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BIOGRAPHY OF THE HON. TONY GUBBAY

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ENCOUNTERS WITH THE ZIMBABWEAN JUDICIARY

My first appointment to judicial office in Australia began in January 1975. I was commissioned as a Deputy President of the Australian Conciliation and Arbitration Commission. This was a federal body with responsibility for deciding important national cases concerning industrial relations. That was an area in which I had practised when a barrister. Although not strictly a federal court, the presidential members were accorded judicial status, salaries and titles. Within a few weeks of my appointment, I was seconded as the inaugural chairman of the Australian Law Reform Commission. I was to hold that position until 1984, when I returned to the courts, as President of the New South Wales Court of Appeal.

Great changes were happening in the world at that time, including in Southern Africa. The British Prime Minister, Harold Macmillan, had asserted that "winds of change" were blowing throughout Africa. They would not leave the southern settler colonies in Rhodesia and South Africa untouched. So it was to prove.

South Africa, a republic outside the Commonwealth of Nations, continued to enforce its apartheid policy, with legally entrenched

[*] Justice of the High Court of Australia (1996-2009); Australian Human Rights Medal (1991); Gruber Justice Prize (2011).

discrimination against its own people on the grounds of their race and skin colour. Southern Rhodesia, in colonial times, had not been as extreme as South Africa. However, the Unilateral Declaration of Independence (UDI) by Prime Minister Ian Smith put the judiciary on a spot. The Chief Justice, Sir Hugh Beadle and the judges of the Supreme Court had to decide a legal question concerning a capital case and the royal prerogative of mercy. Was that power to be exercised, as it had been for some time, by the local Governor, acting on the advice of the Rhodesian Government? Or had UDI severed the right and duty of the Governor to so act? The majority of the judges of the Supreme Court, led by Beadle CJ, concluded that the government in office exercised de facto the powers of a lawful government, including decisions on clemency. Queen Elizabeth II meanwhile, had been advised by her United Kingdom ministers to exercise the royal prerogative of clemency in favour of the prisoners. So she did.

One judge of the High Court of Rhodesia, Justice John Fieldsend, dissented from the views expressed by Beadle CJ and his colleagues. He resigned in protest. He wrote to Governor Gibbs telling him that he no longer believed that the Rhodesian courts were defending the rights of Rhodesian citizens, according to law. The three accused at the centre of the controversy were hanged on 6 March 1968. Fieldsend packed his bags, considering that the rule of law had broken down. He returned to the United Kingdom, with no salary and no work to support him or his family.

Fortunately, after a little time, Fieldsend secured employment in London in the peripheries of the legal profession in England. Ultimately, when the Law Commission of England and Wales was established in 1965, its

first chairman (Sir Leslie Scarman) offered Fieldsend employment in the library of that body. Recently, the Law Commission celebrated 50 years of important work on law reform. Upon my appointment as inaugural chairman of the Australian Law Reform Commission in 1975, I took an early opportunity to visit the English Commission in London. There I met Scarman. I also met Fieldsend. No one mentioned to me at the time the latter's previous service as a judge in Rhodesia. No one spoke of his courage and integrity in refusing to go along with the *de facto* power of constitutional usurpers. No one told me of this faithful servant of the rule of law.

Many years later I made my first visit to Zimbabwe. It was soon after Rhodesia had achieved full legal independence from the United Kingdom, under its new name. My visit was not concerned with law reform or the judiciary as such. It was addressed to what was then a pressing issue of medical ethics and public health law: the sale and provision of breast milk substitutes in Africa and the need to discourage their use and to return African mothers to breastfeeding which had numerous advantages over the substitute formulas, at least in ordinary cases.

During the visit, the delegates met the new President of independent Zimbabwe: Robert Mugabe. We were received at State House. He was charming and welcoming to us all. In the background, I spied someone whom I thought I recognised. Eventually, he was introduced to me as the Chief Justice: Fieldsend CJ. Upon assuming office, President Mugabe had remembered the only Judge of the Rhodesian High Court who had stood for strict compliance with legal norms and the principle of non-discrimination on the grounds of race. He had brought Fieldsend

back to the country. He was sworn as one of the three great officers of state of Zimbabwe. This was a graceful and well merited gesture. But it also emphasised the abiding importance of non-discrimination in the application of the law of the new country. The stand of principle by John Fieldsend appeared to have been belatedly vindicated.

