

**A COMPARATIVE ANALYSIS OF STATE PRACTICE ON
THE PROMOTION OF RESPECT FOR THE RULE OF LAW
IN ZIMBABWE AND THE REPUBLIC OF SOUTH AFRICA.**

BY

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**Submitted in partial fulfilment of the requirements for the degree of
Master of Laws in the Department of public law and Legal Philosophy
in the Faculty of Law at the University of North West.**

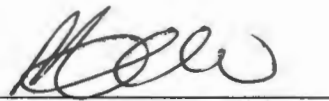
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SUBMITTED: 15 SEPTEMBER 2002

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I HEREBY RECOMMEND THAT THIS DISSERTATION BY CANDIDATE NO. 10070818 STEVEN SEKIRYA SERUMAGA-ZAKE ENTITLED RESPECT FOR AND OBSERVANCE OF THE RULE OF LAW, A COMPARATIVE ANALYSIS, FOR THE DEGREE OF MASTER OF LAWS IN THE DEPARTMENT OF PUBLIC LAW AND LEGAL PHILOSOPHY, BE ACCEPTED FOR EXAMINATION.

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I declare that the dissertation for the degree of Master of Laws at the University of North-West hereby submitted, has not previously been submitted by me for a degree at this or any other university, that it is my work in design and execution and that all material herein contained has been duly acknowledged.

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STEVEN SEKIRYA SERUMAGA-ZAKE

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ANC	African National Congress
BBC	British Broadcasting Corporation
BCLR	Butterworths Constitutional Law Reports
CNN	Cable News Network
CC	Constitutional Court
CIO	Central Intelligence Organization
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
FXI	Freedom of Expression Institute
ICCPR	International Covenant on Civil and Political Rights
IFP	Inkatha Freedom Party
LAAA	Land Acquisition (Amendment) Act
LGTA	Local Government Transition Act
LOMA	Law and Order (Maintenance) Act
MDC	Movement for Democratic Change
MP	Member of Parliament
MEC	Member of Executive Council
NGO	Non Governmental Organization

PAC	Pan Africanst Congress
RSA	Republic of South Africa
SALJ	South African Law Journal
SAJHR	South African Journal for Human Rights
SADC	Southern African Development Community
SARFU	South African Rugby Football Union
SABC	South African Broadcasting Corporation
SCZ	Supreme Court of Zimbabwe
UDI	Unilateral Declaration of Independence
UDHR	Universal Declaration of Human Rights
UNO	United Nations Organization
WWW	World Wide Web
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZBC	Zimbabwe Broadcasting Corporation
ZIM	Zimbabwe
ZNLWVA	Zimbabwe National Liberation War Veterans' Association
ZTV	Zimbabwe Television
ZLR	Zimbabwe Law Reports

Case Law

International case law

1. Attorney General of Canada v. Lawell (1974) 38 DLR (3RD) 481
2. Goodwin v. United Kingdom (1992) A ECHR
3. Golk Nath v. State of Punjab 1967 AIR SC
4. Furman v. Georgia 408 US. 238 (1973)
5. Thorgeirson v. Iceland (1991) A ECHR
6. Information Sovereign Lentia and Others v. Austria (1993) A 276 ECHR

South African case law

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1. Barolo and Others v. University of Bophuthatswana and Others (1995) (8) BCLR 108 (B)
2. Curtis and Others v. Minister of Safety and Security and Others, CCT 21 / 95
3. De Lille and Another v. Speaker of the National Assembly 1998 (7) BCLR 916 (C)
4. Larbi-Odam v. Member of the Executive Council for Education (North West Province) 1997 (12) BCLR 1655 (C)
5. Minister of Defense v. Standard Bank, HC 548 / 99
6. Moseneke and Others v. Master of the High Court CCT 51 / 200
7. National Media Ltd. and Others v Bogoshi 1998 (4) SA 1196 (SCA)
8. President of Republic of South Africa and others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) or 1999 (7) BCLR 725 (CC)
9. S v. B 1996 (2) SA CR 54 (C)
10. S v. Babeile (unreported)

11. S v. Williams 1995 (7) BCLR 861 (CC)
12. South Africa National Defense Union v. Minister of Defense 1999 (4) 469 CC or 1999 (6) BCLR 615 (CC)
13. S v. Heita and another 1992 (3) SA 785 (NM) 719
14. Van Royen and othres v. s and others CCT 21/ 01

Zimbabwe case law

1. Banana v. Attorney General (1) ZLR (S)
2. Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others 1993 ZLR (S)
3. Government of Zimbabwe v. Commercial Farmer's Union HC/2000 (Unreported)
4. Retrofit (Pty) Ltd. v. Telecommunications Corporation (SCZ) 1995
5. Re: Muhuneso 1995 (1) (ZSC) 557 C-D

TABLE OF STATUTES

South African Statutes

1. Black Administration Act No. 38 of 1927
2. Defense Force Act No. 44 of 1957
3. Powers and Privileges of Parliament Act No. 91 of 1963
4. South African Interim Constitution Act No. 200 of 1993
5. South African Final Constitution Act No. 108 of 1996
6. South African Local Government Transitional Act of 1993
7. South Africa Native Land Act of 1933
8. Labour Relations Act No. 66 of 1995

Zimbabwean Statutes

1. The Zimbabwe Constitution of 1980 as Amended
2. The Law and Order Act of 1960
3. The Zimbabwe Broadcasting Act of 2001
4. The Defense Force Act
5. Land Acquisition Act of 1992
6. The Land Apportionment Act of 1930
7. The Land Tenure Act of 1960
8. Prison Act of 1996
9. Promotion of Access to Information or Preservation of Privacy Act, 2002

International Statutes

1. The Universal Declaration of Human Rights 1948
2. The Delhi Declaration of 1959
3. The African Charter on Human and People's Rights
4. The Lagos Declaration Convention on the Rule of Law
5. The UN Declaration on the Independence of the Judiciary Of 1985
6. The Bangalore Principles of 1995

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* *

CHAPTER ONE: INTRODUCTION

1.0 STATEMENT OF THE PROBLEM

The rule of law has now become a universally accepted concept that is intrinsically connected to the promotion of respect for and observance of human rights. It is also perceived as an essential foundation of any democratic system of governance. Some internationally respected writers have presented the concept of the rule of law as the mark of a free society.¹ This is particularly so because where the doctrine is followed government exercises its powers only to the extent that this is sanctioned or conferred upon it by the authority of the law.²

Following this global trend, South Africa and Zimbabwe have, at different points in their history, adopted constitutions that embrace this internationally accepted norm, with the aim of ensuring the existence of governments that are answerable for their actions.

Against this backcloth, the purpose of this dissertation is to compare and contrast state practice in the Republic of Zimbabwe and South Africa as regards respect for and observance of the rule of law. Given this objective, the first chapter of this study outlines the research design adopted for the prosecution of the entire investigation. To this end, therefore, the rest of the chapter is divided into five sections: (1) statement of the problem; (2) rationale and significance of the study; (3) data collection and methodology; (4) scope and limitation of the study; and, (5) definition and explanation of the major concepts referred to in the dissertation.

1. Sartori, G; The theory of Democracy Revised, (1987) Chatham, New Jersey; at page 64,
Shen, Y ; Understanding the Complexity of the Rule of Law Reform in China (2000) Washington
University of Washington Press, 37

2. The Universal Declaration of Human Rights (UDHR) opens by stating ".... it is essential, if a man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..." The Lagos Conference Declaration on the Rule of Law, 1961 declares that, the Rule of Law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of individuals.....

1.1 THE PROBLEM DEFINED

It will be realized that the two countries under study have a lot in common. For example, a glance at the constitutional development of these two countries reveals a number of commonalities between these countries.

Both countries were under British colonial rule during which the Westminster style of governance, which advocated for the sovereignty of parliament as opposed to the supremacy of the constitution, was imposed.³

Historically, it was common in both countries that a sovereign parliament to which the majority blacks did not form part was used as a tool to pass racially discriminatory laws, all of which were to the disadvantage of the majority black population and to the advantage of the minority whites.⁴

In both countries the black majority had their political, economic and social rights denied by the white minority. Native blacks in both countries were made second-class citizens in their own countries. They were removed from their ancestral lands and instead resettled in inadequate reserves after their land was confiscated by the minority white settlers.⁵

Both countries, at some point in time, suffered from the consequences of sanctions imposed by the United Nations, the Commonwealth of Nations and the Organization of African Unity, as a result of the unacceptable policies of apartheid and denial of civil and political rights to the black majority.

3. South Africa was under the Westminster style of government up to 1993 while Zimbabwe was under the Westminster style of government up to 1981.

4. The Reservation of Separate Amenities Act No. 49 of 1953 of South Africa forced segregation in all public amenities, public buildings and public transport with the aim of eliminating contact between whites and other races. The Act stated that facilities provided for different races needed not to be equal. The Native (Prohibition of Interdicts) Act No. 64 of 1956, denied black people the option of appealing to the courts against forced removals. The Native Land Act, Act No. 27 of 1913, made it illegal for blacks to purchase or lease land from whites except in reserves. Likewise, Zimbabwe's Land Apportionment Act of 1930 and the Land Tenure Act of 1969 prohibited blacks to own land in white areas.

5. South Africa's Native Land Act of 1913, The Black Administration Act of 1927.

It was after the attainment of black majority rule in these countries in 1980 and 1994 respectively that saw the advent of non-racial, non-discriminatory constitutions, which substituted the principle of constitutional supremacy for that of parliamentary sovereignty.⁶

The land issue still remains one of the burning, unsettled issues in both countries given the fact that in both countries the minority whites own more than half of the land masses while the majority blacks are either landless or squatters. As a result of the long period of white minority domination, the two countries still face the daunting task of bridging the wide gap between the rich (white minority) and the poor (black majority).

1.2 RATIONALE AND SIGNIFICANCE OF THE STUDY

This dissertation is a comparative study on the observance of the rule of law in Zimbabwe and South Africa. The study is focused on the two countries because of their being in possession of constitutions founded on more or less the same principles. It is hoped that this study will contribute to a greater understanding of the different approaches adopted by the two countries in the course of internalizing those values, which are internationally accepted as benchmarks of the doctrine of the rule of law. It will help teachers, students and international lawyers to appreciate the likely causes of the failure by these two countries to respond positively to their international obligations and constitutional imperatives that require them to respect their international law obligations with regard to the respect for and observance of the rule of law.

In the case of South Africa, one other motivating factor is that the country is a young democracy, which is still in the process of consolidating her democracy. In this process, important lessons could be drawn from Zimbabwe's twenty years experience with a supreme constitution.

6. Worden N: Concise Dictionary of South African History (1998). The change took place in 1980 in Zimbabwe, while in South Africa the change took place in 1994.

1:3 DATA COLLECTION AND METHODOLOGY

In this study, because of the constraints of time and space, the study relied heavily on library resources such as articles in journals, books and other publications, decided cases, statutes etcetera.

An innovative and modern tool used in this study was the Internet. Due to its being one of the easiest means of access to the rest of the world, the Internet was of much help in locating fresh and current information on the general political, social and economic affairs of the two countries.

1: 4 SCOPE AND LIMITATION OF THE STUDY

The study is restricted to the periods from the time the two countries attained their democratic constitutions to date. This is because of the fact that it was only after independence that each of these countries obtained a non-discriminatory constitution⁷ providing for the respect for and observance of the rule of law.⁸

Because of the limitations of time and space, the study is restricted to exploring in depth the four major concepts of the rule of law, the combination of which has been internationally accepted as amounting to the doctrine of the rule of law.⁹

In its structure and composition, the study consists of five chapters. Chapter one is an introductory chapter. It deals with introductory aspects such as the statement of the problem under investigation, the rationale and significance of the study, data collection and methodology, definitions of the major concepts referred to as well as a summary of the chapter.

Chapter two deals with four major aspects. First, it provides a brief historical position of Zimbabwe and the features of its independence constitution.

7. Sections 23 (1) (a) of the Zimbabwe Constitution of 1980 and 9 of the Constitution of South Africa Act 108 of 1996

8. Section 1(c) of the South Africa Constitution of 1996 and Section 18 of the Zimbabwe Constitution of 1980

9. The Lagos Conference Declaration on the Rule of Law Op cit, n. 2

Secondly, the chapter deals with the first decade after independence that is (1980- 90) during which it can be said that there was respect for and observance of the rule of law in Zimbabwe. Thirdly, the chapter deals with the period from 1990 to date, this is the period at which it can be said that the rule of law collapsed. Chapter three deals with three major aspects. First, it provides a brief historical background to the constitutional development of the Republic of South Africa. Secondly, it examines the post-apartheid constitution of South Africa. Thirdly it looks at the position of the rule of law in South Africa since 1994 to date. Chapter four contains the findings of the study while chapter five contains the conclusions and recommendations of the study.

1. 5 MAJOR CONCEPTS DEFINED

It is instructive to define the major concepts used in this study.

1. 5.1 The doctrine of the rule of law

In addressing a question of this nature, it is instructive to start by defining and explaining what is exactly meant by the 'doctrine of the rule of law'.

The Victorian jurist, A V Dicey, is generally accepted as the leading authority on the doctrine of the rule of law. In his writings at the end of the Victorian age, Professor A.V. Dicey elaborated and explained the doctrine of the rule of law as having the following three major meanings:

1. Supremacy of the ordinary law (the principle of legality)
2. Equality before the law and
3. The right of personal freedom.¹⁰

10. A V. Dicey; An Introduction to the Study of the Law of the Constitution 8th edn. London, Macmillan; 1920 at p 183

1.5.2 Supremacy of the Ordinary law

According to Dicey, the first meaning (supremacy of the law) calls for the law to be supreme in the state. This means that all actions that may be taken by the authorities of the state must be based on and traceable back to an ultimate source of legal authority (the ordinary law of the land).

The existence of the principle of legality as one of the elements of the doctrine of the rule of law becomes evident from A V Dicey's declaration that "no man is punishable or can be lawfully made to suffer in any way except for a breach of the law established in the ordinary legal manner before the ordinary courts of the land."

An appreciation of Dicey's interpretation of the supremacy of the law as an element of the rule of law was seen in the Indian case of Golk Nath v. State of Punjab,¹¹ in which Subba Raj J, held that "no authority created under the constitution is supreme and all such authorities must function under such a supreme law." For instance, no one should be arrested or imprisoned except by the prescribed due process of the law, that is to say, the powers of the government should be exercised in accordance with the limits as established by the laws of the land. In other-wards, there is a need to have the basic rights of the citizens protected through rules administered by the ordinary courts.¹²

Many scholars and jurists have however criticized his exposition of the doctrine for being 'too narrow'.

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Both the Delhi Congress of Jurists (1959) and the Lagos Congress of Jurists (1961) criticized Dicey's approach in his exposition of the rule of law for being too much westernized as it basically expressed spiritual and intellectual values, neglecting the basic material needs that had yet to be satisfied in the third world countries like those on the Africa Continent.

11. 1967 AIR SC at 1643

12. A S. Mathews; The rule of law -An Assessment (1982)

Dicey's approach which is primarily concerned with issues such as liberty of the subject, freedom of expression, freedom of movement and the right to hold meetings,¹³ was viewed by the Lagos Congress of Jurists as being luxurious in the eyes of the third world nations.¹⁴ This resulted in the expansion of the definition of the rule of law by adding more elements to the definition.

The meaning of the doctrine was extended to accommodate more human needs. The Delhi Congress and the Lagos Congress of Jurists widened the scope of the rule of law by declaring that the "rule of law stood for values of a free society in which the supreme value of human personality is accorded the fullest respect; that such respect, that is, (for the value of human personality) called for the promotion and observance of man's economic and social needs as well as his spiritual and political freedom".¹⁵

With the aim of adding more essential needs of man in the scope of the rule of law, the meaning of the doctrine as provided by the Delhi conference was also reformulated in a document called the Law of Lagos at a congress, which was held in Lagos in January 1961 by 194 judges, practicing lawyers and teachers of law from twenty-three African countries as well as nine countries from other continents.

The Lagos congress viewed and interpreted the rule of law as "a dynamic concept which had to be employed to safeguard and advance the will of the individuals as well as their political rights and to establish social, economic, educational and cultural conditions under which the individual could achieve his dignity and realize his legitimate aspirations."¹⁶

13. A V Dicey, Op cit. n. 10 at 188, 193 and 195

14. A Mathews: Freedom, State Security and the Rule of Law (1986) Juta; Cape Town chap. 4 page 15.

15. The Delhi Declaration (1959) at page 196-4

16. The Lagos Report (1961) at page 11

In his book entitled Freedom, State Security and the Rule of Law Mathews (1986) criticizes Dicey's exposition of the rule of law for being limited to only basic civil rights.¹⁷ Likewise, Devenish, in his thesis entitled Constitutional Change and Reform in South Africa (1986), criticizes Dicey's exposition of the rule of law for having not exhausted the full ambit of the rule of law.¹⁸ Other writers on the topic such as SM Anthony, further scrutinized Dicey's trend and others as it will be shown hereunder.

The importance of such limitation of powers entrusted to public authorities by the doctrine of the rule of law was emphasized by Hiemstra J in his article entitled "Constitutions of Liberty", wherein he stated that "if parliament should grant the executive unlimited powers, then all the actions of the executive would be legal, but the rule of law would be grossly violated".¹⁹ More emphasis on the need to limit such powers entrusted to public authorities by the rule of law can be seen in A S Mathews's book entitled State Security and the Rule of Law (1986),²⁰ in which, while advocating for the recognition of the principle of legality as part of those qualities making up the doctrine of the rule of law, he maintained that the doctrine of the rule of law did not only need such acts to be authorized by the law, but it exceeded this level and demanded that "such authorized conducts be carried out according to the prescribed procedure."²¹ Cameron in his work on constitutionalism and the rule of law entitled "Rights, Constitutionalism and the Rule of Law",²² where his main focus was on the new South African constitutional order, stated that "South Africa's new constitutional order based

17. In this case what the Lagos Congress of Jurists meant was that values like the right to hold meetings, freedom of expression, freedom of movement etc. could not be enjoyed and appreciated by a person who lacks the basic material needs such as food, cloth, housing, and education as it is the case to the majority in Africa

18. E. George Devenish: Constitutional Change and Reform in South Africa (1986) Pretoria UNISA, LLD Thesis (unpublished)

19. AV. Hiemstra; (1971) SALJ 45 at 46

20. A. S Mathews, State Security and the Rule of Law (1986) Juta; Cape Town

21. A S, Mathews, Ibid. n. 20 at page 25

as it is on constitutionalism involves an existential experiment involving certain immanent premises. First it requires that government powers must be exercised through a system of defined procedures and limits."²²

It follows therefore that in terms of the rule of law, if an act carried out by any public authority was authorized, but executed in a manner that is not in line with the procedure as provided for by the law in force, a breach of the law in terms of procedure will have occurred, holding the responsible official accountable.

1.5.3 Equality before the law

Equality before the law, means that all persons should be subject to the same law and particularly the officials of the government of the day should have no special privileges substantially different from those of the ordinary individuals, nor should they be exempt from the jurisdiction of the ordinary courts.

Consequently, the rich and the poor, the powerful and the weak alike are subject to and are equal before the same law.²³ In his book Matthews explains the concept in these words "the principle of equality means that the standards should be equally and generally applicable"²⁴ In simple terms, the principle requires that things that are alike should be treated alike, while things that are unlike must be treated unlike in proportion to their unlikeness.²⁵

In a state where the rule of law is respected and observed, no one will be expected to be above the law. The doctrine requires every one to be subject to the ordinary law of the realm and answerable to the jurisdiction of the ordinary tribunals. In the Canadian case of Attorney General of Canada v. Lavell,²⁶ the Canadian Supreme Court held that, equality before the law had to be treated as

22. Cameron, (1997) *SALJ* 504 at 506

23. AV Dicey: Victorian Jurist, The Rule Law, (1980)

24. A S. Matthews Op cit. n. 12 at page 42

25. Dannis Davis, in Dugard's Right and Constitutionalism The New South African Legal Order, (1994) at 196

26. (1974) 38 DLR (3rd) 481 at 494

meaning equality in the administration or application of the law by the law enforcement authorities in the ordinary courts of the land.

1.5.4 The right of personal freedom

Dicey emphasized that, “under the rule of law, the general principles of the Constitution must be the result of judicial decisions determining the rights of private persons in particular cases before the court”²⁷

In other words, the meaning advocates the existence of a maximum respect for individual and group rights in terms of freedom and liberties. A judge of the Constitutional Court in South Africa has interpreted the right to freedom and liberty to imply the “independence from the constraint of another’s will.” He added that the right to freedom was a negative right of individuals not to have obstacles to possible choices and activities placed in their way by the state.²⁸

It calls for the rights to be vested in the individual; it is against the practice of such rights being conferred on the individual. That “those rights should be viewed as God given, hence be regarded as inherent in the individual.”²⁹ The statement means that these rights cannot be taken away from the individual as they are naturally given. In other words, they are inalienable though not absolute.

