

JUDICIAL SERVICE COMMISSION

“A Zimbabwe in which world-class justice prevails!”



KEYNOTE ADDRESS BY

**THE HONOURABLE MR JUSTICE LUKE MALABA
CHIEF JUSTICE OF ZIMBABWE**

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**THEME: STRENGTHENING COLLABORATIVE EFFORTS TOWARDS A
COMPETENT AND COORDINATED *PRO-DEO* SYSTEM AND
ACCESS TO JUSTICE FOR WOMEN, MEN AND CHILDREN IN
ZIMBABWE.**

SALUTATIONS,

It is a real pleasure, as well as an honour, to have been asked to give the keynote address on the occasion of the Annual Access to Justice and *Pro-Deo* Review Conference. Although access to justice and the *pro-deo* system concern the justice delivery system as a whole, I have decided to discuss them within the context of the criminal justice system. There are good reasons for this approach. The criminal justice system is representative of the justice system as a whole. In fact, one scholar described criminal justice systems as having “dramatic and tragic real-world effects”.¹ It represents the most basic form and function of the law.

Most people have participated in or will participate in and interact with the criminal justice system in their life either as direct actors or as interested onlookers. As a result, injustices arising from the operation of the criminal justice system are often received by the public with deep concern if not with loss of trust and confidence in the system. Fairness in the criminal justice system is a matter of concern for all. This much

¹ See Benjamin Levin, “Values and assumptions in criminal adjudication: Response to Andrew Manuel Crespo, *Systemic Facts: Towards Institutional Awareness in Criminal Courts*”, 129 Harv. L. Rev. 379, June 10, 2016. Available at: <https://harvardlawreview.org/2016/06/values-and-assumptions-in-criminal-adjudication/>. Accessed on 10 September 2022.

is confirmed by the pointed observations of James Spigelman – a former Australian Judge and Chief Justice of New South Wales. While commenting on the sentencing within the criminal justice system, he said:

“Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.”²

Given the great extent to which the operation of the criminal justice system affects the public’s confidence in our courts’ administration of justice, I take the proper administration of this system seriously. As the saying goes, “*justice must not only be done but it must be seen to be done*”. The obligation to ensure that justice is done rests squarely on all the players in a system of justice delivery. Thus, as different players within the justice system, all our efforts must be directed toward ensuring that justice is achieved.

² See T F Bathurst, *Community Confidence in Justice System: the role of public opinion*, Handbook for Judicial Officers — Publicity and Social Criticism, 1 Oct 2021. Available at: https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/community_confidence_in_the_justice_system.html. Accessed on 12 September 2022.

The focus on providing access to justice brings to the fore an enquiry as to what exactly is meant by the term “justice”. Not long ago, I had the occasion to discuss the concept of justice at length at the University of Zimbabwe’s “2022 Right of Access to Justice Symposium”. Justice has been defined as “the amount of fairness that people experience and perceive when they take steps to solve disputes and grievances”.³

I repeat the observations that I made at the University of Zimbabwe that the renowned philosopher, Aristotle, espoused the idea of justice as a state of character, a cultivated set of dispositions, attitudes and good habits. Likewise, the *Institutes of Justinian*, which is part of a codification of Roman Law from the sixth century AD, defines justice as “the constant and perpetual will to render to each his due”. This definition reveals four important aspects of justice –

1. It shows that justice has to do with how individual people are treated;

³ See the Legal Aid Service Providers Network (LASPNET), *Access to Justice for the Poor, Marginalised and Vulnerable People of Uganda*, (Kampala, 2015) at p. 18. Available at: <https://namati.org/wp-content/uploads/2015/12/Access-to-Justice-for-the-Poor-Marginalised-and-Vulnerable-People-of-Uganda.pdf>. Accessed on 30 June 2022.

2. The definition underlines the fact that just treatment is something due to each person. In other words, that justice is a matter of claims that can be rightfully made to the agent dispensing justice, whether a person or an institution;
3. The definition draws attention to the connection between justice and impartial and consistent application of rules. Justice is the opposite of arbitrariness. The rule concerned must be relatively stable.
4. The definition reminds one of the fact that justice requires an agent whose will alters the circumstances of its objects. The agent might be an individual person or it might be a group of people or an institution such as the State.

