Zimbabwe Lawyers For Human Rights

Discussion Paper on the Mooted Division (Fission) of the Legal Profession in Zimbabwe[*]

Zimbabwe Lawyers for Human Rights (ZLHR) is a not-for-profit law-based human rights organisation whose core objective is to foster a culture of human rights in Zimbabwe as well as encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the just rule of law. ZLHR has a membership of close to 200 lawyers throughout Zimbabwe. Its members are also members of the Law Society of Zimbabwe.

Executive Summary

Zimbabwe has had a fused bar since 1981. Currently, there is a national discussion over a proposed division of the legal profession. ZLHR believes that this proposal should be contested as unsound, for the following reasons:

1. It is of questionable constitutionality.
2. It would severely restrict access to justice, particularly to the most vulnerable and marginalised persons within Zimbabwe society.
3. It would limit freedom to contract.
4. It obviates the real problem of no, or limited, post-graduate training and continuing legal education.
5. It overstates the efficacies of a divided bar.

The paper explores the reasons in more detail below.

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1. Constitutionality

The Constitution of Zimbabwe grants greater access to the courts than its predecessor.[1] A wide group of persons enforcing fundamental rights is granted *locus standi in judicio,*[2] including those alleged to have contravened a law.[3] It also requires that the Rules of Court ensure this right to approach the courts is "fully facilitated".[4] It is apparent that the framers of the Constitution sought to ensure greater access to the courts in order to widen access to justice. Further, section 69(4) of the Constitution provides as follows:

> *"Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."*

Thus, greater access to courts is complemented by the right to a legal practitioner of a client's choice. This right cannot justifiably be derogated from by foisting particular legal practitioners on individuals. It is a clear right in the Constitution which enhances access to the courts. Limiting this right, as the division of the legal profession would, is against the letter and spirit of the Constitution.

2. Access to justice

The vast majority of individuals and communities in Zimbabwe – more particularly those represented by not-for-profit law-based organisations[5] (legal aid clinics) – are indigent. In light of the prevailing socio-economic situation, even those who are not indigent *per se* are not in a position to cover costs of litigation without significant hardship and sacrifice. They are more likely to forego legal redress in favour of covering the basics of survival for themselves and their families – food, employment, education for their children, and health services. The ability of such individuals and/or groups to access the courts is thus already limited by lack of means.

Law-based non-governmental organisations (NGOs) and other bodies, including the statutorily mandated Legal Aid Directorate, work tirelessly under an already high burden of sustainability, and have been doing so for decades, to address this asymmetry of access. As explained elsewhere:

> *"'The access to justice movement aims to highlight two basic purposes of a legal system: that it must be equally accessible to all and that it must lead to results that are individually and socially just."*[6]

A significant number of lawyers and members of such law-based organisations and legal aid clinics are registered members of the legal profession with right of appearance in the courts, which right they assert every day in order to represent such clients. Over the years, they have represented thousands of clients who, without them, would never have had access to the courts and the justice they are meant to provide.

A divided bar would mean that all cases to be taken to the higher courts would have to be taken through "advocates". Natural tenets of economics indicates that the higher fees charged by advocates would require the number of cases to be culled for the financial sustainability of not-for-profit institutions, as they would no longer be in a financial position to take up every case, no matter how desirable. Fewer individuals will be represented in the higher courts. This is in spite of the fact that the framers of the new Constitution increased the range of persons who could enforce rights in the courts, in addition to providing for a more expansive Declaration of Rights. In spite of these progressive provisions, fewer people would be able to enforce their rights. Thus, the new Constitution would represent a Pyrrhic victory. The work of law-based organisations would shrink, and the number of persons they could assist would be drastically reduced, having a knock-on effect on access to justice and the attainment of redress for violations.

A real indicator of development is the number of persons who can access the courts and obtain a remedy, rather than those who are limited from doing so. The reality is that more ordinary people have legal representation under the fused bar in Zimbabwe. As former President of the Law Society, Sternford Moyo, put it,

> *"There is also more representation for the smaller client in the form of smaller firms … I am therefore confident that … the profession is providing a wider service to the community."*[7]

The unique socio-economic factors that Zimbabwe faces as a developing nation should be taken into account. The aim must not be to mirror jurisdictions whose economies and populations are not congruent with those in Zimbabwe. The economic and social conditions of the generality of Zimbabweans must not be ignored if we are to uphold the client as the ultimate beneficiary of the legal system. Access to justice must be viewed not only as a constitutional imperative, but as a necessary principle in improving the human condition of all people.