At this stage it is clear that the emphasis of the doctrine is on individual freedom by placing limitations on the exercise of power by those in government, and this is achieved by subjecting everybody to the same law. Therefore in its modern form, the rule of law advocates for the creation and maintenance of conditions, which will ensure the dignity of man as an individual and to ensure his personality.³⁰ In other words, in its modern form, the definition of the doctrine can

27. A V. Dicey; Law of the Constitution (1920) at page 191

28. 1996 (1) CC at Para. 54

29. Selby D; Human Rights (1987).

30. Delhi report page 194-6

be summed up as a fusion of the original position of the rule of law as provided by Professor Dicey and the Universal Declaration of Human Rights (1948).³¹

1.6 SUMMARY:

This chapter has attempted to introduce the dissertation by explaining its statement of the problem, its rationale and significance, the data collection and methodology that was employed, the scope as well as the limitation of the dissertation, and it lastly defined the major concepts employed in the study.

31. Op cit, n. 24

CHAPTER TWO. ZIMBABWE; THE DEVELOPMENT OF ITS CONSTITUTION

2:0. INTRODUCTION

In this chapter four issues are to be looked into. Firstly, we will look into the historical development of Zimbabwe. Secondly we will look at Zimbabwe's Independence Constitution and its amendments. Thirdly we will look at state practice with respect to the promotion of respect for and observance of the rule of law from 1980 to 2002 and lastly, we will look at the decline of the rule law in Zimbabwe.

2:1. Brief Historical Background of Zimbabwe

Formally known, as Southern Rhodesia, Zimbabwe is a land-locked country, located in Southern Africa. It shares a 125-mile (200 kilometers) border on the south with the Republic of South Africa and is bounded on the southwest and west by Botswana, on the north by Zambia and on the east by Mozambique. It has a total area of 150, 873 square miles.²³

The predominant groups of the population include the Shona, who make up about 70% of the total population. The Ndebele number about 16% of the total population, while the whites constitute about 2% of the country's total population. Although the Bantu languages of the Shona and Ndebeles are widely spoken, English is the official language.³³

Zimbabwe was formally a British colony. With the advancement of colonialism in the 1890s, the demand for gold, which was then one of the most prestigious minerals Zimbabwe, arose. In the year 1888, the leader of the Ndebele by the name of Lobengula entered into an agreement with the arch-imperialist by the name of John Cecil Rhodes in terms of which Lobengula granted Rhodes mineral rights by "consensus". This resulted in Rhodes's British South African Company

32. Black: A history of Rhodesia. (1978): Alfred Akropf, at page 6

33. Black: Ibid. n. 32 at page 4

occupying most of the region, which he later in 1895 named "Rhodesia".

As it was the case with most of the African territories which the whites wanted to take over by force, disagreements between the two races ensued which eventually turned into aggressive attacks on each other.³⁴

The crashing of the African resistance by the British in 1896 and 1897 and the reports of the presence of gold in the area saw more Europeans looking for the gate-way into Southern Rhodesia. In 1898, Britain recognized Southern Rhodesia (Zimbabwe) and Northern Rhodesia (Zambia) as separate territories.³⁵

A referendum, in which the whites chose to become a self-governing colony other than becoming part of the Union of South Africa, was concluded in 1922. This however, had an effect of excluding blacks from the vote despite the colony's non-racial Constitution which was in place and in 1923 Southern Rhodesia became a self-governing British colony. In 1961, Britain and Southern Rhodesia approved a new Constitution. The leading two black African parties however, boycotted the elections on the ground that very few blacks could vote. Because of their continued demand for a greater part for blacks in the government, the government banned these two black political parties, that is, ZAPU and ZANU.³⁶

The banning of the two black political parties was followed by the May 1965 elections in which Ian Douglas Smith's party won a two-thirds majority necessary to amend the Constitution. Smith's overwhelming victory in the May elections did not impress Britain to grant Southern Rhodesia independence, as it was not reflective of the black majority representation.

As a response to Britain's refusal to grant independence to Southern Rhodesia, Ian Smith (Prime Minister) called for a "Unilateral Declaration of Independence" (UDI) on the 11th of November 1965. Britain declared Smith's UDI illegal and

34. Black; *A history of Rhodesia*. (1978) New York: Alfred Akropf.

35. Black, *Ibid.* n. 34 at page 44

36. Black, *Ibid.* n. 35 at page 46

imposed economic sanctions on Southern Rhodesia. In 1968, the UN voted to make the sanctions mandatory but they were largely ineffective. The measures taken by the British government to force Smith to revoke the UDI and accept a black majority rule appeared useless as the economic sanctions imposed actually saw Rhodesia's economy grow.³⁷

Pressure from Britain and the United Nations continued on the Rhodesian government to have the political rights of blacks recognized. Black nationalists who had organized themselves to wage a guerrilla war on the white government also started military attacks clashing with the whites. With such pressure and an alarming number of whites leaving the country to avoid the on going clashes between the two sides, the then leader, Ian Smith, decided to enter into an agreement with the nationalists at the Lancaster House Conference in England in 1979 wherein he agreed to give them their political demands.

The Smith government's acceptance of the political demands of the black nationalists was subject to the following conditions:

1. They promised him a minimum of 28 seats out of the 100 seats in Parliament.
2. A veto over legislation for a period of ten years
3. White control of the army, air force, police, judiciary and the civil services.³⁸

Wars broke up there after that forced Smith to call for non-racial elections and both parties agreed to the formation of a new government. The elections were held in February 1980, with Mugabe's ZANU-PF winning the majority seats in the House of Assembly, which saw him becoming the Prime Minister (the highest executive post by then).

37. The World Encyclopaedia, World Book, Inc. 1989 Chicago USA.

38. Nyangoni Wellington, African Nationalism in Zimbabwe; (1978) Washington DC. Oxford University Press: America

On 8 April 1980, Britain recognized the country's independence and Rhodesia's name was officially changed to Zimbabwe. The economic, political and other forms of sanctions were lifted by Britain and other states and by the United Nations Organisation.

National elections were again held in 1985 and again Mugabe's party won. In 1987 the office of Prime Minister was abolished and replaced with that of the Executive President as the highest government post. Parliament elected Mugabe to the new office of the Executive President.³⁹

2.2 FEATURES OF THE ZIMBABWE INDEPENDENCE CONSTITUTION

Section 1 of the Zimbabwe Constitution declares Zimbabwe a sovereign state, meaning that Zimbabwe as a state does not only enjoy the power of supremacy over subjects within Zimbabwe's territory but it also enjoys the freedom to deal with its internal affairs without interference by other states.⁴⁰

Generally, the Zimbabwe Constitution reflects the constitutional principles of democratic values such as the rule of law, separation of powers,⁴¹ independence of the judiciary,⁴² supremacy of the constitution,⁴³ equality before the law et cetera. A concern for the fundamental rights and other values, which are in line with the internationally required standard, are also evident.⁴⁴

On top of the Declaration of Human Rights, the Zimbabwe Constitution contains provisions, which not only guarantee basic human rights and fundamental freedoms but good governance as well.⁴⁵ It reflects the values of liberal democracy and stands comparable to that of the Republic of South Africa.

39. The World Encyclopaedia; World book (1989) USA

40. I D Delupis; International Law and Independent States 2nd ed. (1987)

41. Chapters 4,5 and 8 of the Zimbabwe constitution of 1980

42. Constitution of Zimbabwe, Ibid. n. 41 at Section 79 B.

43. Constitution of Zimbabwe, Ibid. n. 42 at Section 12

44. Chapter 111 of the Zimbabwe constitution

45. Constitution of Zimbabwe, Ibid. n. 44 at chapter v.

In terms of Section 3,⁴⁶ the Constitution is the fundamental and supreme law of Zimbabwe.

All the three major organs of the state are fully subordinate to the Constitution, that is, to say the executive, legislative as well as the judicial powers are subject to the Constitution. It declares any other laws, which may be found to be inconsistent with the constitution void to the extent of the inconsistency.

The existence of the doctrine of separation of powers is evident from chapters 4, 5 and 8 where the executive, legislature and the judiciary are declared to be the main organs of the state.

2.2.1 The Executive branch of government.

The Executive is composed of the President and his Deputy, Cabinet Ministers, Deputy Ministers, the Police Force, the Defense Forces and the Prison Service.⁴⁷

As already mentioned, the office of the Executive President replaced that of the Prime Minister as the highest governmental post in 1987. The Constitution requires cabinet ministers to be accountable to both the President as the head of state and the legislature (Parliament). On top of being the head of state and of government, the Constitution declares the President as the Commander-in-Chief of the Defence Forces.⁴⁸

In terms of Section 27 (2) the President takes precedent over all other persons in the country.⁴⁹

46. Constitution of Zimbabwe, Op cit. n. 42 at Section 3

47. Constitution of Zimbabwe. Ibid. n. 46 Section 31 G (1)

48. Constitution of Zimbabwe, Ibid. n. 47 at Section 27 (1)

49. Constitution of Zimbabwe, Ibid. n. 48 at Subsection 2

2.2.2 Tenure of office of the President.

The term of office of the President is limited to six years,⁵⁰ provided that the President shall continue in office until the person elected as president at the next election of president assumes office.⁵¹ The Constitution is completely silent on whether a serving President may stand for office more than once, following the repeal in 1990 of Section 29 (1) (ii) which limited tenure to two terms. The President enjoys immunity from civil and criminal proceedings from the time he gets into that office till the end of his term of office as the president.⁵²

Section 29 of the Constitution calls for the removal of the President from office on a resolution of two-thirds of the members of parliament on reasons such as willful violation of the Constitution, gross misconduct and inability to perform the functions of his office due to physical or mental incapacity.⁵³

In other words, except where the impeachment is based on either of the grounds as provided for in paragraph b of Section 29, the language used suggests that non-willful and minor violations of the Constitution by the President do not qualify as justifiable grounds upon which the President can be impeached.

2.2.3 Powers and functions of the President.

In terms of Section 31H, the principal functions, powers and duties of the President include, negotiating and entering into international agreements, conventions and treaties, proclaiming as well as terminating martial law, pardoning offenders, declaring war and making peace, appoint the judiciary (on the recommendation of the Judicial Service Commission), appointing and removing the Deputy President as well as Ministers and other members of the cabinet. It should be noted that although he has the powers to dismiss his

50. Constitution of Zimbabwe, Ibid. n. 49 at Subsection 1

51. Constitution of Zimbabwe, Ibid. n. 50 at S. 29 (1)

52. Constitution of Zimbabwe, Ibid. n. 51 at Section 30 (1).

53. Constitution of Zimbabwe, Ibid. n. 52 at Section 29 (a), (b) and (c)



appointees (such as cabinet ministers), such powers are, to a certain extent limited. This is evident from the fact that any of such actions that may be taken by the President are subject to being reviewed or amended by a two-thirds majority of the members of the legislature. This is a proper reflection of the checks and balances principle.⁵⁴

Section 20 of the Zimbabwe Constitution guarantees the right to freedom of expression in these words:

except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive or impart ideas and information without interference, and freedom from interference with his correspondence

2.2.4 Administration of justice.

Section 79 (1) vests the judicial powers in the courts which are, (a) the Supreme Court (b), the High Court (c), the Magistrates Courts and other courts subordinate to these courts as may be established by or under an Act of parliament (d). After consultation with the Judicial Service Commission, the President appoints the Chief Justice and other judges of the Supreme Court and the High Court. The Chief Justice heads the judiciary.⁵⁵

Amongst other things, the courts are, in terms of the Constitution, vested with powers of judicial review as a result of which are required to interpret, implement and uphold the Constitution and the fundamental rights and freedom guaranteed thereunder.⁵⁶ Except where it has been reversed by the Supreme Court itself, or

54. Constitution of Zimbabwe, Ibid. n. 53 at Chapter V111 Section 79 A (a).

55. Constitution of Zimbabwe. Ibid. n. 54 at Section 84 (1)

56. Constitution of Zimbabwe, Ibid. n. 55at Section 80 and Chapter X11 Section 108 (1).

an Act of Parliament, the decisions of the highest court of the land (Supreme Court) are binding.

The courts are vested with the powers to declare any law or legislation invalid on the ground that it is in contravention of the Constitution.⁵⁷

To ensure that the judiciary is independent, the Constitution requires judicial officers not to be subject to the direction or control of any person or authority except to the extent that a written law subjects them.⁵⁸ In other words, the courts are subject only to the Constitution and the law that they are supposed to apply independently and impartially.

A judge of the Supreme Court or High Court may only be removed from office by the President on the recommendation of the Judicial Service Commission on grounds of inability to discharge the functions of his office arising either from infirmity of the body, mind or any other causes or on the ground of misbehaviour.⁵⁹

From the wording of Section 87 (1), it is evident that the President is vested with such discretionary powers as to decide whether or not the matter that has led to the removal of a judge from office should be investigated.

Where however, the removal from office of the judge is concerned with a judge of the Supreme Court or the High Court other than the Chief Justice, and it happens to be that in the opinion of the Chief Justice the matter ought to be investigated, the President will be obliged to appoint a tribunal to investigate the matter.⁶⁰

In term of Section 86 (2), a judge of the Supreme Court or a High Court may at any time resign his/ her office by notice in writing to the President.

The Constitution also provides for an independent Ombudsman whose duties include the investigation of complaints concerning violations of fundamental

57. Constitution of Zimbabwe, Ibid. n. 56 at Section 2

58. Constitution of Zimbabwe, Ibid. n. 57 at Section 79 B.

59. Constitution of Zimbabwe, Ibid. n. 58 at Section 78 (2).

60. Constitution of Zimbabwe, Ibid. n. 59 at Section 78 (3).

rights and freedoms, abuse of power, manifest injustice, high-handed treatment by government officials or private institutions et cetera. This office has powers to correct any violations by, amongst other ways, referring the matter to the courts or by judicial review.⁶¹

2.2.5 The legislature

Section 32 (1) of the Zimbabwe Constitution provides for a unicameral legislature, vested with the legislative authority of Zimbabwe.

The legislature consists of the President and Parliament.⁶² Subject to Section 76 (3) (b) of the Constitution, which provides for the Attorney-General as a member of Parliament but without the right to vote therein, Parliament consists of one hundred and fifty Members of Parliament. One hundred and twenty of the members are elected by voters registered on the common roll from the one hundred and twenty common roll constituencies, while eight of the MPs are Provincial Governors, appointed by the President as Members of Parliament ex officio. Ten of the MPs are Chiefs elected in accordance with the Electoral Law and the remaining twelve of the members are appointed by the President.

The Zimbabwe Constitution⁶³ requires MPs to elect a Speaker and his or her Deputy to preside over Parliament. The Speaker does not have to be a member but he or she must meet the qualifications for election. However, according to a report by the Research Unit of the Zimbabwe Human Rights NGO Forum,⁶⁴ the current Speaker of Parliament Emmerson Mnangagwa and his deputy Edna Madzongwe, are Presidential appointees to Parliament.

61. Constitution of Zimbabwe, *Ibid.* n. 60 at Section 108 also see J Hatchard's "Institution of Ombudsman in Africa with special reference to Zimbabwe", 35 *ICLQ* (1986) 255

62. Constitution of Zimbabwe, *Ibid.* n. 61 at Section 78 (2)

63. Constitution of Zimbabwe, *Op cit.* n. 57 at Section 39

64. A Special Report, Released on the 3rd September 2001 by the Zimbabwe Human Rights NGO Forum at Page 9

The report maintains that neither of these two (Speaker and his deputy) was elected to Parliament and neither attracted any opposition support in their election to their presiding positions.

Subject to the Constitution, the legislature is vested with powers to originate and pass legislation with regard to any matter and it may confer legislative functions on any person or authority.⁶⁵

2.3 Position of the rule of law from 1980-1997

From 1980 when the country attained independence till the late 1990s, the Zimbabwe government had been credited for ruling in accordance with the Constitution and the ordinary law of the land. Generally, respect for fundamental human rights as guaranteed by the Constitution and International Instruments such as the UN's Universal Declaration for Human Rights, the African Charter on Human and Peoples' Rights was evident in Zimbabwe. The country's recognition of and respect for human rights is discernible in the case of Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Other,⁶⁶ where Chief Justice Gubbay (as he then was), in interpreting the provisions pertaining to dignity, stated that,

the section meant nothing less than dignity of man. That it was a provision that embodied broad and idealistic notions of dignity, humanity and decency. He added that the provision guaranteed that punishment or treatment of the individual had to be exercised within the ambit of civilized standards.⁶⁷

65. Constitution of Zimbabwe, Op cit. n. 60 at Section 50

66. 1993 (1) ZLR 242 (S) at 265

67. Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others, Ibid. n. 66 at page 266.

The independence of the judiciary was beyond dispute. It is evident from the then decisions of the courts that the executive and other branches of the government could hardly interfere with the affairs of the courts in their functioning as it will be shown hereunder.⁶⁸

This independence of the judiciary resulted in the creation of a conducive environment for the judges and other judicial officers to execute their duties as required in a society having the rule of law as one of its founding principles.

Courts could feel free to pass judgments irrespective of whether they were opposed to the ruling party or not. This fact can be inferred from the case of Minister of Home Affairs and Another v. Dabengwa⁶⁹ in which the Supreme Court found that Dabengwa (subsequently appointed Minister of Home Affairs) who had been in detention for one hundred and sixty-two days, had not had his case reviewed "forth with" by a detainees tribunal as required by the constitution. Non-the less, the court refused to order his release, holding that the appropriate remedy was an order of mandamus directing the executive to remedy its failure. Such a courageous ruling was indicative of the fact that the judicial officials executed their duties without fear or favour of any other branch of the government but according to how the law required them to do. Similarly in the case of Catholic Commission for Justice and Peace in Zimbabwe v the Attorney General⁷⁰ wherein despite the fact that the executive clemency had been refused, the sentence of death upon four condemned prisoners was quashed and replaced in each instance with imprisonment for life. In the case of Nkomo v. Attorney General and Others⁷¹ the Supreme Court again substituted life imprisonment for the sentence of death, despite the fact that the exercise of

68. see *Infra*, 69 and 70 at page 22

69. 1983 (2) ZLR 346 (SC)

70. 1993 (2) ZLR 242 (SC) or 1993 (4) SA 239 (ZSC),

71. 1993 (2) ZLR 442 (SC) or 1994 (1) SA 34 (ZSC)

executive clemency had yet to be considered. It is also clear from the court's decision that the judiciary and other branches of the government appreciated the fact that all persons should be subject to the same law as enshrined in the Constitution.

The right to freedom of speech and expression, which is a well-known ingredient of democracy ⁷² was, to a certain extent, respected and protected by the courts.

Through their judgments and comments the courts illustrated how important the right to freedom of expression was in a country like Zimbabwe whose constitution is founded on such notions as democracy, the rule of law, transparency, equality et cetera. In the case of Banana v Attorney General⁷³ Gubbay C.J. (as then he was) said "freedom of expression is a right and its enjoyment is to be jealously guarded. It is recognized as a core value of society essential to truth, democracy and personal fulfillment"

Lawful publication of any matter of public concern by the press was seen as something acceptable and courts always did whatever was in their powers to suppress any unlawful interference with the free press. This is discernible in the case of Banana v. Attorney General⁷⁴ wherein while considering whether the publication of the facts of a pending case in the press could probably have a negative effect on the outcome of the case thereby violating the accused's right to a fair trial, Justice Gubbay ruled that "although an accused person has a right

72. John Van Der Westhuizen, in V. Dugard's Right and Constitutionalism, The New South African Legal Order (1994) at 264 presents freedom of expression as a right, which occupies a prominent place in any category of fundamental rights. He maintains that this right is central to the concept and ideal of democracy.

73. 1983 (1) ZLR at 197.

74. Banana v. Attorney General, Ibid. n. 73 at 103

to a fair and impartial trial, the public also have the right to know about such pending criminal cases and the media will have the right to inform the public about such matters".⁷⁵

Similarly in the case of Re: Munhuneso and Others,⁷⁶ while emphasizing the importance of freedom of expression, the court held that " the importance attaching to the exercise of the rights to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man".

The courts interpreted Section 20 (1) of the Constitution as not only protecting the contents of the information but as well as the means of transmission and the reception of such information. Inference can be drawn from the case of Retrofit (Pty) Ltd. v Telecommunications Corporation,⁷⁷ which, concerned a company that desired to provide a cellular telephone service in the country. The respondent was the Posts and Telecommunications Corporation, a parastatal company, which was established to provide telecommunication services, regulate radio stations and establish radio stations in Zimbabwe. Section 26 (1) of the Posts and Telecommunication Services Act of 1988 conferred on the respondent the exclusive rights to establish, maintain and operate telephone system in Zimbabwe. The applicant had requested the respondent to issue it with a license to establish and operate a cellular telephone service. The respondent declined the request on the ground that Section 26 gave it a 'monopoly' to provide such a service and that accordingly the respondent was unable in law to grant the applicant such a license. The applicant sought an order declaring that Section 26 (1) of the Postal & Telecommunication Services Act was inconsistent with Section 20 (1) of the

75. 1995 (1) (ZSC) 557 C-D at B and 127 1F

76. 1994 (1) ZLR 49 (SC) OR 1995 (2) BCLR 125 (ZS)

77. 1995 (2) ZLR 199 (ZSC) OR 1995 (9) BCLR 1262 (ZS)

Constitution of Zimbabwe. The applicant also sought an order directing the respondent to issue it with the license to operate such a telephone service in Zimbabwe. It was held that the protection of the freedom of expression applied not only to the content of the information but also to the means of transmission and reception of such information; that a restriction imposed on the means of transmission or reception necessarily interfered with the right to receive and impart information; and that any monopoly which had the effect of hindering the right to receive and impart ideas and information violated the right to freedom of expression. The court went further to declare Section 14 of the Post & Telecommunication Services Act inconsistent with Section 20 of the Constitution on the ground that it prohibited any person other than the (ZBC) from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.⁷⁸

2.3.1 Political rights of the individual citizens

As have been pointed out in the previous chapter at page 11, in its interpretation of the doctrine of the rule of law, the Lagos Congress of Jurists (1961) insisted on the existence of a climate conducive to the individuals to advance their political rights as one of the essential ingredients of the doctrine of the rule of law.⁷⁹

Between 1980 and 1997, the existence of such conditions which enabled individuals to advance their will and exercise their political rights was evident from the past events such as the presidential and parliamentary elections which took place.