Of greatest importance to access to justice and the *pro-deo* mechanism is the fourth aspect which denotes justice as requiring an agent whose actions will alter the circumstances of those involved in its pursuit. Efforts must be made to ensure that the interaction with the agent of justice is done in a manner that does not prejudice the outcome of the proceedings. This is an important objective due to the recognition that

justice is a powerful tool that, when wielded, alters the circumstances of the parties involved.

Due recognition of this transformative feature of justice is imperative because, in some instances where the interaction with agents of justice is imbalanced, there might be grave repercussions such as mistrials that regrettably are visited on the accused. Later efforts to undo the “injustice” cannot erase the negative experiences of the affected persons. This has given rise to the often-sounded warning to justice practitioners that “*justice delayed is justice denied*”.

Another pre-eminent feature of justice that is relevant to the objectives of this Conference is its connection to equality of treatment. Justice ought to be viewed as a standard of measurement or, more appropriately, a judgment that rises above the socio-economic and political circumstances of those involved. In other words, every person must be able to obtain the same justice despite their socio-economic or political circumstances. In the context of criminal justice, an indigent accused person ought not to be subjected to any treatment that is dissimilar to that accorded to another accused person with the capacity to hire a lawyer.

Basically, the same rules ought to apply to all people and in all circumstances including where the State's interests are involved. This is a fundamental entitlement of all those that petition courts. Any unsanctioned departure from this standard upsets the balance of order, thereby negatively impacting the rule of law in a civilised and democratic society.

During this Conference, both the concept of access to justice and the *pro-deo* system will be considered. I will, thus, make some remarks about both of these concepts, our roles in operationalising them, the prospects of full access to justice for all, as well as the attainment of a robust *pro-deo* system.

I have deliberately decided to begin with the *pro-deo* system. Not only does the *pro-deo* system stand out as one of the tested and effective means of access to justice but it also reflects the faith that our justice delivery system has reposed in proper legal representation. But I pause to ask this question: what really is the *pro-deo* system?

THE *PRO-DEO* SYSTEM

Although there are several forms and models of *pro-deo* systems, all *pro-deo* systems have the same characteristics. Generally, each system is composed of a mechanism by which private lawyers provide legal assistance and representation to persons who cannot afford to hire legal services. In our jurisdiction, it almost entirely refers to the provision of legal representation to accused persons within the criminal justice system. Where accused persons are afforded legal representation from a pool of practising lawyers, these lawyers provide legal services *pro-deo* or “for God” as the name of the system suggests. That is to say, without charge.

The fact that most countries have one form or another of a *pro-deo* system points to its inseparability from the delivery of justice. We must, therefore, perceive the *pro-deo* system as a means or mechanism within the justice delivery system, which is aimed at the full realisation of justice. Justice is a legal process and *pro-deo* systems are intended to facilitate the attainment of justice by putting in place lawyers who assist accused persons to ensure that they are tried in accordance with the law. Consequently, these systems are increasingly being guaranteed by constitutions and other elaborate statutory frameworks. Under the

Constitution of Zimbabwe, 2013, legal representation in civil and criminal proceedings is an essential guarantee of real and substantial justice. That is so, regardless of how the legal representation is provided. Legal representation is a guarantee for a fair trial as envisaged in section 69(1) of the Constitution.

The relevant constitutional provisions are the following. The first is paragraph (e) of subsection (1) of section 70 of the Constitution, which states that any person accused of an offence has the right “to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result”. The second is section 31, which enjoins the State to take all practical measures, albeit within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice.

There is little scope for debate about what each of the two provisions that I have just referred to demand. For the greater part, they are self-explanatory. I must, however, observe that in both section 70(1)(e) and section 31, it is the State which is enjoined to carry the cost of providing

legal representation. It also bears highlighting that section 70(1)(e) is a fundamental right whereas section 31 is a national objective.