Subsequently, I returned to Zimbabwe on several occasions, mainly for meetings with judiciary and with the practising legal profession. Upon its independence, and with its new constitution, Zimbabwe had been welcomed to full membership of the Commonwealth of Nations. In the 1980s, I had many connections with the Legal and Constitutional Affairs Division of the Commonwealth Secretariat in London. Some of these were concerned with the common issues of institutional law reform. However, one stream of activity concerned a different topic. It was one that had been placed on the agenda of the Commonwealth Secretariat by Interrights, an organisation with headquarters in London that engaged in the study and application of the growing body of international human rights law. Interrights had been involved in leading human rights cases. An increasing number of the cases were coming before regional human rights institutions: especially the European Court of Human Rights in Strasbourg. However, another issue that attracted the attention of Interrights was the extent to which judges, in their domestic courts, could or should apply international human rights law in the performance of their professional duties. As I was to find, this was a controversial issue.[1] However, Interrights took up this issue up and so did the Commonwealth Secretariat.

[1] For the ongoing controversy of the point in Australian constitutional law see *Al Kateb v Godwin* (2004) 219 CLR 562.

DOMESTIC APPLICATION OF HUMAN RIGHTS NORMS

The first of a series of colloquia designed to explore the topic of the domestic application of international human rights norms took place in Bangalore, India, in 1988. The moving force behind the meeting, basically organised by the Commonwealth Secretariat, was Mr [later Lord] Anthony Lester QC, a leading London barrister. He persuaded the Commonwealth Secretariat to issue invitations to a number of well-chosen judges from countries of the common law. Most of them were from Commonwealth countries. However, one, Judge Ruth Bader-Ginsberg, was then a judge of the Court of Appeals for the Federal Circuit, soon to be elevated to the Supreme Court of the United States. The Chairman of the meeting was Justice P.N. Bhagwati, then recently, the Chief Justice of the Supreme Court of India. Most of those present were Commonwealth chief justices.

One judge who stood out in every way was Chief Justice Enoch Dumbutshena, the newly appointed Chief Justice of Zimbabwe who had succeeded John Fieldsend. After due debate, the participants at this first colloquium adopted the *Bangalore Principles on the Domestic Application of International Human Rights Norms*.[2] The principles addressed the possible impediment to domestic application presented to international law by the 'dualist' principle observed by most common law countries. According to this rule, international rule was not, as such, part of municipal or national law unless properly brought into application by local lawmaker. Ordinarily, that lawmaker would be the democratically elected legislature. However, as even commencing law students know,

[2] The *Bangalore Principles* are contained in (1988) 62 *Australian Law Journal*, 531-532. They appear as an appendix to M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal*, 514.

in the common law system the judge, in performing his or her duties, is also sometimes a lawmaker. This fact opened the door to the possible use of international human rights law in aid of the functions of national courts. At least where there was an ambiguity in the written text of the local law (whether statutory or constitutional) it was open to the judges to have regard to international human rights law in resolving the ambiguity and declaring the local law. Similarly, where the law in question was the common law, and no relevant binding precedent or principle could be discerned, it was open to the judge deciding a case to draw upon the wisdom of the emerging body of international human rights law to guide and stimulate the decision.

On my return to Australia, to my busy work as President of the New South Wales Court of Appeal, I began to apply the *Bangalore Principles*.[3] I also began to write about this process and the utility of drawing upon international human rights law in discharging day to day judicial functions.[4] Some Australian judges and practising lawyers regarded this process as impermissible and even heresy.[5] However, more open minded and creative judges were willing to contemplate using international law in this way. At least they would do so where the international law of human rights expressed universal principles of civilised nations.[6]

Thus, in 1992, when (before my appointment to it) the High Court of Australia had to reconsider the conventional rule of the common law

[3] See e.g. *Gradidge v Grace Bros. Pty Ltd* (1988) 93 FLR 414.
[4] M.D. Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993) 16 *UNSW Law Journal* 363.
[5] See *Al Kateb v Godwin* (2004) 219 CLR 562 at 589 [62] per McHugh J. referring to the use of international human rights law in the interpretation of the Australian Constitution. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181], per Heydon J.
[6] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42, per Brennan J.

which had denied Australian Aboriginals recognition of legal title in their traditional lands, the majority of the Court reached out to a principle similar to that expressed in the *Bangalore Principles*. In his historic reasons on that subject, Sir Gerard Brennan, then a Justice of the High Court of Australia and later Chief Justice, wrote:

> *"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant to Civil and Political Rights… brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law; is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."*

Elsewhere in the Commonwealth of Nations the Bangalore idea spread its influence.