According to the report as provided by the Bureau of Democracy, Human Rights and Labour, Zimbabwe's past presidential and parliamentary elections were all

78. Retrofit case, Ibid, n. 77 at page 130

79. The Lagos Congress of Jurists (1961)

generally fair and the winning was always a convincing one. Acts such as violence and intimidation of individuals because of being in favour of a given candidate or political party are reported to have been very rare.⁸⁰ It should however be noted that there were no strong opposition parties by then as it is the case at present.⁸¹ After agreeing that the rule of law was a powerful factor in protecting and advocating for the growth of the economy, the Lagos Congress in their interpretation of the doctrine of the rule of law, mentioned the positive growth of a country's economy as one of the significant factors of the respect for the rule of law.⁸² Zimbabwe's economy is reported of having experienced a positive growth, in the early 1980s, which saw it being ranked as one of the best performing economies on the continent.⁸³

2.4 The decline of the rule law in Zimbabwe

In recent years, the Zimbabwe government has been making headlines in the media for having embarked on activities that are against the rule of law. Principles such as the separation of powers, the independence of the judiciary, the supremacy of the Constitution, freedom of speech and the press freedom which were seen in chapter 1 to be the yardsticks for determining the existence of the doctrine of the rule of law, have been reported by the media and human rights activists as having been abrogated by the government of Zimbabwe, as it will be shown hereunder.

80. www.state.gov/www/global/humanrights/Zim.

81. After the National Working People's Convention which was held in Harare on February 26-28 1999, an agreement was reached, by the members to have a political party which could improve the standard of living for the employed and unemployed, improve the country's economy and restore the rule of law; thus the MDC political party was formed in May 1999. www.samara.co.zw/zctu/background.htm "Movement For Democratic Change (MDC) May 1999".

82. Lagos Congress of Jurists Op cit, n. 29 at page14

83. www.usaid.gov/gov/pubs/bj2001/afr/zw/ "Zimbabwe"

A number of possible causes for this change have been advanced; however, the failure by ZANU-PF to win the 1998 referendum which proposed the taking away of farms privately owned by white farmers by the government without payment of compensation and the outcome of the June 2000 Parliamentary elections⁸⁴ appear to have marked the turning point in state practice with respect to the rule of law as well as the entire political environment in Zimbabwe.

The upholding of the rule of law is supposed to start from those in power. In other words it should start from the three major government organs.⁸⁵

The question to be answered next is whether the three government organs of Zimbabwe have acted in a manner that shows respect for and observance of the rule of law? In the paragraph that follows, we endeavor to provide answers to this question.

2.4.1 The legislature

The rule of law starts with a democratically elected legislature.⁸⁶ Such legislature (Parliament) will then have to pass laws in accordance with the Constitution as the supreme law of the land and in line with the rules of procedure.⁸⁷

As pointed out earlier in chapter one,⁸⁸ much of the emphasis of the doctrine of the rule of law is on individual freedom,⁸⁹ by placing limitations on the exercise of power by those in government, which is achieved by subjecting every body to the same law,⁹⁰ thus the rule of law requires Parliamentarians not only to make

84. The referendum was voted against by the public and the June 2000 election saw the MDC opposition the strongest challenge ever to the ruling party.

85. A V, Dicey, Op cit. n.4 at page 32

86. Drunton D J; The Law and the Individual, (1979) The Macmillan; Press London at Page 37

87. Drunton D J, Ibid. n. 86 at page 39

88. Drunton D J, Ibid. n. 87 at page 39

89. A V Dicey Op cit. n. 80 at page 42

90. A S Mathews, Op cit. n. 19

these laws but to also obey them like any ordinary individual.⁹¹

It is however disappointing that the Zimbabwean Parliament has on a number of occasions failed to act as expected in a democratic society as it will be shown hereunder. It has performed its duties according to the way the executive branch wants it to do and not according to the principles of the rule of law as provided for in the Constitution. Among others, it has contravened its own rules of procedure, passed laws that are unconstitutional, and in contravention of the UDHR.⁹²

Individual Members of Parliament have on a number of occasions contravened the laws, as it will be shown hereunder, thus setting a bad example to the rest of the Zimbabweans.

2.4.2 Laws passed by Parliament in breach of Chapter 3 of the Constitution (Bill of Rights)

Most of Zimbabwe's Parliament's constitutional breaches relate to the role and powers of the executive especially the Presidency, for instance, Parliament gave its approval by amending the Constitution to protect presidential prerogatives from possible court challenges; to the State-President "appointing" 12 Members of Parliament and eight Provincial Governors.⁹³

At present in terms of the Zimbabwe Constitution, the President "appoints" 20 MPs to Parliament while over 7 million adult Zimbabweans "elect" 120 MPs!!! Surely, this is not in line with the principle of equality before the law as understood by the rule of law.⁹⁴

91. The Law of Lagos (Resolution) (1961)

92. Op cit. n, 2 at page 26

93. It has up to date failed to act against the non-democratic rules of the old white regime which the executive is reported to be applying to suppress the opposition. Laws such as the Law and Order (Maintenance) Act of 1960 are still on the statute book

94. Johnson R. W and Schlemmer L. Launching Democracy in South Africa, The First Open Election, 1994-1996 at page 45

On the side of specific laws, there are still a number of laws, which were inherited from the old racial white regimes,⁹⁵ which are not in line with the Bill of Rights as enshrined in chapter 3 of the Zimbabwe Constitution.⁹⁶

Despite the powers vested in the Zimbabwe Parliament to repeal these laws which violate the supreme law (Constitution) of the land, it has failed up to date to do so hence notorious laws such as the Law and Order Act of 1960 are still valid in Zimbabwe. Instead it is the courts, which are overturning section by section of these Statutes.⁹⁷ Inference can be drawn from the case of United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others.⁹⁸ in which the Supreme Court struck down a section in the Political Parties (Finance) Act on the ground that it violated the fundamental right to receive and impart information and ideas. The provision stipulated that, registered political parties with no less than fifteen elected members of Parliament, were entitled to receive money from the state every year, the precise amount being at the discretion of the Minister of Finance. The provision clearly restricted the ability of applicant political parties to engage in electoral free speech. It was argued that the fifteen-seat threshold requirement meant in effect that only the ruling party qualified for funding. The court observed that,

A high threshold for entitlement to receive state funding made it extremely unlikely that small but meaningful voices would be heard. In a relatively non-affluent society, where nothing like adequate funding from private sources is available, such a threshold renders it virtually impossible for political parties to gain any real margin of success.⁹⁹

95. The Law and Order (Maintenance) Act of 1960

96. The Law and Order (Maintenance) Act, Ibid. no, 95

97. Section. 50 (2) (a) of the (LOMA) were struck down by the Supreme Court for their unconstitutionality.

98. 1997 (2) ZLR 254 (SC), OR 1998 (3) SA 85 (ZSC)

99. United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others Ibid. n. 98 at para 45

The overturning of these offensive sections by the courts has resulted in the executive branch of the government accusing the courts of changing the laws.¹⁰⁰

During the period 1991-2000, the Parliament of Zimbabwe reportedly passed several amendments to the Declaration of Rights in the country's Constitution to the detriment of ordinary Zimbabweans.¹⁰¹

100. On the 22nd December 2001 the Daily Newspaper quoted Information Minister Jonathan Mayo accusing the judges of disrespecting the will of the majority Zimbabweans by invalidating the laws which were passed by Parliament. This is further discernible from the pressure that the judges were put under forcing them to retire

101. In early 1991 Parliament passed the Constitution of Zimbabwe Amendment Act (No.11). Two saving provisions were added to Section 15 (1) (the protection against inhuman or degrading punishment or other such treatment) (Zimbabwe Financial Gazette 19 March 1991 at page 2). The first enacted that corporal punishment inflicted upon a male under the age of eighteen years shall not be held to be inhuman or degrading. This amendment was reported to have had the effect of nullifying the decision of the Supreme Court (The Zimbabwe Financial Gazette 19 March 1991 at page3). It is submitted that this amendment also was inconsistent with Article 5 of the African Charter of Human and People's Rights and the United Nations Convention on the Rights of the Child.

The eleventh amendment was also reported to have altered Section 16, the protection against deprivation of property without compensation. It was reported of having reduced the amount payable in the event of expropriation from "adequate compensation payable promptly" to " fair compensation payable within a reasonable time". It was reported of having removed the right of an expropriatee to challenge in court of law the fairness of any compensation awarded (The Zimbabwe Financial Gazette 19 March 1991 at page 3). On the 19 April 2000, Just two months before the General Election was due to be held, The Constitutional Amendment (No. 16) Act was passed (The Daily Newspaper 20 April 2000 at 3). Whereas previously the owner of agricultural land compulsorily acquired for settlement of people had to be compensated, the amendment spelt out that such obligation no longer pertained; it was the exclusive responsibility of the former colonial powers to do so. (Daily Newspaper 20 April 2000 at 4)

Parliament was reported by the media to have passed what the Internet Service Providers referred to as the "draconian", Post and Telecommunications Bill without any Parliamentary debate on the issue.¹⁰² The controversial Bill was reported by the media¹⁰³ to have been aimed at curtailing existing freedoms.

The Zimbabwe Parliament has been reported by the media to have passed a number of Bills despite the rejection of such Bills by the Parliament's Legal Advisor on the ground that they were unconstitutional. Such Bills included the Land Acquisition (Amendment) Act of 1992 and the Broadcasting Services Act of 2001.¹⁰⁴

The Land Acquisition Act of 1992 was reported by the media to have been rejected unanimously by Parliament's Lands, Agriculture and Rural Resettlement Portfolio Committee.¹⁰⁵ The Act was reported¹⁰⁶ to have been passed in two days by 61 to 49 votes, gazetted into law on the 7th of November 2000. It was reported¹⁰⁷ to have replaced the earlier Amendment gazetted using the Presidential powers (Temporary Measure) Act at the time when both were under constitutional challenge in the Supreme Court. The ruling Party was reported¹⁰⁸ to have refused to accept that the Land Acquisition (Amendment) Act of 2000 was unconstitutional and an attempt to pre-empt a Supreme Court ruling was reported. The Speaker's defending of the Act by claiming that Parliament's Legal Committee had given it a non-adverse report was reportedly¹⁰⁹ disputed by

102. It was provided in the International Freedom of Expression Report of 1999

103. International Freedom of Expression Report of 1999, Ibid. n. 102 at page 24

104. 3/2001, Cap 2.06 and (15/ 2000, Chapter 20:10)

105. Parliamentary Debates 27, 26: 2710, 2713

106. Andrew Meldrum, Mail and Guardian 21st October 2000 "Controversial Land Law Passed"

107. Mail and Guardian, Ibid. n. 106 at page 9

108. Foster Dongozi The Daily Newspaper 22nd of March 2000(A Big Question Mark on the Legality of the LAAA)

109. The Daily Newspaper Ibid. n. 108 at page 12

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a member of the Committee, Welshman Ncube (MDC Bulawayo North-East).¹¹⁰

The Daily News¹¹¹ reported that the Zimbabwe Council of Church's expressed concern about another undemocratic practice of fast-tracking of crucial Bills through the House which prevents the possible existence of a broad-based consultation before the Bill can be passed.

As already indicated at the beginning of this chapter, the Constitution¹¹² requires MPs to elect a Speaker and Deputy Speaker to preside over Parliament. However, according to the report by the Zimbabwe Human Rights NGO Forum,¹¹³ the former speaker of Parliament Mr. Mnangagwa and his deputy Madzongwe were presidential nominees to Parliament. None of the two was elected by Parliament and none of them attracted any opposition support in their election to the presiding positions.¹¹⁴

After the opposition's strong move to impeach the President, in the first session of the fifth Parliament, the Speaker was reported by the Zimbabwe Independent Newspaper to have told a ZANU-PF gathering on the 25th October 2000, in Zhombe and Nembudziya that he would make sure the impeachment process did not succeed.¹¹⁵

110. Trevor Ncube Zimbabwe, Independent Newspaper 27th November 2000 (Parliamentary Legal Committee Disputes Speaker's Claims over the LAAA)

111. Parliamentary Debates 27,25: 2475:27,26: 27,27:2831

112. The Daily Newspaper "The Zimbabwe Council of Churches expresses concern on Zimbabwe's democracy" by Foster Dongoai at Page1-2

113. Op cit. n. 10 at Section 39

114. Special Report No. 3 by the Research Unit of the Zimbabwe Human Right NGO Forum September 2001

115. Zim Human Rights NGO Forum Report of 2001, Ibid. n. 114 at page 22

2.4.3 Violation of the law by the individual Members of Parliament

From the June 2000 Parliamentary elections, ZANU-PF had 62 elected Members of Parliament. According to the Zimbabwe Human Rights NGO Forum Report,¹¹⁶ 15 of these MPs were named as having been directly and personally implicated in political violence during their election campaigns.¹¹⁷

A number of ZANU-PF MPs have been reported by the media to have played a big role in the still on-going invasions of white-owned farms. For example, television footage¹¹⁸ recorded Philip Chiyangwa (ZANU-PF MP, Chinhoyi) inciting party youths in the still on going invading of the white-owned farms.

2.4.4 Violation of the law by the executive

The executive branch of the government has the responsibility of enforcing the laws passed by the legislative branch of government. In executing this duty, the law enforcers are, in terms of the doctrine of the rule of law, supposed to act within the empowering statutes.¹¹⁹ They themselves are not supposed to be above the laws they are enforcing.¹²⁰ Zimbabwe's executive branch of government has however, failed to honour the above principles and functions. Despite the cardinal duty upon the President, as the head of state and of the executive branch, to uphold the Constitution and to ensure that its provisions and other laws are faithfully executed,¹²¹ the President has, instead, led his supporters and sycophants in violating the provisions of the Constitution and other laws as it will be shown hereunder. The police, the army, the intelligence agencies and the prison authorities have not only acted outside

116. Zim Human Rights NGO Forum Report of 2001, Ibid. n. 105 at page 22

117. Zim Human Rights NGO Forum Report of 2001, Ibid. n. 106 at page 13-14

118. Shot by ZTV, but screened on BBC via SABC 2 on the 9th 09 2001

119. A. S Mathews, Op cit. n. 19 at 42

120. A V Dicey, Op cit. n. 14 at 63

121. Section 31 (2) of the Zimbabwe Constitution of 1980.

the boundaries of the empowering statutes but have also considered themselves to be above those laws they enforce as it will be shown hereunder.¹²²

2.4.5 Violation of the law by the head of the state

Section 23 of the Zimbabwe Constitution and Section 6 of the Prevention of the Discrimination Act of 1999 prohibits discrimination of any kind whatsoever. The President has however, on several occasions, been quoted by the media delivering hate speeches, which are aimed at inciting violence and killings of Zimbabweans of European extraction.

In March 2001, the Zimbabwe President was quoted as¹²³ saying, "those who try to cause disunity among our people must watch out because death will befall them". Zimbabwe's Financial Gazette¹²⁴ and other newspapers quoted him while he was addressing the ZANU-PF supporters at a congress as saying that "we must continue to strike fear into the heart of the white man our real enemy"¹²⁵ He was reported¹²⁶ to have threatened the white farmers with 'very very severe violence' if they were to take any action against anyone invading their farms. The

122. See *Infra*, at page 39-38. Also evident in who was responsible? Alleged perpetrators and their crimes during the 2000 Parliamentary Election period. (by the Zim Human Rights NGO Forum.

123. Rhodah Mashavae, The Daily News 17th March 2001 "Opposition Warned by the President" at Page 7

124. Sydney Masamvu, Financial Gazette 29th 04 2000 "President Declares Violence on Farmers" at Page 2

125. James Ncube, The Daily News 14th, December 2000, "Farmers named as Government's First Real Enemy" at 4

126. Financial Gazette, *Ibid.* n. 125 at page 9

President was quoted to have described white Zimbabwean, as the enemies of the state.¹²⁷ On the 3rd of February he was reported by The Sunday Mail to have promised to come up with new disciplinary measures against the white farmers.¹²⁸

The President has on a number of occasions been quoted by the media as warning Judges not to interfere with the government's determination to acquire land, saying,

"this is a political (land issue) and not a legal matter.... The land issue is not for the courts. It seems the judges did not hear me clearly on this one.... We will take the land in a political struggle. If courts want compensation, then they should go to Britain...If the technicalities continue to hamper the process, I (President Mugabe) Together with Vice-Presidents.... Will do it on our own"¹²⁹ "The courts can do whatever they want but no judicial decision will stand in our way. My position is that we should not even be defending our position in the courts. We can not brook interference or court impediment to the land acquisition programme"¹³⁰

President Mugabe has been reported by the media and Human Rights Organizations as having misused his prerogative of mercy powers to suit his needs and his political supporters.¹³¹ He has used the prerogative of mercy powers to pardon his supporters who had been found guilty and sent to prison for

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127. E chawinga The Zimbabwe Independent newspaper, 15th December 2001 "Framers named Reaal Enemy" at 3
128. D Jonathan, The Sunday Mail 3rd 02 2002, "Zimbabwe President Threatens Sterner Action Against Unrepentant Whites" at Page 4
129. E. Joshua, The Sunday Mail 28th 01 2001, "Mugabe want Courts out of Land Issues" at Page 8
130. Zimbabwe Independent 15th December 2000, "ZANU-PF, Determined to Grab Land" by Staff Reporter
131. In 1998 the President used the Prerogative of Mercy Powers and pardoned 14 ZANU-PF supporters who had been found guilty of political violence

political violence.¹³² He was reported by the Zimbabwe Independent Newspaper¹³³ to have granted amnesty to ZANU-PF members who had been involved in political violence from the beginning of January 2000 to the end of July 2000, while at the same time declining to include members of other parties imprisoned for over 10 and above years on similar charges. This is parallel with the pardoning of prisoners by the President in South Africa in such a way that it is unfairly discriminatory. For example on 13 May 2002, the Star Newspaper reported 33 prisoners who were granted presidential pardon. According to the Newspaper, the prisoners were ANC and PAC members who were denied Amnesty by the Truth and Reconciliation Commission.¹³⁴

The Zimbabwe President has also used his presidential powers and his Constitutional prerogatives to promulgate subordinate legislation, which he relies upon in his violation of the principle of the rule of law,¹³⁵

The failure to act against administrative, financial and political corruption is another way in which the executive has failed to uphold the rule of law. This was evident in one of the trials of the top executive officials of the Zimbabwe government Mr. Kumbira Kangal (Former Minister of Lands and Agriculture), on charges of corruption. During his trial, the official reportedly told the court that his

132. In 1988, the President used the Prerogative of Mercy Powers and pardoned 14 ZANU-PF supporters who had been found guilty of political violence.

133. 13 / 3 / 2000

134. The Star Newspaper 13 May 2002 "Row brews After Mbeki Pardons Prisoners" at page 6

135. S1 176A / 1993 which nullified a specific High Court eviction order and S 1 148 /1994, which allowed the Permanent Secretary for Justice Legal and Parliamentary Affairs to forbid sales in execution of private homes. S1 240B / 1999, which amended regulations under Prison Act and conferred powers on warders. It should be noted here that this was after a Supreme Court judgment, which enforced remand prisoners' rights.

acts had the approval of President Mugabe and the cabinet.¹³⁶ A number of other cases of corruption involving the President have been reported by the press. For instance in 2001 it was reported¹³⁷ that the three prefabricated houses which President Mugabe commissioned in Kambuzuma on 22nd August 2001, had been constructed without the City Council planning approval.

The Minister of Foreign Affairs, Stan Mudenge, was quoted by the Daily News¹³⁸ as telling staff members and student of Masvingo Teacher's Training College that "you are going to lose your jobs if you support opposition political parties in the presidential elections. You can even be killed for supporting the opposition and no one will guarantee your safety"

What the Minister warned of those in support of the opposition soon became a reality when civil servants began to be dismissed from their jobs for supporting the opposition.