For the provisions of section 70(1)(e) of the Constitution to be activated, a person must obviously have become an accused person within the contemplation of the criminal procedure. Another equally important observation that can readily be drawn from that provision is that the State has the paramount obligation to support the provision of legal representation to people who need it and are unable to afford legal practitioners of their choice. In light of the underlying considerations of justice, legal representation of accused persons through the *pro-deo* system is not a privilege.

The fact that the Constitution acknowledges the value of legal representation shows that judicial officers may fall short of reaching the standard of justice, especially in an adversarial system like ours. Despite the fact that magistrates and judges are free to explain the procedures to unrepresented accused persons, there is a limit to this freedom. If judicial officers were unrestrictedly permitted to assist unrepresented persons, they would undermine their impartiality and independence.

I will refer to the Legal Aid Act [*Chapter 7:16*] as part of the statutory framework for the representation of indigent people. The Legal Aid Act establishes and elaborates a mechanism by which indigent persons may be granted legal aid. Under the Act, any person who satisfies the eligibility requirements for legal aid may apply to the Director of the Legal Aid Directorate for legal aid.⁴ If a person meets the eligibility criteria,⁵ the Director of the Legal Aid Directorate is obliged to provide legal aid on the condition that the resources of the Legal Aid Directorate and the Legal Aid Fund are sufficient to provide the required legal aid.⁶

In terms of section 10 of the Legal Aid Act, a court – that is to say a judge or magistrate – or the Prosecutor-General may recommend to the Director of the Legal Aid Directorate that a person should be provided with legal aid. This recommendation may only be made when it is in the interests of justice that any person who is or will be a party to any proceedings before a court, and has insufficient means to hire a legal

⁴ See section 7 of the Legal Aid Act [*Chapter 7:16*].

⁵ For the eligibility criteria see section 8 of the Legal Aid Act. See also Law Society of Zimbabwe, *Review of the Pro-Deo System in Zimbabwe & Prospects for a New Model*, (Law Society of Zimbabwe: Harare) at p. 19. Available at: <https://kubatana.net/2021/03/16/review-of-the-pro-deo-system-in-zimbabwe-prospects-for-a-new-model/>.

⁶ See section 7(2)(a)(ii) of the Legal Aid Act [*Chapter 7:16*].

practitioner, be represented. It is noteworthy that this recommendation is made after the consideration of the interests of justice.

Despite its provision under the Legal Aid Act, the legal aid system administered by the Legal Aid Directorate may be said to be less popular than the *pro-deo* system administered by the Registrar of the High Court in conjunction with the Law Society. The Registrar of the High Court performs his or her role in this system under the auspices of the Judicial Service Commission. Under this system, an accused person who has been indicted for trial in the High Court, and has no means to hire a legal practitioner of his own choice, is afforded the services of a legal practitioner in court by the Registrar of the High Court.

Rightly understood, the *pro-deo* legal service is a basic mechanism that assists all the stakeholders in guaranteeing a fair trial and justice for persons accused of serious crimes. The benefits of fair trials, which are underpinned by proper *pro-deo* systems, are multi-fold. First, they help in ensuring that both the accused person and the victim of the crime obtain justice. Second, they entrench the rule of law and strengthen public confidence in the criminal justice system. That is why the

entrenchment of the legal aid system is a national objective founded on considerations of the human right to a fair trial. As Justice Black said in the American case of *Gideon v Wainwright*:

“... lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”⁷

These living words are true of any criminal justice system.

THE CHALLENGES IN THE *PRO-DEO* SYSTEM

Far from achieving its intended objectives, the *pro-deo* system in Zimbabwe has faced significant challenges and presented several weaknesses worth addressing. Most of the challenges are helpfully summarised in the Law Society’s *Review of the Pro-Deo System in*

⁷ See *Gideon v. Wainwright* 372 U.S. 335 (1963) at p. 344.

Zimbabwe, which was published pursuant to the Law Society's access to justice programme and initiatives. These challenges range from the substandard representation of accused persons charged with serious crimes to the lack of interest by senior and experienced legal practitioners to render legal services in support of the *pro-deo* legal system.

