE ANALYSIS OF THE RIGHT TO A FAIR TRIAL

UNITED STATES OF AMERICA

The right to a fair trial in the United States of America is constitutionally guaranteed under Amendment VI of the Constitution, which provides as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense.”

In the United States of America, the right to a fair trial is secured by the Fourteenth Amendment as a fundamental liberty. A fair trial is a legal trial conducted according to the rules of common law. In a fair trial, the accused’s legal rights are safeguarded and respected. A fair trial hears before it condemns.²⁰ The trial proceeds on inquiry and renders judgment only after trial. In a fair trial, jurors are to be entirely indifferent as to the parties at the outset.²¹ The necessary elements of a fair trial are an adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. A fair trial presupposes full justice within human limitations. [*Box v State*, 74 Ark. App. 82, 88-89 (Ark. Ct. App. 2001)]

INDIA

The Indian Constitution, through its Article 21, renders the fair trial a part of life and personal liberty.²² The Supreme Court in the case of

²⁰ [http://www.uslegal.com/fair trial](http://www.uslegal.com/fair%20trial)

²¹ *Ibid*

²² Article 21 reads: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

Rattiram v State of Madhya Pradesh (2012) 4 SCC 516 observed that a fair trial is the heart of criminal jurisprudence. A fair trial is a fundamental right which flows from Article 21 of the Constitution. The denial of a fair trial is the denial of human rights. Also, the Court in *Mohd Hussain Julfikar Ali v The State (Govt. Of Nct)* 2012 (8) SCALE 308 stated that every person has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. Thus, a right to a fair trial being a fundamental right cannot be refused to any person.

In *Sidhartha Vashisht v State (NCT of Delhi)* (2010) 6 SCC 1, which was quoted with approval in *Rattiram and Ors v State Of M.P.Tr.Insp. Of Police AIR 2012 SC 1485* it was held that:

“It would not be an exaggeration if it is stated that a ‘fair trial’ is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by Rule of Law. Denial of ‘fair trial’ is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasising the principle of ‘fair trial’ and the practice of the same in the course

of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardised as a consequence of which there has been failure of justice or causation of any prejudice”.

CANADA

The first part of the Canadian Constitution is the Canadian Charter to Rights and Freedoms (“the Charter”). It is the Bill of Rights which offers certain rights to citizens of Canada. Section 11 of the Charter provides for rights in criminal matters in order to secure a fair and impartial criminal justice system. The right to a fair trial is recognised under section 11(d) of the Charter and it states that:

“Any person charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal.”

The Supreme Court of Canada in *R v Rose* (1998) 3 SCR 262 held that the right to a fair trial is guaranteed by section 11(d) of the Charter. The obligation of a trial judge to ensure that an accused person’s right to a fair trial is preserved has been enshrined in section 11(d) of the Charter. Further, in the case of *Selvey v Director of Public Prosecutions* [1968] 2 All ER 497 LORD GUEST referred to the overriding duty of the trial judge to ensure that a trial is fair. He wrote that this duty “springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused”.

CONCLUSION

Judicial officers ought to be alive to the fact that the right to a fair trial enjoys a superior position in our constitutional dispensation. The right envisages a trial that is fair to the accused because it provides a number of minimum procedural protections. This right outlines a level of

protection below which a court cannot go without compromising fairness and effectiveness. In this regard, the right to a fair trial comprises several rights, the violation of which constitutes an affront not only to the concept of justice in relation to the accused but to the society at large.

Further, the right to a fair trial is two-dimensional, in the sense that it accrues to the accused person by virtue of him or her being human. This is closely related to the right to human dignity, which recognises the intrinsic worth of a human being. It is the judicial officer who ensures the realisation and fulfilment of this right. The realisation or fulfilment is guaranteed through the independence and impartiality of the judicial officer, the absence of which would certainly violate the right to a fair trial.

The entrenchment of the right to a fair trial by the Constitution signifies its importance in a democratic society. Its importance is further magnified by the fact that the right to a fair trial is one of the fundamental rights which are non-derogable in terms of section 86(3) of the Constitution. The fundamental right is not only recognised in

Zimbabwe. It is a universal right. Several international human rights instruments recognise the right as a basic human right. At regional level the right is given effect by the ACHPR. Zimbabwe, as a State Party to the international conventions and treaties recognising and requiring protection of the right to a fair trial, has an obligation, which is embodied in the Constitution, to respect the fundamental human right. The domestication of the right to a fair trial is evidenced by its entrenchment in the Constitution and amplification in various statutes.