It was reported by the Financial Gazette¹³⁹ that the government suspended the assistant district administrator of Bulimamagwe district and 10 junior employees of the local authorities in Plumtree on charges that they were sympathetic to the MDC. Gabriel Karonga, the MDC vice-chairman for Hurungwe West district was reported¹⁴⁰ to have been dismissed from his job in Mashonaland West after threats by the so-called war veterans.

136. Foster Dongozi, The Daily News 23rd / 05/2001 "Corruption Scam Approved by the President" at page 5

137. Sunday wodraw, The Standard Newspaper 18th 07 2001 "State Prefabricated house illegally built" at page 11

138. Rhodah Mashavave, The Daily News 18th 07 2001 "Jobs to be Lost for supporting Opposition" at page 9

139. Sydney Masamvu, 15th of January 2001 (Top District Official Suspended)

140. Chris Gande, Daily News 21st May 2001, "Top District Officials Suspended" at page 7

The Deputy Minister of Education was quoted¹⁴¹ as saying "his ministry would not provide security to teachers affected by violence perpetrated by ZANU-PF supporters".

A number of police officers were reportedly threatened with dismissals for allegedly attending a Christmas party hosted by an MDC politician in Chegutu.¹⁴² In July 2001 the Commissioner of Police was quoted as saying "police who are anti-government and in support of the opposition would be kicked out of the force"¹⁴³

2.4.6 Violation of the law by other executive branch members (Police, Army, and the CIO)

The MDC's Provincial Secretary was quoted¹⁴⁴ as criticizing the police for applying the law selectively, in their usual pattern of arresting MDC supporters involved in violence while failing to act against the ZANU-PF people similarly involved.

A number of reports of police's refusal to accept complaints, particularly against members of the ruling party have been reported by the media. One young man reported that war veterans had taken over as policemen in some places.¹⁴⁵

141. Chris Gande, The Daily News 13th 06 2001 "Minister Supports violence against ant-government Teachers" at page 8

142. Luke Tomborinyoka, Daily News 9th 01 200, "Police Officers' future threatened after MDC party" at page 10

143. Herald 11th July 2001 "Opposition Supporters to be kicked out of the Police Force" at page 9

144. Luke Tomborinyoka, Daily News 18th July 2001 "Zim. Laws Enforced Selectively" at page 12

145. Trevor Ncube, Zimbabwe Independent Newspaper 24th Agust 2001 "War Veteran take over as state Police" at page 2

He was quoted as saying "the police are not doing anything, the war veterans are fed at the District Administrator's offices in our area and are paid every months".¹⁴⁶

The police have on several occasions been reported by the media as having failed to enforce the judgments of the courts. Inferences can be drawn from the case of Government of Zimbabwe v Commercial Farmer's Union¹⁴⁷ in which the Supreme Court ruled for the second time that Mugabe's government policy of seizing privately-owned white commercial farms was illegal, hence unconstitutional as it was contrary to what the Constitution and the Land Acquisition Act of 1992 prescribed. The five judges thereby ordered the police "to use all means and authority available to end the land occupations".¹⁴⁸ Despite this order the illegal land occupations continued.

The Daily News¹⁴⁹ and the Zimbabwe Mirror¹⁵⁰ reported the police's involvement in the looting of commercial farms and properties thereon. Both papers' senior staff were arrested, questioned and threatened with charges of criminal defamation and or publishing subversive material¹⁵¹

Such police involvement in unlawful acts and its failure to enforce the law impartially calls into question the application of the rule of law in Zimbabwe.

In August 2001, the Daily newspaper¹⁵² reported the shooting to death of detective George Dhokwani by a soldier who was guarding an army officer's private house.

146. Independent Newspaper, Ibid. n.145 at page 4

147. H.C/ 2000. (Unreported)

148. H.C/ 2000. (Unreported)

149. E Bara. 17th 08 2002, "Law Enforcers leads Law breaking" at page 9

150. Chris Gande ,18th 08 2002 "Zim Police gives a hand in the looting of white farm equipment" at page 4

151. Foster Dongazi Daily News paper 19th 08 2002, "Daily News and Zim Mirror Senior Staff Arrested" at Page 3

152. Sam Munyavi , 31 08 2001 "Police detective short dead" at page 7

It was reported¹⁵³ that the soldier was initially taken into custody, but later released after the alleged intervention of unnamed army officials.

The Mail and Guardian¹⁵⁴ reported the alleged plot by the CIO to assassinate the editor of an anti-government newspaper which failed after the hit-man decided not to go ahead with the murder as planned. The newspaper reported that the murder of Geoffrey Nyarota, the then editor of the Daily News was going to be the first of the several killings of anti- government figures. The hired hit-man was reported to have confessed that he was hired by the CIO to murder the editor because the paper was a "formidable opponent of the government"¹⁵⁵

2.4.7 The role played by the Judiciary

The judiciary is the branch of the government which has the responsibility of interpreting the laws of the land so as to fulfill the objectives of the Constitution and to use these laws to decide disputes between parties. They are therefore, as a constitutional imperative, required to be neutral and impartial while presiding over disputes, dispensing justice without fear or favour.¹⁵⁶

2.4.8 Enforcement of the rule of law by the judiciary

By September 2001, the Zimbabwe judiciary comprised of eight judges of the Supreme Court, a High Court bench of nineteen judges (after the three resignations) and a Labour Court of four judges.¹⁵⁷

With a previous good record of respecting the Constitution and the principles of the rule of law in executing their duties, judges have been reported by the media to have had it "rough" in the execution of their duties in recent years

153. Sam Munyavi Daily Newspaper Ibid. n. 152 on the 10th 09 2001 "Detective Dhokwani's killer unaffected by the law" at page 2

154. Foster Dongazi , 2ndth 02 2001 "A plot to murder Daily News Editor" at page 4

155. Daily Newspaper, Op cit, n. 153 at 7

156. Chapter vii Section 79 of Zimbabwe Constitution

157. Daily Newspaper, Ibid. n. 156 at 38

The cardinal cause of such a rough environment on the judiciary has been reported by the media to have been purely political and relating to the constitutional referendum, the outcome of the June 2000 Parliamentary elections and the land issue as it will be shown hereunder.

Until late 2001, Zimbabwe Judges are on record as having been acting in line with the Constitution and the principles of the rule law, in that they tried all cases in accordance with the law, even when the Police, Attorney General's office and some court administrators were discriminatory in their handling of cases as it has already been indicated above.¹⁵⁸ Complaints against the police's failing to act where they were supposed to act have been making headlines since 2000.¹⁵⁹

The Supreme Court of Zimbabwe is the country's Superior Court of record and also acts as the final court of appeal.¹⁶⁰ It is headed by the Chief Justice as the head of the Judiciary.¹⁶¹ The Supreme Court has original jurisdiction to redress any alleged contravention of the Bill of Rights¹⁶².

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158. On the 7th of July 2001, The Financial Gazette Newspaper, reported the disappearance of a police docket, from the Attorney General's office, in which the MDC leader M Tsvangirai had been charged with terrorism. The Newspaper noted that the incident happened after Justice Chinehengo had asked the Supreme Court to determine whether Section 51 (2) and Section 58 of the Law and Order (Maintenance) Act under which Tsvangirai was charged did not contravene Constitutional Rights. While responding to the charges of inciting public violence which were laid against his client Nelson Chamisa (the DMC national youth chair) Advocate Innocent Chagonda was reported by the Daily Newspaper on the 9th of February 2001 to have argued that "certain people in certain quarters have not been charged under the same section, with particular reference to ZANU-PF which has openly boasted of having degrees in violence. The selective application of justice is totally undesirable in a democracy. You cannot have one section of the population enjoying immunity while the other does not, when they have both made utterances likely to cause violence"

159. Daily Newspaper, Op cit. n. 49 at page 9

160. Constitution of Zimbabwe, Op cit. n. 25 at Section 80 (1)

161. Constitution of Zimbabwe, Ibid. n. 160 at Section 79 A (a)

162. Constitution of Zimbabwe, Ibid. n. 161 at Section 24

From 1999 to 2001 the Supreme Court ruled as unconstitutional a number of executive actions¹⁶³ and declared provisions in many statutes unconstitutional¹⁶⁴ after finding that they were violating the Declaration of Rights and other provisions of the Constitution. Most of these cases involved the executive as an interested party, thus the court's ruling against the State was reported by the media to have annoyed the authoritarian politicians of the ruling ZANU-PF party, resulting in the relationship between the two branches of government getting tense.

Despite such continued reported political interference with the judiciary by the executive branch, most of the judges were reported by the media to have rejected to facilitate the executive desires, they lost their jobs including the respected former Chief Justice, Anthony Gubbay who at one point in time called on the government to provide him and his fellow judges with security from possible attacks by the ruling party supporters.¹⁶⁵

On 14 February 2001, the Daily Newspaper quoted the General Bar Council of Zimbabwe as saying however, at the start of 2001 the Law Society of Zimbabwe was still confident that the courts of Zimbabwe will continue to uphold the Constitution without fear or favour.... They have been impartial

163. In the unreported case of The Government of Zimbabwe v. Commercial Farmers Union. H.C/ 2000 the Supreme Court ruled for the second time that the 'government's policy of seizing privately owned white commercial farms was illegal and unconstitutional'. "The five judges were reported by the Daily Newspaper of 9th April 2001 to have ordered the police to use all means and authority available to end the land occupation"

164. The Supreme Court struck down Section 50 (2) (a) of the Law and Order (Maintenance) Act of 1960 and the amendments to Section 5 (4) of the Land Acquisition Act of 1992 which incorporated retrospective provisions originally gazetted using the Presidential Powers (Temporary measures) Act were also struck down. On the 8th of March 2002, the Daily Newspaper reported the Supreme Court's confirmation of the High Court ruling that the State President could be sued in his official capacity.

165. On the 26th of April 2001, the Zimbabwe Independent Newspaper quoted the ZANU-PF MP. Kadoma West Zacharia Ziyambi in Parliament as saying, " when we are at this stage of pursuing our revolution, they (the Judges) need also to play the tune... They also need to bend down and do like what the revolution requires us to do"

fearless of the public clamour, regardless of public praise and indifferent to private political or partisan influences. They have administered justice according to the law.¹⁶⁶

Prior to the replacement of the old judges with the present judges, the media reported a number of attacks on the judiciary by other senior politicians. Among those attacks was the attack by the Justice Minister Patrick Chinamasa which was reported on 7 November 2000.¹⁶⁷ The paper quoted the minister as calling for the removal of the Chief Justice because he was first appointed to the High Court by the 'racist Smith's regime'. The Minister was repeatedly quoted as saying,

the government would not rest until there was a complete overhaul of the judiciary. 'Eurocentric' judges regarded as being in conflict with the other arms of the government and perceived as constituting the main opposition to the ruling party would have to go. Judges should be politically correct: If they behave like 'unguided missiles, I wish to emphatically state that we will push them out'. The present composition of the judiciary reflects that the country is in a semi-colonial state, half free, half enslaved.¹⁶⁸

On 4 March 2001,¹⁶⁹ the Standard Newspaper quoted one of the war veteran leaders in Harare as having vowed to oust the entire Supreme Court bench and the four black High Court judges. The young leader was quoted as saying,

we are not afraid of the High Court.... This country belongs to us and we will take it whether they like it or not. The judges must resign. Their days are now numbered as I am talking to you.... I am telling you what the comrades want, not what the law says.¹⁷⁰

166. Staff Reporter, It was also reported by the Herald Newspaper on the 19th of January 2001 "lawyers still trust judges"

167. Rhodah Mashavave, The Daily Newspaper (Justice Minister wants Chief Justice out) at page 4

168. Daily Newspaper, Ibid, n. 167 at 8

169. Ibid. Colin Matiza, at page 6 (War Veterans Vow to oust the entire Supreme Court Bench)

170. The Daily Newspaper, Ibid, n. 169 at 7 (War Veterans Vow to oust the entire Supreme Court Bench)

Mike Moyo, (the deputy chairman of ZNLWVA) Harare branch, was quoted by the Daily News in these words " The judiciary must go home or else we will have to chase them and close the courts indefinitely until President Mugabe appoints replacements."¹⁷¹ The Standard Newspaper reported the ruling party as having used the ZBC to call upon its MPs to be in Parliament on the 28 February 2000 when it was reported by the Standard Newspaper to have defeated the MDC's motion to support the judiciary.

Three weeks later, the Herald Newspaper¹⁷² reported the threat by the executive branch of the government to have the judges removed by force if they did not resign within a fortnight. Two months later the ruling ZANU-PF party was reported by the Standard Newspaper as having passed on its own a parliamentary motion of "no confidence" in the judiciary.¹⁷³ Thereafter more pressure was put on the remaining non-black judges from the Supreme Court and the High Court to resign. They were initially reported by the media to have refused to resign, as a result of which Jonathan Moyo (the Information Minister) was reported¹⁷⁴ to have threatened to apply the law to get rid of these unwanted judges. Eventually the two High Courts Judges who had repeatedly found the state guilty of violation of people's fundamental human rights were reported to have resigned.

2.4.9 Independence of the judiciary

The Hon. Justice Michael Kirby AC CMG, defined judicial independence as "the ability of judicial officials to conduct their work free from improper pressure by the executive, by litigants and by particular pressure groups."¹⁷⁵

171. Foster Dongazi 20 November 2001 "ZNLWVA Leader wants the Judiciary out" at page 3

172. 24 January 2001 at page 4

173. 17 May 2001 at page 7

174. The Herald 23rd of February 2001 "Minister to come up with law to get rid of unwanted judges" at 13

175. In a paper presented at the International Bar of Association Human Rights Institute Conference held in Hong Kong on 12-14 June 1998 entitled 'Independence of the Judiciary, Basic Principles, New Challenges' at page 17

Since 1998 Section 79(B) of the Zimbabwe Constitution, which guarantees the independence of the judiciary, has suffered countless unlawful attacks by the government and the supporters of the ruling party. The media and eyewitnesses have reported cases of harassment, intimidation and threats against the judiciary.

Such attacks on the judiciary came after the courts outlawed the unconstitutional acts by the executive and the ruling party followers.¹⁷⁶

It is evident from the discussion hereunder that the executive branch has eventually managed to emasculate the independence of the judiciary. Such attacks by the executive over the judiciary became a reality when it managed to force the "old judges"¹⁷⁷ from both the Supreme Court and the High Court out of the system and replaced them with those who were reported by the media to be allies of the ruling party.¹⁷⁸

Such loss of confidence in the independence of the judiciary is evident from the expression by the lawyers for the twenty-one Chinhoyi farmers who were charged with public violence.

176. See *Infra* page 44-45

177. www.CNN.com/World/Zimb, who had worn a reputation of being impartial from the general public

178. Justice Godfrey Chidyausiku was sworn in as the Chief Justice in mid-March 2001, replacing Chief Justice Gubbay. Justice Vernanda Ziyambe from the Harare High Court, Justice Misheck Cheda and Justice Luke Malaba from Bulawayo High Court were promoted to the Supreme Court bench in July 2001. The Zimbabwe Independent newspaper of 24.08.2001 reported Justice Luke Malaba and Misheck Cheda as having benefited from the government's opaque land lease scheme. Those appointed to the High Court were: Rita Makarau (Reported by the Herald newspaper 22.12.200 to have been a former non-constituency (appointed) MP and a member of the Government's Constitutional Commission; her law-firm partner in a law-firm Annie Gowora; Ben Hlatwayo, a former University of Zimbabwe law lecturer who was reported by the media to have been a member of the Government's Constitutional Commission; Charles Hungwe, reported by the media to be an ex-combatant; Antonio Guvava, reported to have been a former director of the Legal Advice Division in the Attorney General's Office; and George Chiweshe, ex-combatant and reported by the media to have previously served as Judge Advocate in the Zimbabwe Defense Forces. Reported by Herald Newspaper

The lawyers were reported¹⁷⁹ to have expressed doubts as to whether their clients would receive a fair trial because of the politicization of the case and its pre-trial publicity, including statements by prominent public figures as to their guilt.

The media has on many occasions reported cases, at all levels, of gross administrative inefficiency within the judicial system as a result of external interference¹⁸⁰

On 12 of February 2001, the British News Web Site¹⁸¹ quoted the UN's Special Rapporteur on the independence of the judges and lawyers, while he was responding to the resignation of Chief Justice Gubbay and the Zimbabwe government's attempt to force Justice McNally and Ebrahim to retire as saying,

I am extremely concerned about those developments, which indicate that the rule of law is further deteriorating in Zimbabwe. The Zimbabwe government must comply with its obligations under international standards and stop harassing and pressurizing members of the judiciary. The allegations that the government has called upon judges to seek early retirement will be seen as a clear violation of principle 2 of the UN Basic Principles on the 'Independence of the judiciary'¹⁸²

Despite national and international complaints against harassment of the judicial officials in Zimbabwe, the media reported the Zimbabwe government as having taken no steps to halt the intimidation directed at the judiciary. Instead, cabinet ministers and other government officials were reported by the media as having

179. Cornelius Nduna, Standard newspaper, 26th 08 2001 "Lawyers doubt on the existence of Justice"

180. The Standard newspaper 26 08-2001 at page 5

181. www.britain.it/news. "UN Special Rapporteur expresses concern over Judicial Independence in Zimbabwe"

182. www.britain.it/news Ibid. n. 180 at page 2

continued to provide vocal support to the downfall of the judiciary by attacking the judges and accusing them of being allies of the white farmers and blocking what these cabinet ministers referred to as "the necessary land reform".¹⁸³

An example of such support can be seen from a statement by Zimbabwe's Information Minister Jonathan Moyo, which was reported by the Mail and Guardian Newspaper¹⁸⁴ on 5 June 2000, as saying:

No sane Zimbabwean should expect the judiciary to be headed by a foreigner especially a British 20 years after our independence, just like it would be insane to have a foreigner or British president or speaker of parliament.¹⁸⁵

A statement of this nature by a cabinet minister is a clear indication of the Zimbabwe government being in support of the attacks on the judiciary.

On 14 November 2001 the Sowetan newspaper reported that on 12 November 2001, ZANU-PF militants attacked and beat up a magistrate accusing him of "having decided a case against their comrade and had him jailed". If this is the way in which the government treats persons who make up the judicial branch of the government, then the independence of the judiciary as a component of the rule of law is being undermined.

From the discussion above, the conclusion is irresistible that the independence of the judiciary is being undermined in Zimbabwe. We cannot speak of the judiciary being independent or the administration of justice being effective where judges, as sentinels of liberty, are subjected to intimidation and violence while carrying out their duties and responsibilities. Sentinels

183. Mike Nico; The Sunday Mail 5th of June 2000, "Judiciary under fire" at page 7

184. Enoch Chimangazo; The Mail and Guardian 7th; June, 2000. "Threats to Zim Judges of Foreign National continues" at 4

185. Enoch Chimangazo; The Mail and Guardian 5th June 2000 (Threats to Zim Judges of Foreign National continues) at page 7

The independence of the judiciary requires guarantees of security of tenure. In this respect such sustained campaign, which was reported by the media to have been fuelled and encouraged by the government, as a result of which almost all the supreme court judges were forced into early retirement did not only violate the principle of independence of the judiciary, but also the international standards to which Zimbabwe is a signatory.¹⁸⁶ The protection of the tenure of judicial appointments is needed to combat the possible arbitrary wielding of power by government officials; thus the Zimbabwean President and the cabinet minister's role in forcing the resignation of Chief Justice Gubbay and other judges is totally unacceptable in a society governed by the rule of law.

Such threats and demeaning remarks and acts which have been directed against the judiciary, and the government's failure to take any action to stop or discourage such unlawful acts, are unacceptable in a democratic nation with the rule of law as one of its founding principles. Any attempt by government officials to seek the resignation of a judge, whose decisions against the government are deemed to be unpalatable, amounts to a serious breach of the independence of the judiciary.

2.4.10 Freedom of speech and expression

As already provided above,¹⁸⁷ freedom of speech, as a component of the rule of law, has never been fully enjoyed in Zimbabwe since independence. The situation started deteriorating from bad to worse in the mid 1990s. With the 1999

186. Article 14.1 of the ICCPR says " ... everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law. The General Assembly Resolution 40/32 of 29th November 1985, in which the Assembly endorsed the basic principles on the independence of the judiciary, and adopted by the seventh United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, and Assembly resolution 40/146 of 13th December.

187. Supra, n.74

constitutional reforms of media laws, it is respectfully submitted that the Zimbabwe government took a step backward in terms of media freedom. On 4 February 2000, the Zimbabwe Mirror newspaper reported the country's Minister of Information as having announced measures to regulate the independent media, which included the restriction of media sector to local investors, the disallowing of donors to pour funds into private media, and the introduction of a legal frame-work within which the media had to operate.¹⁸⁸ The newspaper quoted the Minister as saying,

the existing environment was too relaxed and had allowed the penetration of the media organizations with a political agenda to destroy the government and the country. "We want to stop dubious foreign donations to some media organizations which come in the name of democracy"¹⁸⁹

The government promulgated laws restricting journalists as much as possible in the process of executing their duties. Laws such as the Public Order and Security Act of 2002, the Access to Information and Protection of Privacy Act of 2002 were passed to make the environment difficult for the media, as it will be shown hereunder.