The first set of challenges are operational problems within the system of legal representation of indigent people. These, I believe, are closely connected to the operations of the Legal Aid Directorate and of the system administered by the Registrar of the High Court. They include the limited human resources and financial constraints of the Directorate; the public's lack of awareness of the *pro-deo* system and the non-payment of the hired legal practitioners. The cumulative effect of these challenges is that they bar indigent accused persons from obtaining legal aid and discourage legal practitioners with sufficient experience from providing *pro-deo* legal services.

In the High Court, *pro-deo* representation may, in some instances, be availed shortly before the trial commences. This has undermined effective preparation for trial and the representation of the accused

person. It is also closely connected to the complaints of poor-quality representation that is afforded to persons accused of serious crimes. In fact, mere legal aid, without more, or poor-quality representation is not what the Constitution demands. The Constitution envisages that legal aid be given diligently, competently and without unnecessary delays.

Poor representation creates the additional problem that judicial officers trying cases involving serious crimes may assume that the fair trial concerns of the accused persons will be properly taken into account by the *pro-deo* lawyers, thus restraining themselves from assisting the accused persons as well as they could have.

But I must also mention that even though some of the causes of poor-quality representation in the *pro-deo* system are attributable to structural and operational problems, there is a disturbing trend in which lawyers appearing in court under the *pro-deo* system simply do the bare minimum. There is evidence of poor preparation for trial, slipshod drafting and inadequate consultation with the accused persons.

I also advert to the operational challenges which have been highlighted by legal practitioners and appear in the Law Society's Report. Some

lawyers have suggested that there is a lack of transparency in the allocation of matters to legal practitioners. In addition, other lawyers have complained that “*pro-deo*” cases are not allocated timeously.

Besides lawyers, other actors such as civil society organisations have voiced concerns about the current set-up of the *pro-deo* system. They have criticised it because it is confined to the High Court. As a result, a significant number of accused persons in the magistrates’ court facing charges of serious crimes such as rape and robbery are unrepresented.

Crucially, the Legal Aid Act does not provide an automatic right to representation. This does not necessarily mean that it does not provide a right to legal aid at all. Instead, it means that an applicant for legal aid must first satisfy the Act’s eligibility criteria before he or she can obtain legal aid. Even when an applicant has done so, the resources of the Legal Aid Directorate and the Legal Aid Fund must be sufficient to provide the required legal aid.

Overall, the most critical challenges are the structural problems afflicting the *pro-deo* system. Top on the list is that the *pro-deo* system is disjointed. The *pro-deo* system that is administered by the Registrar

of the High Court runs parallel to the legal aid system managed by the Legal Aid Directorate. Relatedly, the Law Society's Review of the system correctly concludes that the *pro-deo* system administered by the Registrar of the High Court is not supported by any statutory framework. There are, therefore, no binding statutory provisions by which the persons administering the system and legal practitioners may be held accountable.

Achieving the goal of providing for an efficient and effective *pro-deo* legal system is a collaborative effort that involves the development of a statutory framework that takes into account the gaps in the current legal aid system and the parallel *pro-deo* system. There is a need for a more comprehensive statutory framework outlining the roles of all the players in the system including the Judicial Service Commission, the Ministry of Justice, Legal and Parliamentary Affairs, the Legal Aid Directorate and the Law Society of Zimbabwe.

The various challenges existing in the *pro-deo* system should not be regarded as evidence of failure to facilitate access to justice. Instead, each problem presents an opportunity for reform, growth and collaboration. There would be no point in having the Conference if

stakeholders did not acknowledge that more can be done to improve the operation and administration of the *pro-deo* system to enhance access to justice.

An honest discussion of the problems currently affecting the legal aid system is also a positive sign that stakeholders recognise its usefulness to the justice sector. The Conference provides an opportunity to stakeholders to consider the challenges presented by the prevailing *pro-deo* system of legal representation and identify possible solutions to guarantee access to real and substantial justice to indigent people.