MEETINGS WITH GUBBAY CJ

The Commonwealth Secretariat continued to pursue the series of judicial colloquia to examine the growing influence of the *Bangalore Principles.* The second such colloquium, after Bangalore, was held in Harare, Zimbabwe at the end of 1989. It was hosted by Dumbutshena CJ. I attended it. So did chief justices and judges from many countries in Africa and elsewhere in the Commonwealth.

One of the judges attending was Justice Anthony Gubbay. This was the first time I had met him. From the start, we formed a friendship. He was serious and thoughtful in his approach to law and to the judicial function. He was clearly conscious of the difficulties and special challenges facing him as a member of the judiciary of Zimbabwe. The background of colonial rule, UDI, racial discrimination, civil war, international sanctions and local fragility made the tasks facing him (and other members of the judiciary in Zimbabwe) much more challenging than those arising in courts of a country such as Australia. Tony Gubbay was prudent, responsible and interested in the *Bangalore* idea. He made a big impression. As did Dumbutshena CJ. Fortunate is a country, I thought, that has judges of such a calibre to guide it in the aftermath of so much conflict, injustice and unrest.

The series of judicial colloquia continued. Another was held at Banjul, The Gambia, in 1990 and at Balliol College at Oxford University in September 1992. Then, in September 1993, a colloquium was convened at Bloemfontein in South Africa: all the more fascinating because of the impending changes in the constitutional situation in South Africa. In all of these meetings where we attended together, Tony

Gubbay took a thoughtful, well-reasoned and creative role. Having witnessed, at first hand, the perils and injustices of discrimination, he was keen to explore all the proper tools that the judges could procure in order to reconcile the letter of the law, still mostly colonial in origin, with universal human rights. The case of South Africa had demonstrated that the letter of the law could be seriously unjust. It showed that having a skilful, well trained, uncorrupted judiciary alone, was not enough. Formalism in the law was not enough. The content of the law was vital. If that content was unjust and discriminatory against human beings, particularly because of indelible features of their natures, whether race, skin colour, gender or anything else, judges had a legitimate role to scrutinise very closely the resulting law. Sometimes they would have a role to bring that law into conformity with universal human rights. That was a particilar challenge of the judiciary in the contemporary age.

My encounters with Tony Gubbay continued after I was elevated to the High Court of Australia in 1996.

In 1994, I was appointed the independent Chairman of the Constitutional Conference on Malawi. My task was to assist in achieving the constitutional changes necessary to establish a multi-party democracy in that country. On my visits to Malawi for this purpose, I had to travel through Harare. I used these opportunities to renew my friendship with Gubbay CJ. He invited me to visit the Supreme Court and to meet the judges. I was proud that I had lived to witness his important role in striving to protect universal human rights in his country.

In February 1999, when Gubbay CJ came to Australia with two of his judicial colleagues, on a judicial visit that was organised by the

Zimbabwe Mission in Canberra, he visited the High Court of Australia where I was then serving. We enjoyed a convivial luncheon together with the other judges. At our invitation, the three visiting judges were invited to join us for a time, sitting on the Bench of the High Court of Australia. This symbolised the global community of the judges of the Commonwealth of Nations. But it also signalled great respect for Tony Gubbay and his commitment to the rule of law and to upholding human rights under the law in his own country.

On the evening of his visit, the Justices of the High Court were entertained to dinner at the Residence of the Zimbabwe Ambassador. I reflected on the changes that I had witnessed in my own country. And the still greater changes that Tony Gubbay had witnessed in his own land and his life. Sadly, many of the high ideals and great expectations of the days of those meetings in the 1990s were not to endure.[7] Whilst President Mugabe had opened the judicial colloquium in Harare in 1989 with a strong commitment, reaffirming the promise of his government to uphold human rights, judicial independence and the rule of law, regrettably these words turned out to be mere political rhetoric. Tony Gubbay himself was obliged to witness the erosion of judicial independence and the flouting, once again, of the rule of law. Control of the legislature by the Mugabe Government led to constitutional amendments overruling decisions of the Zimbabwe Supreme Court. Gubbay CJ had to endure personal vilification and coercion in his own country. He was forced to work in a climate of fear and repeated lawlessness. He was compelled to take early retirement. Judges across the Commonwealth, who so admired him and Dumbutshena CJ, felt

[7] For a description of the recent position of Zimbabwe see A. England and D. Pilling, "No Ordinary Succession", *Financial Times*, London, 23 February 2016, 7.

particular pain at these developments. Yet hope endures in human memory. A good example in hard times is often a source of inspiration for the future.