Section 15 of the Public Order and Security Act of 2002 makes it a criminal offence to publish or communicate false statement prejudicial to the state. Section 16 of the same Act, makes it an offence to make a public statement with the intention, or knowing there is a risk of " undermining the authority of or insulting" the President. All these restrictions are unacceptable in a democratic state with the rule of law as one of its founding principles.

President Mugabe created a climate of intimidation and brutality against the independent media. This was evident in his speech on the Voice of America

188. The Zimbabwe Mirror 4th of February 2001 at page 5

189. The Zimbabwe Mirror Ibid, n. 188 at 9

(VOA) in New York where he said, "irresponsible journalists who write outright lies to cook up emotions in Zimbabwe were to be arrested"¹⁹⁰ The warning by the President subsequently became a reality as members of the media were intimidated, newspaper practitioners assaulted, arrested on false charges and even sometimes prevented from distributing the news, offices of private press were bombed et cetera.¹⁹¹ Before the presidential elections in March of 2002, all foreign reporters were reported by the media as having been banned under the government's new Access to Information and Protection of Privacy Act of 2002.

On March 13 2002, the Daily Newspaper¹⁹² reported the arrest of its telegraph correspondent, Petta Thorycroft and detained for five days. She was reported to have been charged with practicing illegally as a journalist and inciting public violence.

On 28 April 2002, the Daily Newspaper¹⁹³ reported the arrest of its two journalists, Loyd Mudiwa and Collin Chiwanza for publishing a story, which allegedly breached the government's punitive media laws. The journalists were charged with publishing a falsehood. The paper reported that if convicted, the two journalists could face up to two years in jail.

On 2 May 2002, the Guardian Newspaper¹⁹⁴ reported the arrest of its correspondent in Zimbabwe, Andrew Meldrum for writing a story, which allegedly breached the government's punitive media laws. He was charged with publishing false information and at the time of the report he was being held at the capital's central police station.

190. Mugabe speaking on the voice of America on the 20th of Oct. 2000

191. www.guardian.co.uk/Zimbabwe/article "Zimb. President warns journalists"

192. Mudiwa I; The Daily newspaper 13th March 2002, "Petta arrested" at 6

193. Bara E; The Daily newspaper 28th April 2002, "The Daily's tow journalists arrested" at 2

194. Owen Bowcott; The Guardian 2nd May 2002 "Guardian reporter arrested in Harare" .at 9

In his comment on the arrest of Andrew Meldrum, the editor of the Guardian Newspaper, Alan Rusbridge was quoted by the Standard Newspaper as saying;

Andrew Meldrum is a highly experienced and well established journalist...who knows and love Zimbabwe. We believe that he has been arrested under Section 80 (1) (b), of the Access to Information and Protection of Privacy Act, which could mean he faces up to two years in prison. It is outrageous that he should be the subject of criminal charges for doing the job of a reporter and we call on the Zimbabwe government to release him immediately and to drop charges against him and his colleagues of the Daily Newspaper¹⁹⁵

Following a home made bomb which exploded in a building where the offices of the Daily Newspaper are situated that left part of the gallery and the distribution offices of the newspaper destroyed, the Zimbabwe police arrested Obed Zilwa, a South African journalist on suspicion that he may have been involved in the bomb attack.¹⁹⁶

The Sowetan newspaper reported¹⁹⁷ that over twenty assailants attacked a car on 21 June 2000 which was carrying four foreign media workers at a farm in southern Zimbabwe in full view of Commonwealth election observers.

The four media workers who were Beatrice Khadige of AFP, Sharon Chetty of the Sowetan, Oliver Gay of Etv. and his camera operator, Brian Ramapulana had the windows of their car smashed.¹⁹⁸

195. Matiza C. The Standard Newspaper 3rd May 2002 "Andrew Muldrum arrested" at page 4

196. Mawande Jabasi; The Sowetan Newspaper 28th April 2000. "Zim Police arrests South-African at page 2

197. Charles Molele; 23rd of June 2000 (Harassment of Journalists Continue in Zimbabwe) Charles page 2

198. Daily newspaper, Ibid. n. 1197 at page 4

On 26 April 2000, the Daily News reported a bomb-threat telephoned to the offices of the Daily News whose origin was traced to have been the headquarters of the ruling ZANU-PF party.¹⁹⁹ It was reported that the number from which the telephone call was made was recorded in the memory of the portable phone and a call to that phone number indicated that it came from the ruling ZANU-PF headquarters.²⁰⁰

On 15 July 2000, members of the so called "war veterans group" attacked and assaulted Chengetai Zvauya of the Standard newspaper while the journalist was reporting on the launch of the government's land acquisition program at the ZANU- PF head quarters. Acts of harassment and intimidation against Zvauya were reported by the Standard newspaper to have continued in the late August, when the journalist was threatened and manhandled by war veterans for writing alleged "negative stories about the war veterans and the ZANU-PF party".

The Zimbabwe government's principle which dictates that journalists who offend should be arrested and punished as the President stated while speaking on the Voice of America, is evident from the arrest of the two journalist Mark Chavunduka and Ray Choto for writing a story in the Standard newspaper which alleged that 23 Zimbabwe soldiers might have been detained for attempting to overthrow the government for economic mismanagement of the country. The newspaper also reported on Zimbabwe's military involvement in the war in the DRC.²⁰¹

According to the Standard newspaper,²⁰² before the journalists' release on bail, the newspaper had secured at least three High Court orders demanding for their

199. Rhodah Mashavave; The Daily newspaper 26th of April 2001 "Daily News Receive Bomb threats" at page 11

200. Daily newspaper Ibid, n. 199 at page 7

201. Collin Matiza; 21st July 1999 "Chavunduka and Choto arrested" at page 4

202. Standard newspaper. Ibid. n.201 on the 23 July 1999.



release, all of which had been ignored. Both men were reported by the Standard Newspaper as having sustained injuries as a result of the torture at the hands of the military police during their illegal detention. Speaking on the court's reaction to the arrest, the Standard Newspaper quoted Gubbay C.J. (as he then was) in his judgment in the matter stating that "it is with regret that I find the Commissioner of the Police failed to afford the applicants (journalists) the protection of the law they were entitled to expect from him."²⁰³

More of the harassment of the media was reported on 5 October 2000 when the police entered the premises of Capital Radio, the only private radio station in the country and seized its equipment. This unlawful entry into the station happened despite the fact that earlier the High Court had issued an order barring the police from seizing the station's equipment.²⁰⁴ The station had just been opened after a long legal battle with the government broadcasting radio station in which case the High Court ruled in favour of the private radio station stating that "the monopoly of the ZBC interfered with the public's right to free expression."²⁰⁵

From the discussion above, it is evident that the government of Zimbabwe has played a vital role in seeing to it that the freedoms of the press and expression as components of the doctrine of rule of law have been seriously compromised in Zimbabwe

2.4.11 Equality before the law.

From the late 1990s to date, experience has shown that some individuals and organizations in Zimbabwe are treated in a special manner by the law-enforcers by virtue of such people's political affiliation and other factors. While some of

203. Standard newspaper, Ibid. n. 189 at 7

204. Sydney Masamvu; The Financial Gazette 25th of October 2000 "Zim Independent Media under attack" at 14

205. Minister of Defense v. Standard. HC 548/99 at 46

these people have proved to be "beyond the law" enforcing agents such as the courts and the police, others have even gone as far as interfering with the judiciary to such an extent of even forcing the judicial officials to either do as it pleases these individuals and organizations, or the judicial officials resign from their judicial posts as already seen above. Some have proved to be beyond the rulings of the courts. Provided here under are just a few of the many examples that can stand as proof to the above assertion.

Following a number of court rulings which were opposed to President Mugabe's way of governing, the Mail and Guardian has on a number of occasions quoted the President repeatedly vowing that,

no court ruling would ever stop his government from implementing the controversial land reform, urging that the issue of land was political and would only be solved by political means.

More disrespect of the judiciary was reported by the media when the Supreme Court wrote to the President urging him to uphold the rule of law and to carry out the High Court orders which required him to release the journalists who had been illegally arrested and not to use the Military Intelligence to arrest and detain civilians.²⁰⁶ The President was reported by the media as having responded by launching what the media referred to as "a vitriolic attack" on the judges and journalists saying,

if the Standard (the newspaper whose journalists had been arrested) had not behaved in such a blatantly dishonest and unethical manner, the army would not have acted in the way they did²⁰⁷

The President went on to challenge the judges to resign, saying that they had no right to instruct him to do anything and that because of their being biased, the

206. World Socialist Website www.wsws.org/articles/Zim. "Supreme Court Urges Mugabe to uphold the rule of law" at page 2

207. World Socialist Website, Ibid. n. 193 at page 4

government could no longer trust them on any case involving the executive.²⁰⁸

More of such incidents can be seen from what happened to Mr. Fidelis Mhashu who competed in the 2000 mayoral elections in Chitungwiza as an independent candidate against a ZANU- PF candidate. The gentleman was reported by the Sowetan, to have been beaten up severely in the month of June 2000 at a local government offices in the presence of government officials. Almost as expected, there were no reports of arrest or charges brought against the individuals' responsible.²⁰⁹

The ruling ZANU-PF supporters (war veterans) in March, 2001 were reported by the Weekly Mail and Guardian newspapers as having disobeyed a High Court order to quit the white-owned farms they had illegally occupied.³⁰⁰ The farm invaders were reported by the Newspaper as having adamantly defied the court order saying,

we are not moving off the farms, if anything we are going to move on to more farms because we are on a mission to reclaim the land of our fore fathers.³⁰¹

These have been just a few of the countless incidents that have taken place and still taking place in Zimbabwe which suggest that there is unequal treatment of individuals before the law as some people and organizations have proved to be above the law because of their political affiliations and political positions in the government.

298. Lunga Masuku; The Sowetan, 3rd June 2000 (Zim Opposition Candidate pay the price) at page 2

299. Ibid. n. 298 on the 27th March 2001 at page 5 "War Veterans Disobey Court Order" at page 4

300. Chris Gande; 17th March 2001 "War veterans vow not to quite farms" at page 6

301. Ibid. n. 1300 at 8

2.4.12 Supremacy of the Constitution

From the late 1990s to date, it can generally be submitted that the notion of Supremacy of the Constitution in Zimbabwe remains in principle. However incidents of violations of the provisions of the Constitution by the executive branch of the government have since the late 1990s to date, almost come to be accepted as the order of the day.

Some individuals, as already pointed out, have proved to be above the law because of their political affiliations and personal relationships to individual government officials. Examples can be seen in the previous discussion where the head of the executive (President) branch of the government vowed never to have his plans stopped by court rulings.³⁰²

This underlines the perception that such a person is not only above the law but also the Constitution, which empowers the courts to act.

Cases of the executive branch of the government executing its duties in a manner that is contrary to what the Constitution as the supreme law of the land demands have always been reported by the media.³⁰³

If the executive can go as far as forcing the judges who are the interpreters and upper guardians of the supreme law (the Constitution) out of office on the grounds that such judicial officials failed to interpret and apply the law (Constitution) in a manner that favours the executive, this signifies disrespect for the principle of constitutional supremacy, thus the absence of the rule of law.

302. Op cit, n. 193 at page 8

303. Op cit, n. 157 at 16

2.5 Democracy

This principle demands nothing more than the government of the day working to see to it that it creates such a political climate, which enables and encourages people to have their wills expressed and political rights exercised without fear.³⁰⁴

As advanced by the Lagos Declaration, (1961), this right involves the giving of citizens the right to change their governments democratically.³⁰⁵ Individuals should always feel free to join and leave any political organization.

Although Section 3 of the Zimbabwe Constitution calls for the respect for political rights, Zimbabwe's ruling ZANU-PF Party has been reported by the media and Human Rights Organizations, as having done anything possible to prevent people from advancing their wills and political rights. From the way the opposition has been and still being ill-treated by the ruling party members, violation of Section 3 of the Constitution³⁰⁶ by the government is one of the most worrying signs of the breakdown in the rule of law.

Both the 2000 Parliamentary and the 2002 presidential elections were reported by the media as having been held under a climate of violence and different forms of intimidation.³⁰⁷

The prevalence of violence, intimidation, abduction of polling agents of the opposition in the 2002 presidential elections is virtually reflective in all reports from the independent observer organizations.³⁰⁸

304. Hosten. W J ; Introduction to South African Law and Legal theory (1995) at page 5

305. Op cit, n. 32 at page 1

306. Section 12 of the Zim. Constitution provides for the right to belong to any political party

307. Independent missions and organizations reports on the free and fairness of the March 2002 Zimbabwe Presidential elections as compiled by Erin Maccandless; released on Friday March 15 2002.

308. Report by the independent groups of observers, Ibid. n. 204 at page 21

2.5.1 Report by the Commonwealth Observer Group

In its report on the whole 2002 Zimbabwe presidential elections, the Commonwealth Observer Group noted that,

the presidential election was marred by a high level of politically motivated violence and intimidation, which preceded the poll... most of which were perpetrated by members or supporters of the ruling party against members and supporters of the opposition.³⁰⁹

In the report concern was also raised over the fact that "the police very often did not take action in these cases and often appeared politically biased in handling cases" ³¹⁰

It was noted in the report that on the polling day, many who wanted to cast their vote could not do so because of the significant reduction in the number of polling stations in urban areas. Due to the government's inexplicable delay in complying with a High Court order to extend voting to the 11th of March, voting in places like Harare and Chitungwiza was especially slow, leading to many voters being turned away even at the end of the third day.³¹¹

It was due to these reasons that the Commonwealth Observer Group concluded that the conditions under which the 2002 Zimbabwe presidential elections were held did not adequately allow for free expression of will by electors.³¹²

309. Report by the Commonwealth Observer Group at page 7, Published by Zim Independent Media Center 2002 at page 24

310. Report by the Commonwealth Observer Group at page 7, Published by Zim Independent Media Center, Ibid. 309 at page 27

311. Stated the report of the Commonwealth Observer Group, Published by Zim Independent Media Center

312. Report by Commonwealth Observers, Ibid. n. 207 at page 21

Other independent observer groups which included the Norwegian observers, the Japanese Observer Mission, the Zimbabwe Election Support Network, the Zimbabwe National Students Union, the International Crisis Group and the 250 strong Civic Crisis in Zimbabwe Coalition concluded by declaring the 2002 Zimbabwe presidential elections as not been free and fair.³¹³

The main opposition (MDC) rejected the election results as "illegitimate in the eyes of the people". Their reasons for denouncing the election results included the subjection of the Zimbabweans to severe intimidation and harassment for the past two years (2000-2002), and that there was calculated and insidious disenfranchisement of hundreds of thousands of voters" particularly in Harare and Chitungwiza.³¹⁴

2.5.2 The Voters Roll

A voters register is considered a basic condition for a successful election. Most of the reports by the independent observer groups on the 2002 Zimbabwe presidential elections, raised concern regarding the timeous release of the voter's roll which was only made available three days before the polls, leaving no time for the electorate to verify its accuracy thus resulting in a large number of people being unable to vote.³¹⁵

2.5.3 Freedom to campaign

In any election, contestants should be able to move freely among the electorates. In the 2002 Zimbabwe presidential elections, observer groups reported that whereas the ruling party's campaigning was relatively uninterrupted,

313. www.britain.it/news "EU observers declare Zim Elections unfair" at page 23

314. Clin Chiwanza; The Daily Independent 16th March 2002 "MDC Denounces Elections results"

315. Report by the Commonwealth Observer group, Op cit, n. 207 at page 24

some of the opposition party meetings were cancelled or interrupted by opponents.

In their reports, the observers raised their concern in respect of the unfavorable legislative framework within which the elections were conducted, particularly certain provisions of the Public Order and Security Act, 2002, which they highlighted as having been used to obstruct regular political activities involving the opposition.

It was maintained by most of the independent observer groups that under this Act, opposition meetings were interrupted, party representatives were taken for questioning during deployment at their polling stations, party officials were raided and supporters detained on spurious charges.³¹⁶ The General Laws (Amendment) Act 2002 was also condemned for limiting freedoms of speech, movement and association thus preventing the opposition party from campaigning freely.³¹⁷

2.5.4 Access to media

Independent observer groups reported the denial of political parties access to public media other than the ruling party. The monopolization of the public media by the ZANU-PF was reported by the independent observers as having played a big role in preventing the opposition from gaining access to public media. Such denial of equal access to this service deprived the electorate of an opportunity to make an informed choice.³¹⁸

2.5.5 Lack of an Independent Electoral Commission:

Despite various recommendations and practices in the SADC region, Zimbabwe has proved to be one of the countries without an Independent Electoral Commission. The election administration that is, (the bodies administering the

316. Op cit, n. 207 at 13

317. Op cit, n. 210 at page 19

318. www.Britain.it/news " EU observers declare Zim. Election unfair at page 1

elections and those supervising them)³¹⁹ form part of the executive structure, thus lacking a convincing independence and integrity. This implies that, the contesting parties' only involvement is through their polling and election agents there, who, in return were reported to have been harassed or intimidated by supporters of the ruling party or police. Being the only vital instrument for keeping the checks and balances in the polling stations, this represents a weakening of the trust in the voting process.

Incidents of harassment of those individuals opposed to the ruling party have been reported by different newspapers³²⁰ to have continued even after the presidential elections. The most recent harassment of the opposition by the ruling party can be seen from what has been reported by the media happening to the leader of the main opposition party (MDC) Mr. Morgan Tsvangirai. The physical harassment by the CIO, arrests, death threats, restriction of movement etc, have been reported to have been directed to the leader. For example the South African Radio FM,³²¹ reported the arrest of the main opposition leader by the CIO members at the Airport while he was about to board for a business trip to RSA. The leader was reported to have had his bags searched by the CIO members who claimed that he was travelling on a false passport. He was reported to have been detained for over 20 minutes before he was let free.

On the 20th of March 2002, the MDC opposition leader Mr. Morgan Tsvangirai and his Deputy Mr. Welshman Ncube were reportedly arrested³²² and charged with treason over an alleged plot to assassinate the Zimbabwean President, Mr. R. Mugabe.

319. A Special Report by the Research Unit of the Zimb. Human Rights NGO forum at page 17

320. Zimbabwe Independent Newspaper 7th May 200 at page 8

321. Reported by the South African Radio FM in the early hours of 13th of Feb 2002

322. Andrew Meldrum; The Mail Guardian 20/ 3/ 2002 at 10 "Zim Opposition Leader Formally Charged with Treason"

Mr. Tsvangirai was reported³²³ to have appeared in the Harare Magistrates' Court where he was formally charged with treason (which according to the Zimbabwe laws carries a possible death sentence) and released on bail of Z\$ 1.5m ie. (R 307,225. 95). He was also ordered to surrender his passport and the deeds to property worth Z\$ 3m. Ncube was also released on bail.³²⁴

They again appeared for trial in the Harare High Court on 1 February 2003.

In his comment about their arrest, Tsvangirai's Deputy Mr. Welshman Ncube, was quoted by the Daily Newspaper³²⁵ as saying,

our arrest was an attempt in fact to continue harassment of the leadership of the MDC to make it impossibly difficult for the leadership to organize the struggle that we have to engage in, in resisting what is an illegitimate election process and results³²⁶

State sponsored terrorism has been reported by the media to have claimed a number of lives since the failure of the Mugabe government to win the referendum that advocated for the confiscation of white-owned land by the state without compensation. Scores have been reportedly beaten, raped and tortured and had their property destroyed because they support the opposition.³²⁷

In their effort to explain the political environment in Zimbabwe, the two political scientists, Dr. John Makumbe and Daniel Compagnon in their book entitled Behind The Smokescreen, described in great detail how the state used every

323. Mail Guardian Ibid. n. 322 at page 11

324. Rhodah Mashavave; Daily Newspaper 22nd of March 2002 "MDC Leader Arrested" at page 3

325. Mail Guardian Op cit. n. 219 at 8

326. Mail Guardian Ibid. n. 325 at 9

327. Tsitsi Mubvumba; The Independent Newspaper February 21st 2002 (Consequences of being an Opposition Supporter) at page 2

trick in books to stage a fraudulent election in the 1995 general elections. The book says

the political system in Zimbabwe is largely based on fear, intimidation, ignorance, state control of the media, legal impediment and financial privileges all of which aim to protect the hegemonic rule of ZANU-PF and specifically of its chefs [Zimbabwean political elite].

Makumbe and Compagnon described the ruling ZANU-PF as a party steeped in a culture of political intolerance and ingrained conviction that made them believe that power belongs to them by virtue of history and brutal force. They maintained that "the country's ruling ZANU-PF party will never concede a nation wide defeat at the ballot box".³²⁸

It should be noted that this book was written before the 1999-referendum election, which saw the ZANU-PF, supported referendum rejected by a democratic vote.

All the above incidents by the government and its allies testify to what has happened despite the constitution's institutionalization of a majority democratic system of rule as well as the protection of the minority rights.

These are just a few of those incidents which happened and are still happening in Zimbabwe that indicate these violations of Section 3 of the Constitution which Section guarantees the respect for individuals' political rights.