Pre-1981, the bar remained divided primarily for two reasons:

(a) in order to limit appearance in the courts by black lawyers; and

(b) to ensure that clients of such black lawyers – and the causes they sought to represent, and conditions they sought to change for the better of an oppressed society – did not access justice.

Post-Independence, and due to the efforts of activist black lawyers, this situation was reversed. It is not possible to simplify the argument for fission by asserting that Zimbabwe now has no racial barrier to those who may appear in courts. By seeking to divide the bar once again using this argument, the unintended consequence is to neglect the second

reason for the divided bar. In Zimbabwe today, addressing issues of socio-economic empowerment, under-development and poverty reduction are the new terrains of struggle, and those who believe the reasons for fission have been addressed will have, whether intentionally or unintentionally, set back the ongoing attempts to achieve socio-economic redress.

3. Freedom to contract

Choice lies at the heart of the law of contract. The Constitution of Zimbabwe mentions the term "legal practitioner" 26 times, the majority of which are references to qualifications for various posts. In the nine references to the actual work of legal practitioners, they are preceded or followed by the terms "choice" or "choosing". At each such reference, accused persons are accorded a right to a legal practitioner of their own choosing.

This principle is not espoused by the proposed division of the legal profession.

A group within the legal profession will be accorded a state-sanctioned monopoly in the higher courts. In this sense, the elitism that was remedied by the Legal Practitioners Act of 1981 will be revived, albeit without the racial overtones. The market must be left to decide on choice of counsel. Considerations of time, efficiency and cost must be allowed to influence the individual in making their own choice of legal counsel.

This is more so for non-profit law-based organisations, which constantly have to make decisions based on costs for the sustainability of their programmes. Limiting the choice to a particular group of practitioners will only benefit this small group of practitioners at the expense of the rest of the legal profession. As noted by the retired Honourable Justice NJ McNally,

> *"One can maintain a de facto Bar, standing on its own feet and unsupported by unwarranted monopoly rights."*[8]

This point, relating to those that will benefit from this "unwarranted monopoly", is buttressed by former Secretary of the Law Society of Zimbabwe, DB Brighton, in that

> *"Those threatened by it (fused legal profession) are the incompetents who should never have been there in the first place and it is neither in our own nor the public interest to carry them."*[9]

In the tough economic conditions in which Zimbabwe finds itself, it cannot be reasonable to create monopolies that benefit a few practitioners at the expense of the vast majority, whilst limiting an individual's access to justice and freedom to contract.

What is important to bear in mind too, when such monopolies are created, are some of the practical realities and experiences facing legal practitioners and the clients they seek to represent when advocates are briefed.

There is no standard and known tariff for purposes of billing. Advocates are not formally regulated in a manner similar to legal practitioners, who are regulated by the Law Society of Zimbabwe. Complaints mechanisms and disciplinary procedures are non-existent or, if available, unknown to the majority of litigants and practitioners in private practice. In practice and in reality, this has led to members of the various advocates' chambers essentially becoming a "law unto themselves" in matters relating to acceptance of briefs, billing of clients, timeliness of attending to briefs, quality of work produced, and performance in the courts. This is exacerbated by the low number of advocates practising as such, the lack of advocates beyond the main cities of Harare and Bulawayo, and the experience and expertise of those currently practising. The proposed division of the bar will only add to their workload and make it more difficult to deliver with quality, thus exacerbating the extant challenges.

There also remains the fundamental question of the basis upon which a lawyer's right of audience in the superior courts can be taken away without any misconduct on their part. Legal practitioners have acquired rights, and this issue needs to be borne in mind when considering this far-reaching proposal.