In my life as a judge in Australia, we would occasionally refer to decisions of the courts of Southern Africa, including Zimbabwe. During the time of Dumbutshena CJ and Gubbay CJ, one could do so with assurance of integrity, independence and principle on the part of the judicial writers.

CHALLENGE TO THE ZIMBABWEAN SODMY OFFENCE

I cannot pretend to have followed closely all of the decisions of the Supreme Court of Zimbabwe in which Gubbay CJ took part. However, one such decision is widely cited and celebrated. This is because it concerns a challenge to the constitutional validity of the law in Zimbabwe against homosexual men a global vulnerable minority. It was a decision that attracted my attention, because of my own sexual orientation. As challenges of this kind have arisen in many countries in recent decades, the judicial writing of Gubbay CJ on this topic still comes under the scrutiny of judges and human rights advocates worldwide.

Unsurprisingly, Gubbay CJ's decision on the subject was a reflection of the *Bangalore Principles*. In his reasoning, he was principled, bold and respectful for universal values. He saw those values before others did. He learned lessons from being a witness, earlier in his life, to racial discrimination and injustice. But he did not confine the lessons he had learned to discrimination on the grounds of race or skin colour. He extended his wisdom to discrimination on the grounds of gender and of

sexual orientation as well. Where others could not see discrimination in the law, he recognised it immediately. He gave effect, where he could, to his perception.

A case in question was *Canaan Banana v State.*[8] It was a case of high sensitivity and controversy in Zimbabwe. That is when judges are tested for their fidelity to fundamental principles.

Canaan Banana was the former non-Executive President of Zimbabwe. In 1997, and aide de camp, Jefta Dube, a former policeman was convicted of murdering a police constable. Allegedly, the later had insulted the prisoner by calling him "Banana's wife". This opened up claims that the prisoner had been traumatised by repeated homosexual abuse by President Banana. Police investigation resulted in charges being brought against Mr Banana alleging the common law crime of sodomy and other sexual defences. The accused denied the allegations. He raised various offences on the merits, including the imperfections of the evidence of penetration – an element necessary to establish the ingredients of the crime. The accused also raised a constitutional argument alleging that Section 23 of the *Constitution of Zimbabwe* invalidated the offence entirely because sec 23 involved discrimination, relevantly on the ground of "gender". The State contested the applicability of "gender". Alternatively, it said that, if that ground applied, the sodomy law was reasonably justifiable in a democratic society like Zimbabwe and valid despite any proved discrimination.

[8] [2000] 4 LRC 621 (SC Zim).

The Supreme Court of Zimbabwe was narrowly divided in the case. Whilst fully dismissing the merits grounds of appeal, in compelling reasons, Gubbay CJ upheld the constitutional objections to the sodomy offence.[9] And he rejected the argument that such a law was reasonably justifiable in the circumstances of Zimbabwe's society. His reasons were supported by Justice Ebrahim. However, the majority of the Court (Justice McNally, with whom Justices Muchechetere and Saundura agreed) rejected "gender" as an applicable ground. They therefore did not have to consider the requirements of a democratic society.[10] Nonetheless, the majority asserted that Zimbabwe was a "conservative" society; that unlike South Africa, it had no constitutional prohibition of discrimination on the grounds of sexual orientation; and that such a law should not be introduced by the unelected judiciary exercising its own powers. Greatly influential in the reasoning of the majority was their recent decision of the majority of the Supreme Court of the United States of America ("perhaps the most senior court in the western world"). In 1986, that court had rejected a challenge to a similar law, applying the constitution of that country.[11]

The reasoning of Gubbay CJ, to the contrary, pointed out that the sodomy offence applied only to males, and not to females. Because the law therefore drew a distinction between criminal acts on the basis of the participants' gender or sex, the constitutional grounds prohibiting discrimination were applicable. Justice McNally declared this argument "technically correct". But he said that it lacked "common sense" because the real basis of the complaint was not that women went unprosecuted

[9] *Constitution of Zimbabwe*, s 23. This is set out in the report.
[10] [2000] 4 LRC 621.
[11] *Bowers v Hardwick* 478 US 186 (1986). Subsequently overruled: *Lawrence v Texas* 539 US 558 at 578-9 (2003) per Kennedy J for the Court.

but that homosexual men were prosecuted at all, because they could not give expression to their sexual desires whereas heterosexual men could do so.[12] Curiously, and without any evidence on the record to support the contention, Justice McNally stated that anal sex between heterosexual partners was the result of either a "drunken mistake" or "an excess of sexual experimentation in an otherwise acceptable relationship". In the face of a huge amount of scientific research, going back at least to that of Alfred Kinsey in the United States in the 1940s, Justice McNally doubted that the occurrence of anal sex between opposite sex partners could be proved. He declared this to be a practical issue rather than a matter of principle.