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328. Makumbe J and D Compagnon, Behind the Smokescreen, (A study on the politics of Zimbabwe, 1995 General elections) New York: Praeger Publishers 1996

2.6 Summary

This chapter has first of all explored the constitutional development in Zimbabwe. It has shown that the Zimbabwean constitution embraces democratic values, which call for the respect for and observance of the rule of law. It has been shown that from 1980-1997 constitutional provisions, which called for the respect for the rule of law, were accorded due respect by the three branches of government. However, the chapter has revealed that the period from 1997 to the present days marked the turning point in the respect for and observance of the rule of law.

The next chapter will deal with the South African position on the question of respect for and observance of the rule of law.

CHAPTER THREE: RULE OF LAW IN THE REPUBLIC OF SOUTH AFRICA

3.0 Introduction

In this chapter, three issues are to be discussed. First the chapter briefly looks at the historical development of South Africa, and secondly it will look into South Africa's non-racial Constitutions that is (the Interim Constitution and the Final Constitution) and lastly, it looks at the state practice in respect of observance of the rule of law in South Africa from 1994 to date that is, (2002).

3.1 Brief historical background.

Situated at the Southern end of the African continent, the Republic of South Africa is the largest country in the far southern part of the continent, bordered to the north by Botswana, Namibia, Zimbabwe, Mozambique and Swaziland and totally encloses Lesotho as well as the Indian Ocean to the east and the Atlantic Ocean to the west.³²⁹

In 1912 SANNIC, which turned to be ANC was formed at Bloemfontein with the sole aim of eliminating restrictions, based on colour as well as enfranchising parliamentary representation for blacks.

After the National Party won the whites only "elections" in 1948, the government passed legislation which codified and enforced stricter policy of white domination and racial separation which was popularly known as Apartheid (separateness).³³⁰ Following sporadic protests by blacks, the two black political parties (ANC and PAC) were banned in the 1960s and many of the key role players were convicted and imprisoned on charges of high treason. The month of May 1961 saw South Africa relinquishing its dominion status and declared itself a Republic.

329. Worden N. Concise Dictionary of South African History, (1998) Cape Town: Fancoline

330. Worden. N. Ibid. n. 226 at 29

Despite the imprisonment of such members and leaders of anti-apartheid organizations, their struggle proceeded underground in the form of guerrilla warfare and sabotage. With the continuing international criticism over the practice of apartheid, the country withdrew itself from many of international organizations, one of which was the Commonwealth of Nations and was expelled from the United Nations General Assembly.

The continued uprising in the black and colored townships made the National Party to realize the importance of settling the country's political differences on a round table. This resulted in the ban on political parties being lifted as well as the release of a number of political prisoners by the then president (F W De Klerk) in 1990.³³¹

From the negotiations that followed, a new constitution, which was promulgated into law in December 1993, was born. The country held its first non-racial, democratic elections on April 26-29 of 1994 under the Interim Constitution. The ANC emerged with a 62 percent majority. Its main opposition came from the NP, which gained 20 percent of the vote nationally and a majority in the Western Cape and then other parties such as the Inkatha Freedom Party (IFP) followed.³³² The country was divided into nine new provinces in the place of the four provinces and ten homelands that existed previously. In terms of the Interim Constitution, the National Party (NP) and IFP participated in a government of National Unity until 1996, when the NP withdrew.³³³

The second democratic elections were held on 2 June 1999. The 1999 elections saw the ANC increase its majority to a point just short of two-thirds of the total

331. Davenport, T R H. The Transfer of Power in South Africa. (1998) Cape Town; Fancoline

332. Johnson R.W and Schlemmer L. Launching Democracy in South Africa. The first open Election, 1994-1996. (1996) New Haven; Yale University Press.

333. Davenport, T R H, Op cit. n. 228 at 22

vote. South Africa launched into the post-Mandela era under the presidency of Thabo Mbeki.³³⁴

From 1994 to 1996 South Africa was governed under the Interim Constitution pending the final constitution which was supposed to be drafted and approved by the 9 May 1996. On the 2nd of December of 1996, a revised draft was certified by the Constitutional Court. It was signed into law by the President on the 10th of December 1996 and entered into force on the 3 February 1997.³³⁵

Since then the country has been ruled in terms of a non-racial, democratic constitution, Act 108 of 1996, as amended.

3.2 Features of the South Africa Constitution

South Africa is a constitutional democracy. The South African constitution, which was approved by the Constitutional Court on the 2 December 1996 and took effect on the 3 February 1997, is a reflection of such values of liberal democracy and stands comparable to any of the constitutions of Western states. Section 1 of the Constitution provides that South Africa is a sovereign, democratic state founded on such values as the rule of law, supremacy of the constitution, human dignity, achievement of equality and advancement of human rights and freedoms,³³⁶ all of which are essential ingredients of liberal democracy, the South African constitution further enshrines a justiciable bill of rights.³³⁷ More interesting about the South African constitution is the fact that it is entrenched and rigid. This implies that it cannot be easily amended. In the case of an

334. Saunders, C and Southey, N. A Dictionary of South African History (2001) Cape Town

335. Davenport TRH, Op cit. n. 230 at 36

336. Section 1 of Act 108 of 1996.

337. Constitution of South Africa. Ibid. n.336 at Chapter 2

amendment to the constitution, a special procedure will have to be followed.³³⁸

After being granted that status of being the supreme law of the land, the constitution goes on to declare that any law or conduct that may be inconsistent with it as invalid.³³⁹

3.2.1 Organs of state

The government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.³⁴⁰ To ensure the existence of the values such as accountability, responsiveness and openness as provided for by the founding provisions,³⁴¹ the Constitution comes up with the system of separation of powers between these three major spheres of government. The system ensures that no one organ interferes in the affairs of the other organ. That is to say, the organs are prohibited from exceeding the ambits of their empowering statutes in the process of exercising their powers. However, the Constitution requires these three spheres to co-operate in the execution of their duties so as to achieve the main objectives of the Constitution. The checks and balance objective is as well achieved as a result of the separation of powers system.³⁴²

The national legislative powers of the country are vested in Parliament. The National Assembly and the National Council of Provinces are vested with the powers to amend the Constitution in accordance with Section 74.³⁴³

338. Constitution of South Africa, Ibid. n. 337 at 74 (2)

339. Constitution of South Africa, Ibid. n. 338 at Section 2

340. Constitution of South Africa, Ibid. n. 336 at Section 40 (1)

341. Constitution of South Africa, Ibid. n. 335 at Section 1 (d)

342. Constitution of South Africa, Ibid. n. 334 at Section 41, TAVC V. Minister of Health and Others

343. Constitution of South Africa, Ibid. n. 333 at Section 44

3.2.2 The executive branch of the government

The national executive is composed of the President and his Deputy, cabinet ministers and Deputy Ministers, the Police force, the Defence force and the Prison Services.³⁴⁴ The President is the head of state as well as of the Executive.³⁴⁵ Thus he reigns as well as rules.

3.2.3 The Legislature

The legislative powers of the country are vested in Parliament.³⁴⁶ The Interim Constitution provided for a classic Westminster style of Parliament with two Houses, that is a 400-member Lower House, the National Assembly, and a 90-member Upper House, the Senate.

The new Constitution, drawn up by the new MPs and the Senators sitting as the Constitutional Assembly, and promulgated in 1997, saw a different role of the second House, which was named the National Council of Provinces. This uniquely South African institution seeks to draw the nine Provinces into the national law-making process, through representation of 10-person delegations from each provincial legislature.

South Africa's Parliament is therefore composed of the National Assembly and the National Council of Provinces.³⁴⁷ The National Assembly consists of not less than 350 and not more than 400 members elected through a system of proportional representation. The National Assembly is elected to represent the people and to ensure democratic governance as required by the Constitution. It is supposed to ensure such democratic governance by, among other things, electing the President, provide a national forum for public consideration of issues,

344. Constitution of South Africa, Ibid. n. 240 at Chapter 5

345. Constitution of South Africa, Ibid. n. 241 at Section 83

346. Constitution of South Africa, Ibid. n. 242 at Section 43

347. Constitution of South Africa, Ibid. n. 243 at Section 42 (1)

by passing legislation, and by scrutinizing and overseeing executive actions.³⁴⁸

On the other hand, the National Council of Provinces consists of 54 permanent members and 36 special delegates, and it is supposed to represent provincial interests in the national sphere of government.³⁴⁹ The National Council of Provinces is supposed to first get the mandate from the provinces before it can make certain decisions.

3.2.4 Powers and Functions of the President

The President is the head of state and of the government as well as the Commander-in-Chief of the defence forces.³⁵⁰ He or she is elected by the National Assembly and is supposed to lead the country in the interest of national unity and in accordance with the Constitution and the law.³⁵¹

The principal functions, powers and duties of the President are provided for in Section 84 as including, assenting to and signing bills, referring bills back to the National Assembly for consideration of the constitutionality of such bills, to pardon offenders, to negotiate and sign international agreements, conferring honours, appointing commissions of inquiry etcetera.

3.2.5 Tenure of office of the President

The President is elected for a term of five years by the National Assembly at its first sitting after its election and this is done in the presence of the President of the Constitutional Court who acts as the presiding officer of the whole process.

348. Constitution of South Africa, Ibid. n.244 at Section 42 (3)

349. Constitution of South Africa, Ibid. n.245 at Section 42 (4)

350. Constitution of South Africa, Ibid. n. 246at Section 83(b) (c)

351. Constitution of South Africa, Ibid. n.247 at Sections 202 and 83 (1)

The president's five- year's term of office is only renewable once.³⁵²

Section 89 provides for the possible removal of the President from office on a resolution of two-thirds majority of the members of parliament on grounds of, serious violation of the constitution or the law, serious misconduct or inability to perform the functions of office. In this case the President and his cabinet will have to resign if the Assembly passes a vote of no confidence in him or her. The constitution does not however address which violations could lead to the impeachment. It is respectfully submitted that this is an unfortunate omission.

3.2.6 Administration of Justice

The constitution vests the judicial powers in independent courts, which are the Constitutional Court, the Supreme Court of Appeal, the High Court, the Magistrates Courts and other lower courts.³⁵³ The Constitutional Court is the highest court for interpreting and deciding constitutional matters³⁵⁴ while the Supreme Court of Appeal is the highest court of appeal in non-constitutional matters.³⁵⁵

The bill of rights provides for due process, including the right to a fair, public trial within a reasonable time of being charged and the right to appeal to a higher court.³⁵⁶

Among the means employed by the constitution to ensure the independence of the judiciary is the constitutional injunction preventing any person or organ from interfering with the functioning of the courts.³⁵⁷ This is evident particularly in the same section that is (35) (1) (d) (3) where the constitution subjects the judges to the law and the

352. Constitution of South Africa, Ibid. n. 351 at Section 88 (2)

353. Constitution of South Africa, Ibid. n. 352 at Section 166

354. Constitution of South Africa, Ibid. n. 353 at (3) (a)

355. Constitution of South Africa, Ibid. n. 354 at Section 168 (1)

356. Constitution of South Africa, Ibid. n. 355 at Section 35(1)(d) (3)

357. Constitution of South Africa, Ibid. n. 356 at Section 165 (2) (3)

constitution only which they are supposed to apply impartially and without any fear, favour or prejudice.³⁵⁸

Decisions of the court bind all persons to whom or organs to which that apply.³⁵⁹

Amongst other things, the constitution vests the court with powers of judicial review in that these courts are supposed to interpret, implement and uphold the constitution and the fundamental rights as well as the freedoms as guaranteed thereunder.

The powers of the courts go as far as regulating the internal proceedings of parliament. This becomes more understandable if one looks back in the wordings of the preamble as well as Section 2, which proclaim the constitution as the supreme law of the land. This section goes as far as providing these courts with the power to declare legislation invalid on the ground that it is inconsistent with the constitution.³⁶⁰ This supremacy of the constitution is discernible in the case of S v. Williams³⁶¹ in which case Section 294 (1) a of the Criminal Procedure Act 51 of 1977 was declared invalid on the ground that it was unconstitutional as it was found by the court to be undermining human dignity which is one of the values upon which the South African Constitution is founded.³⁶²

3.2.7 Fundamental Human and Political Rights.

Read in light of the liberal democratic values provided for in the preamble to the Constitution, chapter 2 of the South African Constitution is reflective of South Africa's high respect for and observance of the basic human rights and fundamental freedoms.

The constitution provides extensive guarantees of civil or political rights, economic, social and cultural rights and third generation rights.³⁶³

358. Constitution of South Africa, Ibid. n.357 at Section 165 (2)

359. Constitution of South Africa, Ibid. n.358 at Section 165 (5)

360. Constitution of South Africa, Ibid. n. 359 at Section 172 (1)

361. 1995 (3) SA 632 (CC).

362. S v. Williams, Ibid. n. 361 at para 49

363. Constitution of South Africa, Op cit. n. 360 chapter 2

The legal rights of criminal suspects and sentenced offenders are also enumerated, as are citizens' entitlement to a safe environment, housing, education, and health care.³⁶⁴

The constitution provides for the possible declaration of a state of emergency during which a number of rights may be suspended. It however, maintains that certain basic rights are non-derogable even during this period of time. These include the rights to life, human dignity, equality, the freedom and security of person and the right not to be subject to slavery, servitude and forced labour etcetera.³⁶⁵

The courts have been vested with the powers to see to it that these rights are not at any time unconstitutionally limited by any person or organ of the state. Section 39 (1) of the Constitution specifically authorizes the courts in the process of interpreting these rights to have regard to principles of public international law and comparable foreign case law. The South African courts showed their positive response to this requirement in the case of S v. Makwanyane³⁶⁶ where several judgments and reasoning from different legal systems of the world were referred to by the court as persuasive aids. For example, the American case of Furman v. Georgia³⁶⁷ in which the death penalty was ruled to be degrading, cruel and unusual form of punishment was one of the foreign cases, which were referred to with approval by the Constitutional Court.

The Constitution also provides for independent institutions such as the Public Protector, the Human Rights Commission etcetera. whose duties include, the investigating of complaints of violations of basic human rights and fundamental freedoms, possible abuses of power, unjustifiable treatment by government officials,

363. Constitution of South Africa, *ibid.* n.362 Section 35, also see Section 12 of the Correction Services Act No111 of 1998. In the case of Van Bilton & Others v. Minister of Correctional Services & others, it was held that the state owed a higher duty of care to HIV positive inmates than to citizens out side in the same condition.

364. Constitution of South Africa, *ibid.* n. 363 at Section 37 (5)

365. 1995 (3) SA 391 (CC)

367. 408 US. 238 (1973)

corruption etc.³⁶⁸ These independent institutions are vested with the powers to correct any of such violations by attempting a compromise between the parties concerned or by referring the matter to court.³⁶⁹

Other institutions whose task is to ensure that these rights are enjoyed without any unlawful limitation include, the Commission for Gender Equality, Commission on Linguistic or Cultural Minorities etc.³⁷⁰ all of which are independent and subject to the Constitution and the law only.³⁷¹

3.3 Position of the rule of law

South Africa has since 1994 been ruled in line with the Constitution. Generally the Constitution, specifically those provisions which provide for the existence of the rule of law have been respected. From 1994 to date, the increasing rate of respect for the fundamental human rights by the government and private bodies as provided for by the constitution, common law and the UN's Universal Declaration for Human Rights (1945) has been evident.

The government has generally respected the political rights of the subjects and it has done all in its power to create such a conducive climate for individuals to choose leaders of their choice. This is discernible in the previous presidential elections both of which were reported by different independent observer groups to have been free and fair.

368. Constitution of South Africa, Op cit. n. 365 at Section 181(1)(a) (b)

369. Constitution of South Africa, Ibid. n. 368 at Section 182 (1)(a)(e)

370. Constitution of South Africa, Ibid. n. 369 at Section 181 (1)

371. Constitution of South Africa Ibid. n. 370 at (2)

The courts and other institutions such as the office of the Public Protector (Ombudsman), the Human Rights Commission etcetera. whose function is to enforce and promote the individual's enjoyment of their rights have been generally active as expected.³⁷² This is discernible in the case of Soobramoney v Minister of Health, Kwazulu Natal,³⁷³ wherein the court appreciated the fact that the state had an obligation to provide all citizens with basic needs such as housing, health-care, food, water and social security as required under Sections 26 and 27 of the Constitution.³⁷⁴ It was however emphasized by the court in this case that, the obligation imposed on the state in relation to providing such basic needs to citizens was subject to the funds and resources available to the state.³⁷⁵

The government's effort to improve social economic conditions of its people has, in general, been commendable.

The case of Minister of Health and others v. TAC and Others³⁷⁶ provides another good example of how the courts and private organizations in South Africa have played a big role in enabling South African citizens to enjoy their rights as provided for in chapter two of the Constitution. In this case the applicants applied to the court to order the government provide 'Nevirapine', a medicine, which could reduce the chances of the unborn child from getting the HIV infection from the mother. The applicants alleged that the medicine was available in private clinics and government hospitals for doctors who were exposed to HIV Aids infected patients.

372. Influenced the taking of the S v. Makwanyane case to the Constitutional Court to consider the constitutional status of the death penalty which was given to the convicts.

373. 1998 (1) SA 765

374. Soobramoney v. Minister of Health, Kwazulu Natal, Ibid. n. 374 at 77 1 H

375. Soobramoney v. Minister of Health, Kwazulu Natal, Ibid. n. 275 at para 11

376. Minister of Health and Others v. TAC and Others CCT8/ 02 (unreported)

The applicants therefore argued that the failure by the government to provide Nevirapine to all pregnant women was an infringement of their right to health-care in terms of Section 27 of the Constitution.

The Constitutional Court ruled in favour of the applicants (Treatment Action Campaign) and ordered the government to provide the drug to all HIV pregnant women in the country. More importantly, the judge ordered the government to formulate an effective and comprehensive national programme to prevent mother-to-child transmission of HIV on a national basis. The case is a landmark case in the struggle to address the HIV Aids pandemic in South Africa.

3.3.1 Independence of the Judiciary

There are a number of factors that lead to the independence of the judiciary. These include the effectiveness of the separation of powers principle, the method of appointing judges, assurance of security of tenure to judicial officials etc.

3.3.2 Appointment of Judges

Because of its being a sole prerogative of the executive, it is difficult to argue that political considerations, do not, to a certain extent play a role in the process of appointing and promoting judges in South Africa. It is against this back-ground that doubts and question marks on both the independence of the judiciary and the impartiality of the judicial officials have been raised especially in those cases where the state was suspected of having an interest. This is discernible in the case of President of the Republic of South Africa and Others v. The South African Rugby Foot-ball Union and Others.³⁷⁷ in which Dr. Louis Luyt, (the former president of SARFU) one of the parties to the case, filed a recusal application of some of the Constitutional Court judges on the ground of the relationship which the families of these judges had had with the President of the Republic of

377. 1999 (4) SA 147 (CC) or 1999 (7) BCLR 725 (CC)

South Africa prior to their appointment as judges.³⁷⁸ Although the application was turned down, the signal was sent that there was lack of confidence on the independence of the judiciary. The applicant was doubtful whether the judges would not be biased.

However, although such political considerations may have played a role in the appointment of judges, in practice judicial independence and the impartiality of judges have been evident in a number of decided cases.

Examples of cases where top government officials and powerful ruling party members have been successfully challenged in court like any man on the street would have been dealt with by the law, some of whom ended up being convicted and sent to prison for years will be provided hereunder.

3.3.3 Non interference in the affairs of courts by other government organs

The government can be credited for having maintained the separation of other organs of the government from the judiciary. This has enabled the courts to exercise their powers as provided for by the Constitution. Such non-tolerance of the practice of interfering in the affairs of the court is discernible in the case of Sv.B³⁷⁹ in which a father who was convicted of raping his minor daughter was sentenced to six years imprisonment. In passing the sentence of six years imprisonment part of which was suspended, the presiding officer justified his sentence by saying "apart from being a first offender, the offender committed the offence against his family member not an outsider which factor indicated his not being a threat to the society".³⁸⁰

378. Ibid. n. 377

379. 1996 (2) SA CR 54 (C). In the case of Van Rooyen and others v. s and others, the court declared a number of provisions of the Magistrate Act and the regulations for judicial officers in the lower courts invalid on the ground that the provisions empowered the Minister of Justice with such control over the magistrates which impermissibly limited the judicial independence of these magistrates.

380. S v. B, Ibid. 379 at para 45

The statement made a number of parliamentarians unhappy to the extent of asking the judicial officer to go to parliament and explain more on the statement to parliament. The situation was however settled in favour of the judge when the judicial officer simply invoked Section 165 (3) of the Constitution, which prohibits the legislature and other government organs from interfering in the functioning of the courts. This incident signifies the independence of the courts.

A number of cases have shown that being an affiliate to the ruling political party does not insulate one from the long hand of the law where such a person acts unlawfully in South Africa. This was made evident in the case of S v. Boesak³⁸¹ in which a prominent member of the ruling party (Mr. Boesak) was found guilty of fraud as charged and sentenced to a period of six years imprisonment.