4. Training and continuing legal education

There is no dispute over the need for continuing legal education and skills training in the legal profession. However, this is not a problem which a division of the legal profession can or will address. Instead, such division would postpone remedying this matter through the semblance of giving the more capable advocates right of audience in the higher courts whilst the general practitioners are left to the lower courts. This unnecessarily gives credit to the work of advocates as a monolithic body of highly efficient experts, whilst judging general practitioners to be inferior professionals not worthy of appearance in higher courts. It is a broad and unfair generalisation, given the fact that there is no difference in the standard legal training for an advocate and the ordinary legal practitioner.

Division of the legal profession will not solve the problem of limited post-graduate training. Legal practitioners must be trained and continue to have audience in the (higher) courts to make use of that training and to consistently sharpen their skills and gain expertise. Senior practitioners and judges must be part of these training courses and curriculum development to bridge the knowledge and experience gap. The mooted dichotomy would do nothing to improve quality. It will create a monopoly which is not necessitated as the current system is adequate. As AP de Bourbon SC put it,

> *"Fusion was not a mistake in Zimbabwe. In a country with a small commercial and industrial sector, there was little justification for the division in the profession. The fault with the 1981 Legal Practitioners Act lies in the abolition of articles, or the failure to introduce some other form of post-graduate training."*[10]

This view is shared by former President of the Law Society, SJR Chihambakwe, who noted that,

> *"When all is considered, even though I was and still am a protagonist of the fused system, there is nothing that can replace the training benefits derived from articles of clerkship."*[11]

It is clear that what should be problematised and addressed is the lack of post-graduate training, as opposed to the fused legal profession. To conflate lack of training with the fused profession is to fail to identify and address the problems and rather prefer a quick fix with the appearance of effectiveness, but which is not true to the conditions and realities in the country.

It is demonstrably fallacious to think that the quality of legal representation and justice delivery will be improved by solely dividing the bar and limiting the right of audience in the higher courts. This will neither improve the quality of submissions nor the level of competence of practitioners. Advocates have no training that is distinct from other legal practitioners. Indeed, there are lawyers of varying degrees of competence on both sides of the *de facto* divide. To formalise the divide is to label those who made the choice to be advocates more competent in the absence of any quantifiable proof. There will remain practitioners of questionable quality even if the profession is divided. The absence of training will remain starkly evident and the problem would have simply been papered over.

5. Fusion v Fission

There is no immanent value to fusion or division in and of themselves. The bar in the United Kingdom is divided. The bar in the United States of America is fused. Both systems have advanced legal systems for which fusion or division cannot be the sole determinants. The true value of fusion or division is instrumental; its efficacy lies in it achieving specific outcomes. After all, as former Secretary of the Law Society of Zimbabwe, DB Brighton, put it,

> *"What counts at the end of the day is the client. I have little doubt that he is better served here by a fused system as we currently have it. Artificial restrictions as to who can appear in which court do not exist while a pool of experts is available in cases where they are really needed rather than just because the law says they have to be employed."*[12]

Currently, there is no reason to believe the public is dissatisfied with the present mode of conducting litigation. Neither are any such concerns shared by the membership and or or beneficiaries of Zimbabwe Lawyers for Human Rights. The *de facto* bar exists and is made use of as a matter of need rather than through legislative *fiat*. As DB Brighton goes on to point out,

> *"There is no need however for the artificial lines drawn by having a divided profession and market forces have drawn a much more practical and cost effective division. For example, it is vastly easier for me as the person drawing the papers to appear in an unopposed application for divorce and deal with any queries raised directly than to go to the trouble of briefing counsel making sure he is available, answering his queries, either sitting behind him or dealing with the queries raised by the court when the matter has to be postponed, re-enrolling the matter, etc, etc. For similar reasons it is sometimes more effective if I can myself argue opposed applications and/or appeals."*[13]

As such, there are benefits to the *de facto* bar as it obtains in Zimbabwe and any problems identified should be addressed within the context of a fully functional fused legal profession.

All arguments in favour of dividing the bar, including benefits of division of labour and specialisation, are misplaced. They presume that such specialisation and complementarity do not already exist. The *de facto* bar already has the advantages mooted. Proponents of division of the bar do not seem to believe such benefits can be enjoyed in the environment of free prior informed consent, but rather that of state imprimatur. It is an extension of the "nanny state" – the idea that the state must be involved in the choice of legal counsel, as opposed to the individual. This is at variance with section 69(4) of the Constitution of Zimbabwe. The choice of legal counsel remains that of the client concerned as a matter of right.