ACCESS TO JUSTICE

I turn now to the aspect of access to justice. A fully functional *pro-deo* system enhances access to justice. The concept of access to justice rightly dominates discourse amongst all key players in the justice delivery system. This is because it is the hallmark of any civilised and democratic society. In its narrow sense, it refers to the formal ability to appear in court. This is access to formal institutions of justice for legal remedies. In this regard, it encompasses the right to have your day in

court.⁸ The narrow view limits itself to the “right of entry” to formal and informal institutions of justice.

However, substantive access to justice extends beyond mere access to a court. When understood in a broad sense, access to justice also includes the right to legal representation despite the financial circumstances of the litigants.⁹ There can be no substantive access to justice where the justice system is financially inaccessible. This precondition is magnified when it relates to the criminal justice system because of its implications on the liberty of persons and the potential sentences that can be meted out, especially where murder charges are concerned. Thus, inherently access to justice also involves a sense of being treated fairly according to the law.

It is the broader conception of access to justice that is closely associated with the purpose of this Conference. The quality of justice is enriched when economic, physical and technical barriers are discarded. This paves the way for fairness and equality in the interaction between the litigating parties. The attainment of this goal is critical because it

⁸ Mauro Cappelletti and Bryant Garth, eds, *Access to Justice Volume 1: A World Survey*, Book 1 (Aphenaandenrijn: Sijthoff and Noordhoff, 1978).

⁹ United Nations Development Programme, “Access to Justice Practice Note”, 2004.

enables the courts to effectively dispense their constitutional mandate as repositories of justice.

Furthermore, the entrenchment of access to justice in the Constitution's Declaration of Rights highlights its centrality in the justice delivery sector. The concept of access to justice is embedded as a justiciable fundamental right in section 69 of the Constitution. That section, which provides for the right to a fair hearing, is worded in the following terms:

“(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.” (the emphasis is mine)

Noticeably, section 69(3) acknowledges that a fair hearing is predicated upon a right of access to the courts. The essence of this observation is that the rule of law cannot be upheld unless there are no undue restrictions on the ability of litigants to petition judicial fora. Where there is a dispute, the equilibrium characteristic of justice is disturbed. Justice demands that the dispute be resolved by an independent and impartial tribunal for the equilibrium to be restored.

The removal of inhibitors to access to justice enables the law to serve its justice function. In the absence of such an initiative, the quality of justice that is accessed by litigants is compromised. The fundamental value of justice ought to be preserved in a manner that affords equality before the law.

In addition, the constitutional entrenchment of access to justice as a fundamental right highlights its proximity to the concept of human dignity. Human dignity exists as the source of all human rights contained in the Declaration of Rights. The prominence of human dignity in the constitutional scheme of fundamental rights and freedoms was cemented in our jurisdiction in the authoritative case of *S v Chokuramba* in the following terms:

“Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). The preambles state in express terms that human rights ‘derive from the inherent dignity of the human person’. They all refer to ‘... the inherent dignity ... of all members of the human family as the foundation of freedom, justice and peace in the world’. The rights and duties enshrined in Chapter 4 of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.”¹⁰

Therefore, access to justice cannot be separated from the person as it flows from human dignity. This symbiotic relationship becomes more relevant when one is cognisant of the fact that human dignity cannot be

¹⁰ See *S v Chokuramba* CCZ-10-19 at pp. 14 – 15.

waived and simply accrues by virtue of one being human. Thus, by extension, access to justice cannot be separated from persons due to the interdependency of rights which builds upon the supremacy of human dignity. It is through access to justice that the dignity of each human being can be asserted.

CONCLUSION

To conclude, I emphasise that legal aid and the *pro-deo* system are mechanisms designed to ensure that persons within the justice system obtain justice. One cannot obtain justice without being empowered to access it, thus the concept of access to justice. In line with the concepts of the *pro-deo* mechanism and its implications on access to justice, it is evident that there is a need for the restructuring of the legal aid framework for indigent litigants within the criminal justice system. It must always be borne in mind that full access to justice entrenches and reinforces human dignity.

I Thank You!