The same situation was evident in the case of S v. Babeile³⁸² which saw the ruling party actively involved in the outcome of the case as they appeared opposed to the judgment and sentence which was passed against the accused. Despite the efforts they took, up to the extent of involving cabinet ministers and the former president (Mr. Mandela),³⁸³ the judgment and the sentence were left to stand when the case was sent on review.

At the time of writing this paper, the former ANC Chief whip in Parliament Mr. Tony Yengeni and the President of the ANC Women's League Mrs. Madikizela Mandela are facing trial for a number of criminal charges.

381. 2000 (3) SA 381 (SCA)

382. S v. Babeile (unreported)

383. E Jack ; Sunday Times 22 June 2001, at page 4. (MECs Visit Babeile n Prison) the paper reported the North West education MEC, Pitso Tolo's visit to Andrew Babeile at Kimberly Prison, accompanied by his Northern Cape counterpart, Tina Joemat Perterson. The MEC, was quoted as saying, " my visit here today was to ensure the young man and to publicly state our belief that Andrew is not a hardened criminal he might have been made to be, and that we will support all efforts that are being made to ensure his early release"

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3.3.4 Supremacy of the Constitution

Generally the Constitution has always been treated with due respect from all sectors of the government. No person or legislation has since 1994 proved to be above the law. Except where incidents of violations of the Constitution have not been brought to the attention of the courts, the courts have always upheld the Constitution as the supreme law of the land. In other words, through their judgments, South African superior courts have made it clear that in the hierarchy of laws, the Constitution comes first. They have sent a message across that no other law, not even an Act of parliament can rank higher than the Constitution. This is discernible in Justice Langa's statement in the case of S v. Williams and Others,³⁸⁴ where he stated that

one of the implications of the new order is that rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them in line with the provisions of the constitution.³⁸⁵

On a number of occasions, not only acts of persons but even legislation at both the national and provincial levels have been declared null and void on the ground that they are inconsistent with the constitution. This can be seen in the case of the Executive Council of Western Cape Legislature and Others v. President of the Republic of South Africa and Others.³⁸⁶ An issue arose from the 1993 Local Government Transition Act which governed the demarcating procedures of the voting districts in preparation for the local government elections.

In terms of the Local Government Transition Act of 1993, powers of demarcation were transferred from the National Government to the Provincial Governments. However, an amendment was made (Section 16A) which provided that the state president had powers to amend the 1993 Local Government Transition Act, by a

384. 1995 (3) SA 632 (CC)

385. S v. Williams and Others, Ibid. at 645

386. 1995 (4) SA 877 (cc) 4 or 1995 (10) BCLR 1289 (CC)

proclamation provided he did so after obtaining the consent of the Constitutional Affairs Committees of the National Assembly and the Senate. It happened that the President used the powers vested in him by Section 16A of the Local Government Transition Act, of 1993 and he amended this Act with the sole goal of preventing members of the provincial executive council from changing the composition of the committees responsible for demarcating the voting districts for the local government elections. This had the effect of giving the president powers to appoint members of the demarcating board.

The Western Cape Government responded by bringing an action in the Constitutional Court in which the issue was whether it was competent for parliament to vest in the President the powers to amend an enabling legislation by a subordinate legislation. In other words, the constitutional validity of Section 16A of the Local Government Transition Act was the major question put before the Constitutional Court.

By a majority nine to two, the Constitutional Court decided that parliament did not have the power to delegate to the President the powers to amend the Local Government Transition Act without going through the usual parliamentary procedure.

In his view, Justice Chaskalson stated that, although the President was in terms of Section 16A of the Local Government Transition Act, empowered to amend an Act in a manner which was different from the normal procedure, this was only supposed to be done in exceptional circumstances such as in the case of a state of emergency.

The two dissenting judges were opposed to the way in which Chaskalson J, interpreted the Constitution. In their opposition to the approach by Chaskalson J. Mohamed DP (as he then was), with Mokgoro J, considered the provision as being an offending one in that it went too far and it effectively constituted an abdication of parliament's legislative function. Ackerman. J; and O' Regan. J; were as well opposed to Chaskalson J's interpretation. According to them such powers

were restricted to parliament and it could not delegate it at any time.³⁸⁷ Both questions, which were put before the Court in this case and the response of the Court signify respect for the principle of constitutional supremacy by the highest court in constitutional matters. In other words, the declaration of Section 16A as being invalid on the ground that it was against the doctrine of separation of powers to legislate as provided for by the Constitution signified the respect for the supremacy of the Constitution.

The decision was also indicative of the impartiality and independence of the judges. This is evident from the fact that these judges were even ready to invalidate the acts of the highest political figure in the state (the President) when required to do so.

Another case which illustrates the superior position of the South African Constitution to all other laws was the case of Moseneke and others v Master of the High Court³⁸⁸ in which Section 23(7) (a) of the Black Administration Act No. 38 of 1927 was declared invalid on the grounds that it was inconsistent with Section 9 (3) of the Constitution which prohibited discrimination on the grounds listed therein.

In terms of Section 23 (7) a, of the Black Administration Act of 1927, intestate estates of black persons were supposed to be administered by magistrates and not by the Master of the High Court.

In his judgment, Justice Sachs, held that the section and the regulation both imposed differentiation on grounds of race, ethnic origin and colour, and as such constituted unfair discrimination in breach of the bill of rights.³⁸⁹

387. 1995 (4) SA 877 (CC)

388. 2001 (2) BCLR 103 (CC)

389. Moseneke and Others v. Master of the High Court, Ibid, n.388 at para 92. In the case of De Lille and another v. Speaker of National Assembly, 1998 (7) BCLR 916 (C), Section 5 of Powers and Privileges of Parliament Act of 1963, which empowered the Speaker of Parliament to instruct the court that it could not hear a particular matter was declared invalid on the ground that it was unconstitutional. It was held that Parliament was no-longer sovereign; thus an attempt to place issues of Parliamentary Privilege beyond judicial scrutiny was invalid.

3.3.5 Freedom of expression and speech

According to Section 16 of the South African Constitution of 1996 and the Freedom of Expression Institute (FXI), the right to freedom of expression encompasses the rights to freedom of speech, media, academic inquiry and artistic endeavor. It also includes the right of access to information as well as the right to receive and impart information.³⁹⁰

From this definition it is evident that the right forms the backbone of many vital institutions and activities of a civil society.

Of all rights provided for by the South African constitution, the right to freedom of expression has proved to be one of those that are jealously protected from any possible violation. This is evident from the wordings of the Constitution as well as from the way the South African Courts have interpreted the laws relating to this right as it will be provided hereunder.

As already provided, unlike its counterpart in Zimbabwe, in its language the South African Constitution avoided the dilemma of subsuming media freedom within the guarantee of freedom of expression, by expressly stating that “freedom of expression includes freedom of the press and other media”³⁹¹

This express provision, which accommodates all other media, can be interpreted to mean all those elements of freedom of expression as provided for in the definition of freedom of expression as defined. This can be seen as a means employed to ensure that the press does not rely on the benevolence of the courts which in the event of conflict, might even side with the government. Actually this signifies a broad form of protection of the freedom of expression.

Although there have been some minor obstacles to the enjoyment of this right, many of which are caused by the government and some private individuals as it will be seen in the examples that will be provided hereunder, generally the climat-

390. Media Law and Practice in southern Africa; (2002) Media Institute of Southern Africa Windhoek, Namibia

391. Constitution of South Africa, Op cit. n. 271 at Section 16(1) (a)

e in South Africa has been conducive to the exercise of the right to freedom of expression.

The South African media offers a broad range of news, opinions and analyses and criticizes both the government and the opposition. Although the South African Broadcasting Corporation, which controls most of the electronic media and the majority of major radio outlets still remains state owned, it has been praised by both independent national and international organization such as the International Freedom of Expression Organisation, as having maintained its editorial independence from the government.³⁹² According to the 1997 report on human rights practice in South Africa, the SABC news programming offered a balanced coverage of the government and the leading opposition parties.³⁹³

Generally, coverage of news and expression of opinions has been reported by the human rights organization to be vigorous. According to the 1998 report on human rights practices in South Africa, the year 1997 saw a black-owned investment consortium acquiring control of the country's leading black-oriented newspaper and of a major, traditionally white-owned publishing business, thereby making major inroads into the historic monopoly of white South Africans over both print and electronic media. Black South Africans have also been reported by the same source as having gained access to the media through community radio and in upper-level management positions at the SABC.

Although the majority of professional broadcast media outlets are still state-owned, according to the 1999 report on human rights practices in South Africa, their editorial independence is generally genuine. In the report, the organization

392. www.Reliefweb.Int/IRISa/countries/ South Africa

393. The International Freedom of Expression Organisation Report of 2001 at page 8

indicated its appreciation of the government's continued steps to end its monopoly over the electronic media.³⁹⁴ It was in 1999 that the first independent television station was issued with a licence to operate. Apart from those threats to the press freedom most of which have been reported by the media to have emanated from government officials after employing defamation laws as a tool to censor the media, journalists as foot soldiers of this right have generally been free in the execution of their duties.

Another organ which has played a major role in the promotion of the right to freedom of expression is the judiciary. Through their judgments and statements in passing, courts have expressed their willingness and commitment to promote and protect the free exercise of this right. This, they have done by either outlawing those laws which hinder the proper exercising of this right or by loosening the restrictions upon the exercise of this right. This inference is supported by the case of South African National Defence Union v. Minister of Defence.³⁹⁵ This was a case in which the Defence Force Act No.44 of 1957 which prohibited members of the defence force from joining trade unions or engaging in any protest action was challenged by the members of the defence force.

In the majority judgment on the issue of the Act's prohibition of the defence force members from public protest, which was delivered by O, Regan J, the court held that

Prohibiting participation in acts of public protest violated the right to freedom of expression of the defence force members. It added that the Act curtailed the right of defence force members to receive and express opinions on a wide range of issues, whether in public or private gathering.³⁹⁶

394. www.state.gov/www/global/human-rights/1999 (South African Media free at last)

395. 1999 (4) SA 469 (CC) or 1999 (6) BCLR 615 (CC)

396. South African National Defence Union v. Minister of Defence, Ibid, n.394 at para 42

The South African court's readiness to create a climate conducive to the exercise of this right was expressed in the land-mark case of National Media Limited and Others v. Bogoshi³⁹⁷ in which the Supreme Court of Appeal altered liability of the media in defamation actions by rejecting the doctrine of 'strict liability' for media defendants and introduced the availability of a defence of 'absence of fault'.³⁹⁸

More can be seen in the case of Curtis and another v. Minister of Safety and Security and others³⁹⁹ in which a constitutional challenge was launched against Section 2 (1) of the Indecent or Obscene Photographic Matter Act No. 37 of 1967 on the ground that it constituted an unreasonable and unjustifiable violation of the applicant's right to freedom of expression. It was also urged that the definition of indecent or obscene, on which the prohibitions in Section 2 (1) of the 1967 Act were based, was vague and over-broad. In its prohibition of possession of indecent or obscene photographic matter, the section provided that "any person who had in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one year or to both such fine and such imprisonment"

On the other hand, Section 1 upon whose definition of indecent or obscene the prohibitions in Section 2 (1) of the 1967 Act was based, defined indecent or obscene matter as follows: "it includes photographic matter or any part thereof depicting, displaying, exhibiting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or any thing of a like nature". The two important questions, which were considered by the court, were, whether

397. 1996 1 SA 670 (W) also 1998 (4) SA 1196 (SCA) . In the two cases, Mandela v. Falati 1995 (1) SA 251 W and

Holomisa v. Argus Newspapers Ltd. 1996 (2) SA 588, one of the major reasons given by the court for rejecting the applications for damages for defamation was that " public figures are sometimes expected to endure a rather harsh criticism".

398. National Media Limited and Others V. Bogoshi Ibid, n. at what para 34

399. 1996 (SA) 617 (CC) OR 1996 (5) BCLR 609 (CC)

sexually explicit material could be defined as a category of speech and expression protected by the Constitution and if so, if the possession thereof was subject to protection under Section 15 of the Constitution. Justice Mokgoro responded affirmatively to the first question and stated that, it would not readily be taken for granted that Section 15 of the Constitution protected sexually explicit material. It could be urged that, in interpreting the constitution purposively, it would not be unreasonable to maintain that expressive material graphically depicting various forms of sexual activity fell outside the protected category of expression⁴⁰⁰

As to whether Section 15 protected the right to possess sexually explicit material, Justice Mokgoro held that “ freedom of expression was impoverished if the right to possess sexually explicit material was not protected as well”⁴⁰¹

After quoting the USA courts as having deemed the right of the recipient to obtain information as being more fundamental than that of the person who transmits it, Justice Mokgoro in her final analysis stated,

I therefore hold that sexually expressive speech is subject to the protection of Section 15 of the constitution and that such protection must necessarily extend to the right to possess such material.⁴⁰²

On the question of whether Section 2 (1) of the Indecent Act of 1967 satisfied the requirements of Section 33 of the Constitution (the limitation clause) the court held that

the means embodied in Section 2 (1) read with the definition of indecent or obscene material which includes within its over broad canvas a vast array of incontestably constitutionally protected categories of expression, are -

400. Curtis and another v. Minister of Safety and Security and Others Ibid. n.320 at para 19

401. Curtis and another v. Minister of Safety and Security and Others Ibid. n.321 at para 25

402. Curtis and another v. Minister of Safety and Security and Others Ibid. n.322 at para 35

entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute. Such law is ipso facto not reasonable within the meaning of Section 33 (1) (a) (i)⁴⁰³

And lastly, while Justice Mokgoro delivered the minority judgment in which she held that Section 2 (1) of the Obscene Act constituted an unjustifiable infringement of the right to freedom of expression as well as the right to privacy, Justice Didcott, on the other hand, delivered a majority judgment of the court in which he held that " the prohibition constituted an infringement of the right to personal privacy guaranteed by Section 13 of the constitution"⁴⁰⁴

The decision as well as the reason for the decisions in this case, provides evidence of the fact that the right to freedom of expression is respected and protected by the courts in South Africa.

On the other hand, the judgment in the Bogoshi case represents a substantial and long over due victory for freedom of expression and the media in South African.

In its unequivocal affirmation of the significance of freedom of the press as well as its rejection of the strict liability doctrine, the judgment signifies commitment to the protection accorded to this right by the courts as well as the country as a whole. The immediate effect of the Bogoshi judgment is that it made both of the traditional legs of defence to a defamation action (ie. Justification and fault) available to a media defendant.

It can therefore be submitted that such an approach to justification and fault adopted in Bogoshi accords with the salutary imperative that the media has an indispensable role to play in the South African democracy. In fulfilling this role, the media has to act also responsibly and with due regard to the importance attached to a person's reputation.

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403. Curtis and another v. Minister of Safety and Security and others Ibid. n. 402 at para 61

404. Curtis and another v. Minister of Safety and Security and others Ibid. n. 403 at para 65

Another incident which illustrated the respect for and observance of the right to freedom of speech as a component of the doctrine of the rule of law in South Africa, happened in 1997 when a member of Parliament Ms. Patricia de Lille, of PAC used her Parliamentary privilege in the Assembly and named a number of senior ANC leaders who were alleged to have spied for the apartheid government. The MP's action was widely condemned by most of the ANC members, as a result of which a special parliamentary committee was convened to consider what action could be taken against Ms. Patricia de Lille. The committee ruled that Ms. Patricia de Lille should be disciplined and suspended from Parliament for a period of 15 days.⁴⁰⁵

In January 1998, Ms. Patricia de Lille made an application to the High Court in Cape Town to have her suspension declared null and void. The court decided the matter in her favour holding that Ms. de Lille's freedom of speech had been infringed.⁴⁰⁶

3.3.6 Equality before the law and in other aspects

The need for equal treatment as provided for by Section 9 of the Constitution has generally been respected. The section provides for the general principle of equality before the law and further confers the right to equal protection and benefit of the law. Subsection 4 of section 9 of the final Constitution contains an injunction to Parliament to pass legislation that will regulate further the prohibition of discrimination, and in this case Parliament has enacted legislation to put this subsection into effect.⁴⁰⁷

405. The Star 25th November 1997 (PAC's Patricia De Lille suspended from Parliament) by Helen Banford.

406. De Lille and another v. Speaker of the National Assembly 1998 (7) BCLR 916 (C)

407. In terms of item 23 (1) of schedule 6 of the final Constitution, Parliament had to pass this legislation as soon as reasonably possible from the date the Constitution became effective. Pursuant to this rejoiner Parliament did pass this legislation namely, The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 on the 2nd of February. The President assent to it on the same day.

All possible means to make the requirements of the equality clause to become a reality have been employed by both the government and the non-government organizations as it will be illustrated hereunder. For example, projects such as SAWEF (The South African Women's Empowerment Foundation), have been created with the sole aim of empowering those who were previously disadvantaged.⁴⁰⁸

In its 2001 report on South Africa, UN's Human Right Monitor Organization appreciated black empowerment projects, which the organization reported to have improved the living standards of a large number of previously disadvantaged black South Africans.⁴⁰⁹

The affirmative action clause which provides for discrimination under certain circumstances to the advantage of those who were previously unfairly disadvantaged, with the sole aim of bridging the existing inequality gap in many aspects of life within the South African population,⁴¹⁰ has been employed as one of the tools to give effect to the right to equality provided for by the constitution.

The judiciary is another organ, which has played a very significant role in making the right to equality a reality in South Africa.

The courts have on a number of occasions, invalidated Acts and rules, which are in violation of the equality clause. Through their judgments, the courts have shown that they are not ready at any time to tolerate any unequal form of treatment among people irrespective of the victim's nationality, race, color, sex etc. This was evident in the case of Barolo and Others v. University of Bophuthatswana.⁴¹¹ In this case the conduct of the University Council of

408. www.janniedutoit.co.za or www.sawef.org.za

409. The 2001 Human Rights Report on South Africa at page 38

410. Constitution of South Africa, Op cit, n. 271 at Section 9 (2)

411. (1995) 8 BCLR 108 (B)

imposing a moratorium on the promotion of expatriate members of the academic staff while simultaneously promoting staff holding South African citizenship was held to be amounting to unfair discrimination on the ground of nationality and that it amounted to a violation of Section 8 (2) of the Interim Constitution. Whenever there is a complaint of discrimination on any of the grounds listed in subsection 3 of Section 9 of the South African Constitution, the burden has been put on the person seeking to uphold such discrimination to prove that such discrimination was actually fair.

The case of Larbi-Odam v. Member of the Executive Council for Education (North West Province) ⁴¹² is instructive in this respect. In this case the Constitutional Court declared invalid a regulation, which prevented non-citizens from being permanently appointed as teachers on the ground that the regulation amounted to an unfair discrimination and was, therefore, inconsistent with Section 8 (2) of the Interim Constitution.

Equality in terms of treatment by the law or before the law has proved to be not only in theory but in practice too. The South African Courts have maintained that equality before the law as provided for by Section 8 (2) of Act 200 of 1993 or Section 9 (1) of Act 108 of 1996 requires every legal subject irrespective of the status to be subordinate to the law of the land in the same way. This was made abundantly clear in the already mentioned case, of the President of South Africa v. SARFU, where the President of South Africa was subpoenaed to appear before the Pretoria High Court to answer certain questions relating to his appointment of a commission of inquiry into alleged racism and corruption within the South African Rugby Football Union (SARFU). The Union had earlier brought an action challenging the setting up of the commission and alleged that the President had failed to apply his mind to the matter. It claimed that the President had merely endorsed a decision made by the Minister of Sports ⁴¹³

412. (1997) 12 BCLR 1655 (C)

413. The Citizen 10th March 1998

The judge Mr. Justice de Villiers, found it impossible to resolve the matter on the basis of the papers before him and ruled that the President would have to appear in court to provide further clarification on the contested issues. An application to overturn this ruling on the basis that a Head of State should only be called on to testify in very exceptional cases, and only if there was a very strong *prima facie* case, was rejected by the judge, ruling that it would not be in the interest of justice to revoke the order.⁴¹⁴ As a result of the ruling, the President appeared in court and he was subject to penetrating cross-examination by counsel.⁴¹⁵ The court upheld SARFU's application ruling that the decision to appoint a commission of inquiry had not been properly taken.⁴¹⁶ Although the ruling was overturned by the Constitutional Court on appeal, a precedent that no one is above the law was set.⁴¹⁷ More evidence to the fact that no one is above the law was seen on the 4th of February 2002 when the SABC reported the appearance of the Eastern Cape Finance and Economic Affairs MEC (Mr. Enoch Godongwana) for trial before the East London Magistrates Court on a charge of drunken driving. He was reported to have been released on a bail of R.500,³³⁹ sending a clear message to the public that every body is prosecutable if he or she breaks the law.

414. The Citizen, Ibid. n. 413 at page 6

415. The Citizen 28th March 1998

416. SARFU v. President of RSA and Others (10) BCLR 1256 (T)

417. SARFU v. President of RSA and Others, Ibid. n. 416

418. Kashiefa Ajam, The Star Newspaper, 6th February 2002 (Premier rebukes MEC for drunk driving)

3.4 Summary

This chapter has examined three major issues. Apart from the historical background of South Africa, the chapter has discussed the provisions in the South African Constitution, which promote respect for, and observance of those principles that lead to the existence of the rule of law.