Further, the claim that having advocates amounts to having a specialised practice seems nebulous. An advocate who accepts briefs on a variety of fields of law cannot be said to be more specialised than a lawyer who only deals with, say, conveyancing. Division of the bar is not synonymous with specialisation. Many legal practitioners are already specialised and it is highly questionable whether division of the bar necessarily results in more specialisation.

General rebuttal and conclusion

The argument regarding benefits of a divided bar is well subscribed to, and many articles have been written in the area. However, it must be borne in mind that most jurisdictions which form the provenance of these papers have no recent experience of a divided bar or even a *de facto* bar.[14] It is important to be cautious against having an unbridled zeal to assimilate foreign custom even when the unique institutions developed in one's own

jurisdiction are fully functional and need only reform in the realm of training. The pitfalls of transplants are well known, a basic one being a failure to be cognisant of local realities and endogenously developed systems. Zimbabwe has a new Constitution and an opportunity to develop new jurisprudence and a culture of constitutionalism. It would not be in anybody's best interests to limit the ability of the vast majority of people to access the courts, and of lawyers to make representations in those courts, at this historic moment in the nation's history.

Proposed way forward

There is need for a multi-stakeholder approach and effort in addressing the current challenges that have led to the belief that there is need to divide the legal profession. Various proposals appear below which can be utilised for purposes of further debate and action:

1. Undertake a much more scientific and research-based study on the benefits and pitfalls of division of the profession, rather than using anecdotal case studies and historical examples which may no longer be relevant in the Zimbabwean context.

2. Revisit the curricula in Zimbabwe law schools, and evaluate whether enough emphasis is being placed on procedural and practical subjects.

3. Consider whether there is need to re-introduce articles of clerkship for graduates before they are admitted and can appear in the courts.

4. Examine the role of law firms in further practical training of its young lawyers in order to ensure proper mentoring, supervision, oversight, responsibility and accountability by the supervising lawyers, both to clients and the courts where young and inexperienced lawyers represent clients in court.

5. Review whether the profession, through the Law Society of Zimbabwe and its co-operating partners, can be doing more in terms of post-qualification training of lawyers; particularly, although not limited to, recent graduates and young lawyers with limited practical experience.

6. The continuing legal education needs to be more structured, uniform, and comprehensive. There is need to develop, using a multi-stakeholder process, a syllabus targeted at graduating students, taking into account what has been learnt at university and the gaps experienced when graduate lawyers enter practice.

7. Increase the role of judges and the Judicial Service Commission in the training of legal practitioners.

END NOTES

1 Zimbabwe enacted a new Constitution on 22 May 2013 – the Constitution of Zimbabwe Amendment (No.20) Act

2 Section 85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely (a) any person acting in their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

3 See 2 above.

4 Subsection 85(3)(a):

(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—

(a) *the right to approach the court under subsection (1) is fully facilitated*; (our emphasis)

5 In Zimbabwe, these include, *inter alia:* the Justice for Children Trust; Legal Resources Foundation; Msasa Project; Women in Law in Southern Africa; Zimbabwe Human Rights NGO Forum; Zimbabwe Lawyers for Human Rights; and Zimbabwe Women Lawyers' Association.

6 See Dr JR Midgley, Senior Lecture Faculty of Law Rhodes University "The Legal Professions – Pointers towards Structural Reforms" (1991) 4 *Consultus* 8 at p 13.

7 See "Meeting of the newly formed Southern African Progressive Legal Practitioners Association (SAPLEPA)" reported in *Consultus* October 1992.

8 See "Fusion of the Profession: A Zimbabwean Perspective" published in *Consultus* October 1990 at p 122; McNally goes on to point that "… one should try to provide proper training for newcomers to the legal profession as a whole" reinforcing the point that it is training that is needed, rather than a division of the profession.

9 See no. 8 above at p 124.

10 See no. 8 above at p 124.

11 See no. 8 above at p 125.

12 See no. 8 above at p 125.

13 See no. 8 above p 125.

14 Such as the United Kingdom and South Africa.