Gubbay CJ was rightly unconcerned by this line of reasoning. He relied heavily on international and comparative law in reasons that are a model of the proper and justifiable invocation of the *Bangalore Principles*. Clearly, his reasoning was greatly influenced by the opinions of the European Court of Human Rights, by judicial reasoning of courts in Canada[13] and South Africa.[14] He invoked an insightful commentary by Professor [later Justice] Edwin Cameron in an article on sexual orientation and universal human rights.[15] In a powerful passage towards the end of his reasons, Gubbay CJ said:[16]

> *"In my view, the criminalisation of anal sexual intercourse between consenting adult males in private, if indeed it has any discernible*

[12] In *Dudgeon v United Kingdom* (1982) 4 EHHR 149. See also *Norris v Republic of Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1994) 16 EHRR 485.
[13] *Vriend v Alberta* [1998] 3 LRC 483; (1998) 4 BHRC 140 (CanSC).
[14] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648; 1998 (12) BCLR 1517; 1999 (1) SA 6 (SACC).
[15] E. Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights" (1993) 110 SALJ 450. See *Naz Foundation v Delhi* [2009] 4 LRC 868. Overruled *Koushal v Naz Foundation* 2013 (15) SCALE 55: (2014) 1 SCC 1. SC India.
[16] [2000] 4 LRC 621 at 648.

objective other than the enforcement of private moral opinions of a section of the community (which I do not regard as valid) is far outweighed by the harmful and prejudicial impact it has on gay men. Moreover, depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do."

THE JUDICIAL GIFT OF FORESIGHT

Here was the voice of an informed, civilised, forward-looking human being and judge. He also had the wisdom of foresight. It is easy, once issues have been established by a line of judicial opinions especially in many countries, to reach a wise and humane application of the law. The real test for a judge comes when the judicial decision-maker is on an unfamiliar pathway. Then, he or she must summon up the capacity (if it can be found) to look ahead and the wisdom to see how, over many instances, the law will shape itself.

The same assessment can be given of the foresight shown in an early decision on same-sex relationship recognition by Justice Ted Thomas, a judge of the New Zealand Court of Appeal in *Quilter v Attorney-General.*[17] Gubbay CJ did not then know that, just around the judicial corner, the Supreme Court of the United States would overrule its earlier decision in *Bowers* that was the bedrock of the judicial opinion of the majority in *Banana*. Indeed, that it would declare that the *Bowers* ruling had been wrong, even at the time when it was pronounced.[18] This

[17] *Quilter v A-G (NZ)* [1998] 3 LRC 119.
[18] *Lawrence v Texas* 539 US 558 (2003) USSC, per Kennedy J.

elucidation was to come three years after the decision in *Banana v State*. One is entitled to ask what view the majority in the Zimbabwe court would have taken, had only they known that the court they declared to be "the most senior court in the western world" had allied itself with the views of their chief justice in the *Banana* case.

In law, as in life, it is important for the principle of equality as between citizens to prevail, so far as possible. That will not happen if judges and lawyers look down on minorities as "the other". If they feel no empathy for them. If, in their hearts, they feel that the discrimination inflicted by the law is basically justifiable – whether on religious, moral, social or institutional grounds. Formalism can then so easily trump universal values. Any lawyer in Southern Africa and Australia, at least, should surely know that.

One lawyer who knew it was Tony Gubbay. For that, he is honoured around the world. He had judicial prescience when it mattered; but also sense and sensibility. In due time, just as the discrimination of apartheid and racial differentiation was overthrown, so homophobia will give way to the knowledge of science, the principle of equality of citizenship and the requirement of human dignity. When that happens, Tony Gubbay will be honoured in the Academy Awards of the global judiciary. He was an early leader in the modern age of universal rights. He stood up for, and explained, his principles. Zimbabwe, its judges, lawyers and citizens can be proud that they produced such a famous son. And that he served the people long enough to leave an inspiring legacy.

The rule of law is not greatly tested when judges face decisions affecting members of the majority community. It is when they must decide a case

affecting small and unpopular minorities that the judge faces a moment of truth. Those who, like Tony Gubbay, emerge with their principles intact are heroes of the people and of the law.