The South African Constitution has been presented as comparable to any of the best democratic constitutions of the world. It has been shown in this chapter that the South African government at all levels respects the rule of law and behaves in line with the prescribed procedures.

The next chapter provides the findings of the study and the recommendations.

CHAPTER FOUR: FINDINGS

4.0 Introduction

This chapter contains the general findings of the study. The findings are based on the discussions on the two countries as provided for in chapters two and three.

According to the discussion in chapters two and three, both countries have laws in place, which call for the respect for and observance of the basic tenets or fundamentals of the rule of law. For example, the discussion in chapters two and three showed that both countries have constitutions, which contain bills of rights.⁴¹⁹ The major principles of the rule of law as were discussed in chapter 1 have been found to be central to the founding principles of the Constitutions of the two countries.

Like the Zimbabwe constitution, the discussion in chapter three has shown that the South African Constitution promotes respect for and observance of the rule of law. Both constitutions contain those major principles in the creation and protection of the rule law as discussed in chapter one. Principles such as the rule of law, the supremacy of the constitution, equality before the law, separation of powers, the rights to personal freedom etc. are evident in the two constitutions.⁴²⁰

Despite the above mentioned similarities between the two constitutions under discussion, the discussions in chapters two and three reveal the existence of a vast difference between state practices in these two countries in their response to the requirements of the constitution as will be shown hereunder.



419. Chapter 1 of the Zimbabwe Constitution of 1980 as amended, Chapter 2 of the South African Constitution Act 108 of 1996.

420. Chapter 1 of Act 108 of 1996, Chapter 2 of the Zimbabwe Constitution.

4.1 The question of independence of the judiciary

It is evident from the discussion in chapter two that there has been disturbing or glaring cases of violations of the Constitution in Zimbabwe. The executive has been interfering in the affairs of the courts whenever it feels like. Factors like the assurance of security of tenure to the judicial officials, which can ensure the confidence and impartiality of these judges in the execution of their duties have been denied at times.

The discussion in chapter two has revealed situations where judges are left with no other choice but to resign due to threats from the executive as a result of their failing to decide cases in a manner that is favourable to the executive branch.

In his work, where he was speaking of "apartheid judges", Dugard quoted professor Wack's statement, which he made in his inaugural lecture in which the resignation of judges on the ground of moral principles was the topic of discussion. He said, "If a judge is to square his conscience with his calling, there would appear to be no choice left for him but to resign".⁴²¹

What professor Wacks implied here was that, any moral judge who wishes to apply or interpret the law in accordance with principles of equality and justice will always feel guilty of telling lies to the public and betraying the profession if he is obliged to decide cases not according to the facts and the available laws but rather according to the way the executive branch of the government wants them to be decided. In such a situation the judge will be left with no choice but to resign. If professor Wack's statement is related to the resignation of the judges in Zimbabwe, indeed a big question mark arises not only on the independence of the judiciary but even the legitimacy of the whole legal system.

421. Dugard J "should Judges Resig" SALJ Vol 10 1984

Another big blow to the independence of Zimbabwe's judiciary can be seen in the government's appointment of a number of judges who are perceived to be allies of the ruling party. Such appointments reveals the absence of the quality of independence of the judges, which is a fundamental feature of the rule of law.⁴²² The absence of an independent judiciary will, as well in this case, imply the absence of a powerful arm in the country to prevent possible violations of the rights of the ordinary, defenceless individuals by those vested with state powers.

In his book entitled Human Rights and the South African Legal Order (1978), wherein he was speaking of the South African apartheid judges, Dugard maintains that

in spite of its own sectional and professional interests, an independent bar will act as a restraining force on the arbitrary acts of other organs wielding power in a society. The bar will as well act as a check on the judiciary, which has such an important place under the rule of law.⁴²³

Dugard's statement does not only show how essential is an independent judiciary to the doctrine of the rule of law, but also reveals that the absence of an independent judiciary, will mean the absence of a guarantee for the protection of people's constitutional rights in general.

The discussion in chapter three has shown the South African government to be acting in accordance with the provisions of the constitution; thus the respect for and observance of the doctrine of the rule of law.

422. A Namibian judge in the treason case of S v. Heita and another 1992 (3) SA 785 (NM) 791 emphasized the importance of judicial independence for the effective functioning of the judiciary without which the constitution can not survive

423. Dugard, J Human Rights and the South African Legal Order (1978) at para 97 Juta; Cape Town

The discussion has shown that South African judges are independent or immune from pressure from the government unlike their counterparts in Zimbabwe.

Although political factors may have played a role in the appointment of some of the South African judges, their impartiality and independence has however proved to be beyond question from the number of cases as discussed in chapter three. It is discernible from the cases discussed in chapter three that even the head of state can be subpoenaed to court like any ordinary person;⁴²⁴ meaning that no one is above the law.

It is respectfully submitted that independence of the judiciary in South Africa is a reality, as conditions are generally conducive for the courts to discharge their functions without outside interference thus guaranteeing respect for and observance of the doctrine of the rule of law

4.2 Supremacy of the Constitution

Despite the presence of Section 3 of the Zimbabwe constitution, which declares the constitution to be the supreme law, it is evident from the discussion in chapter two that the executive and some cabinet ministers perceive themselves as being above the constitution.

The discussion in chapter two has shown the president vowing never to have his plans stopped by the orders of the court,⁴²⁵ which eventually proved to be true after he managed to force those judges who were not ready to abide by his orders to resign.⁴²⁶ Such acts of making the judges to terminate their contracts of

424. President of the Republic of South Africa and Others v. SARFU, Op cit. n. 303

425. Zim Financial Gazette, Op cit. n. 302 at 4

426. www.britain.it/news,

employment in a manner that is inconsistent with the provisions of the constitution meant that, to the Zimbabwe President, the provisions of the constitution are observed more in breach.

It is therefore respectfully submitted that in Zimbabwe at the moment the supremacy of constitution is in theory and not in practice, a situation which is contrary to the most elementary precepts and tenets of the doctrine of the rule of law.

On the side of South Africa, the discussion in chapter three has shown that the South African government is, in most of the aspects, responding positively to Section 2 of the constitution, which declares the constitution to be the supreme law of the land.

A number of cases have been discussed in which not only acts by top officials of the government but even legislation from the legislative body (parliament) have been declared invalid simply because they were found to be inconsistent with the constitution.⁴²⁷

It is therefore submitted that the supremacy of the constitution as an element of the rule of law is not only observed in theory but also in practice, in South Africa.

427. Executive Council of Western Cape Legislature and Others v. President of the Republic of South Africa Op cit, n. 309 and 311

4.3 Equality before the law

It is evident from the discussion in chapter two that some individuals in Zimbabwe are treated in a different way by the law enforcers as compared to others because of their political affiliations or relationship with government officials. If a person can be killed or deprived of his right of ownership of property in the presence of the law-enforcement agencies as the case discussed above attest and the perpetrator remains at large without being charged, that clearly shows that such a person by virtue of being affiliated to the ruling party is handled with soft hands by the law enforcement agencies as compared to others irrespective of the gravity of the crime he may have committed.⁴²⁸

On the other hand, it is clear from the cases discussed in chapter two that some individuals have been dragged to police stations for minor offences without even satisfactory evidence incriminating such people. This shows the fact that in Zimbabwe, the law enforcers, in executing their duties, treat individuals differently according to their status, in terms of political affiliation, colour or origin etcetera. On the other hand, the cases discussed above illustrate the fact that South African law-enforcement agencies apply the law without distinction as to race, colour or sex.

4.4 Freedom of speech and expression

From the cases discussed above, it is evident that people in Zimbabwe are treated differently, depending on their political affiliation.

Limitations have been placed on the media as a means through which the citizens can receive information of public interest or have their opinions conveyed to the intended audience.⁴²⁹

The cases indicate that a number of obstacles have been placed in the way of journalists as foot-soldiers of this right. The cases discussed above reveal the

428. Daily newspaper, Op cit, n. 152

government's monopoly of the broadcasting sector and its strict control of the media as one of the tools employed by the government in its denial of its citizens' right of access to matters of public interest. The discussion in chapter two has shown the struggle by the private press in their effort to try to force the government to abandon its monopoly control, but it appears they are still far from attaining this goal. Monopolizing of the media by the government is one of the factors that largely hinder citizens from enjoying their right to free speech and expression. The above submission was emphasized by the European Court of Human Rights, in the case of Information Sovereign Lentia and Others v Austria⁴²⁹ where the court ruled that "of all the means of ensuring that those values which ensure the respect to freedom of speech and expression are respected, a public monopoly is the one which imposes the greatest restriction on the freedom of expression."

The discussion in chapter two reveals disrespect shown to the Zimbabwe journalists by the executive branch of the government. As a matter of fact, any assault on the journalist as foot-soldiers of the press, and informers of the public about the government, will imply an assault on the general public's right to receive information and to have their opinions heard; this was made clear in the decision of the European Court of Human Rights in the case of Thorgeirson v. Iceland,⁴³⁰ where it was emphasized that "it is incumbent on the press to impart information and ideas on the matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has the right to receive them. Where it is otherwise, the press will be unable to play its vital role of public watchdog".⁴³¹

The discussion in chapter two has shown the existence of such laws that forcefully command journalists to disclose their sources of information whenever

429. (1993) A 276 ECHR) at para 38 & 39

430. (1992) A 239 ECHR at para 62)

431. Thorgeirson v. Iceland, *ibid.* n. 430 at para 21

the executive feels it necessary. Such forceful disclosure is a big blow to the exercise of the right of free speech and expression as it narrows the chances of the journalists to receive information and to pass it over to the public. This was highlighted in the case of Goodwin v. United Kingdom⁴³² where it was ruled that “freedom of expression protects journalists from mandatory source disclosure except in very narrow circumstances where there is an overriding public interest in the information.” It was further held by the court that the protection of journalist sources of information was one of the basic conditions for a free press.⁴³³

The discussion in chapter two shows that both the media and individuals are subject to strict liability in Zimbabwe. This implies that in case of a defamatory statement, it will not be a defence for the concerned publisher of such a statement that he or she had no intention to defame, or that such a publisher defamed the plaintiff in question by mistake, or that the publisher genuinely believed the statement to be true or that even if the statement was indeed false and defamatory, it was in the public interest to have the information published, nor will it be a defense that the publisher took all reasonable steps to check the accuracy of the story before going ahead and have it published.

The discussion in chapter two has shown laws put in place to specifically protect public officials from possible criticism by the media. This is all aimed at silencing the media and the individual Zimbabweans at large. There is no need for special laws to protect the President, his honour or dignity. The Public Order and Security Act of 2002 gives protection to public figures that is not available to the rest of Zimbabweans. This means that public figures are protected even from heinous deeds and they have their own laws that do not apply to the rest of Zimbabweans; a principle which is inconsistent with the doctrine of the rule of law. The shielding of public officials from scrutiny violates the notion of

432. (1996) 22 ECHR 123 at para 39

433. Goodwin v. United Kingdom, Ibid. n. 348 at para 40

transparency and accountability. The presence of these laws, which are aimed at stopping the media from reporting on certain individuals, reveals the existence of conditions, which do not favour the existence of a free speech and expression as ingredients of the rule of law.

On the other hand, from the South African experience, it is evident from the discussion in chapter two that conditions are generally fairly conducive for the exercise of the right of free speech and expression. For instance, the discussion in chapter three shows that although the government still owns the majority of the television stations, laws have been put into place to enable transformation in this regard and already the first private television station (etv.) is in place as a result of this law.⁴³⁴ The fairness in terms of reporting by these state-owned stations has been highlighted in the discussion in chapter three by the independent non-governmental and international organizations.

The cases discussed in chapter three show that journalists are generally free and fairly protected in the execution of their duties of collecting information as well as reporting it. The laws are generally conducive for both the journalists and the public in their enjoyment of the right to free speech and expression.

Unlike the situation in Zimbabwe, the South African situation, as discussed in chapter three shows that laws hindering the proper enjoyment of the right to free speech and expression, such as that providing for strict liability have been declared unconstitutional by the South African courts.⁴³⁵ It is therefore submitted that while conditions in Zimbabwe do not favour the existence of a free exercise of the right to freedom of speech and expression, conditions in South Africa are generally fairly conducive for the public to exercise their right to freedom of speech and expression.

434. Op cit. n. 124

435. Op cit. n. 402

4.5 Advancement of people's political will.

The discussion in chapter two indicates that from the late 1990s, conditions in Zimbabwe started changing from being in favour of promoting the principles of democracy to that of dictatorship. .

We cannot talk of the rule of law to be respected in such a situation where one's holding of a political opinion that is different from that of the ruling party qualifies him or her to be seen as the country's number one enemy by the ruling party. If all possible means are employed by the government to see to it that any meaningful opposition is eliminated, this violates the people's liberty and right to political opinion, such an act in its self signifies nothing other than the violation of the rule of law and its values. In his work Dugard says " to prevent a person from expressing his view, belief or emotion is to deny that person his or her basic dignity, freedom and individual autonomy as a human being and thus to violate the most basic human right of all". ⁴³⁶ The rule of law demands the basic freedoms of persons, conscience, speech, information, movement, meeting and association to be guaranteed by the law in force to all citizens in a non-discriminatory manner.

436. Van Wyk Dugard; New South African Legal Order. (1994) at page 69

4.6 Summary

This chapter has attempted to synthesize and bring out the different levels at which the rule of law is respected and observed by the two countries. It has shown the Zimbabwe government to be in total conflict with the principles, which were seen in chapter one to be the yardstick of the doctrine of the rule of law. The practice of ignoring court orders by the Zimbabwe government has been found to be one of the factors responsible for the violations of human rights and the consequent break down of the rule law. The ZANU-PF government of Zimbabwe has been found to be very far from reaching the level at which the rule of law is respected in South Africa. The chapter has shown the South African government to be acting in line with the Constitution and internationally recognized standards of the rule of law as were seen in chapter one.

The next chapter will provide the summary and the conclusions of this study. It will also provide the recommendations.

CHAPTER FIVE. CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter contains two major issues; that is the general conclusions of the study and the recommendations to the possible solution of those problems, which have been found to be the major obstacles to the enjoyment of respect for and observance of the doctrine of the rule of law.

5.1 Conclusion

In conclusion, it is respectfully submitted that credit be given to the South African government for its commitment in respecting and observing the doctrine of the rule of law, despite its being one of the world's youngest democratic nations.

Credit is given to South Africa's executive and the legislative branches of government, which have not only acknowledged the fact that the constitution is the supreme law but also respected the decisions of the courts as the interpreters of the law.

On the other hand, the ZANU-PF government has proved to be in total disregard for the rule of law from almost all angles of the government. If the sovereign legislature can be brave enough to enact such constitutionally retrogressive laws as witnessed in chapter two, it implies that the main foundations of the rule law are being eroded.

The rule of law cannot exist where the executive branch of the government employs such internationally unacceptable legislation full of draconian clauses, against the media, the opposition and even go as far as advocating for organized violence against these two sectors and the judiciary as shown in the discussion in chapter two.

The ZANU-PF government's attitude of disclaiming the judgments of its own courts and disregarding the Constitution, on which its legitimacy is based,

undoubtedly undermines the government's moral authority, if not legitimacy. It is completely unacceptable to qualify the rule of law in this way. Such a practice amounts to a breach of the principles of the rule of law and leads to the erosion of the standards set in the bill of rights. The essence of the constitution is that it should, among other things, lay down the rules of conduct for state organs. Parliament, which is established and exists in terms of the constitution, should be subordinate to it. It should not be able to change the constitution and downgrade fundamental rights whenever it suits it to do so.

There can be no rule of law where the same laws are applied differently to some people. Mugabe's practice of picking and choosing which laws he wishes to obey by defining certain matters as 'political' because it suits him thereby vitiating the principle of equality before the law, setting one standard for himself and another for the people he governs is at variance with the principles of the doctrine of the rule of law, justice as well as international norms.

5.2 Recommendations

Notwithstanding the intense pressures on the police and other security organizations to deliver results in the fight against crime, the torture and ill-treatment of suspects in criminal investigations should never be tolerated. The highest authorities should always lead the trend of opposing acts of torture and they must always be the first ones to condemn such cases of torture whenever they arise. Prompt and impartial investigations of all alleged acts of human rights abuses should be undertaken by the authorities, and at the end appropriate criminal and disciplinary measures against officers found to be responsible should be taken.

While national laws or the Constitution of Zimbabwe and South Africa prohibit torture and forced confessions, it is advisable that the prohibition of such acts

should as well be officially incorporated into procedures and police standing orders in the two countries.

The Zimbabwe government should abandon its system of creating a climate of impunity among the security forces as such will merely increase the likelihood of further violations of the provisions of the Constitution. Authorities should investigate both past and present allegations of human rights violations with officers suspected of perpetrating abuses suspended from active duty during investigations, and those found to be responsible must be brought to justice. The victims of human rights violations by the police and other security organs should be entitled to obtain fair and adequate redress from the state. The ZANU-PF government should cease to use the police and the security forces for political purposes, including the suppression of peaceful, non-violent public assemblies and to persecute opposition parties, non-governmental organisations and minorities. Police officers and other officers in the security forces should receive clear, explicit instructions to respect the constitution and the international obligations upon the Zimbabwe government to respect human rights of all, irrespective of a person's political beliefs, sexual orientation, religion, ethnic origin, sex, colour or language.

It is not enough to enact such a beautifully drafted constitution when the government is not ready to work in line with the provisions of such a constitution as it has been seen to be the case in Zimbabwe. It should as well be appreciated that the Zimbabwe constitution is in a serious need of reform and in this case, any reform can only be meaningfully undertaken if it is part of a broad based and fundamental change.

It should also be noted that acts violating the principles of the doctrine of the rule of law, will never be done away with if leaders don not appreciate the fact that they are simply temporary holders of state authority, who should give in such powers peacefully whenever the laws and the people governed requires it that way. It is because of such greed for power that most of the African leaders with

special reference to the Zimbabwean president have ended up violating the constitution as a means to suppress any possible move by the public that may be aimed at removing these leaders from power.

Bibliography

Books

1. Anorl, R; Nation Building in Africa: Problems and Prospects. Rutgers University Press, New Brunswick: New Jersey 1997
2. Blerk, A E; Judge and be Judged, Cape Town: Juta & Co. 1988
3. Burns Y. Media Law, Durban; Butterworths, 1990
4. Brunton D J ;The Law and the Individual, London; The Macmillan Press Ltd. 1979
5. Davenport, T, R, H; The Transfer of Power in South Africa, Cape Town: Francolin, 1998
6. Delups ID; International Law and the Independent States 2nd edition. Aldershot, Hampshire: Gower 1987
7. Dicey, A. V; An Introduction to the study of the law of the Constitution, 8th Edition, London; Macmillan and Co. Ltd. St. Martinis Street 1920.
8. Gann, L; The Struggle for Zimbabwe, New York: Praeger Publishers 1981
9. Johnson R.W and Schlemmer L; Launching Democracy in South Africa. The First Open Election, 1994-1996. New Haven: Yale University Press, 1996.
10. Kriger, N; Zimbabwe's Guerrilla War; Peasant Voices, Cambridge; Cambridge University Press 1992.
11. Mathews S.A; Freedom State Security and the Rule of Law, Cape Town; Juta & Co. Ltd. 1986

**NWU
LIBRARY**

12. Mathews, A.S; Law Order and Liberty in South Africa, Cape Town; Juta 1971
13. Nyangom, W; African Nationalism in Zimbabwe, Washington D.C.
University Press of America, 1978
14. Robertson Blake; A History of Rhodesia, New York: Alfred A Knopf 1978
15. Robertson, M; "The participation of Judges in the present Legal system;
Should Judges Resign?"(Provisional title), Democracy and the Judiciary;
edited by H. Corder, IDASA Cape Town.
16. Saunders, C and Southey, N.; A Dictionary of South African History: 2nd ed.
Cape Town: David Philip Publishers 2001
17. Selby D; Human Rights, Cambridge; Cambridge University Press 1987.
18. Worden N; Concise Dictionary of South African History, Cape Town:
Fancolin, 1998

Internet Web sites

1. [www.Reliefweb.Int/IRINSa/ Countries / Zimbabwe](http://www.Reliefweb.Int/IRINSa/Countries/Zimbabwe)
2. [www.State.gov/ global/human rights/Zim](http://www.State.gov/global/human%20rights/Zim)
3. www.afrol.com/news/zim 004
4. www.britain.it/news
5. www.wsws.org/articles/Zim.

Articles in Journals.

1. Ackerman, L; "Human Rights and Judicial Review in an Emergency Oriented Society" (Provisional title) in Democracy and the Judiciary, edited by H. Corder, IDASA Cape Town. 1989.
2. Cameron, "Rights Constitutionalism and the Rule of Law", (1997), SALJ 504
3. Dugard .J, "The role of International Law in Interpreting the Bill of Rights"; 10 (1994) SALJ at 208
4. Hatchard, J. "Institutions of Ombudsman in Africa with special reference to Zimbabwe", 1986 (35) ICLQ 255.
5. Suzanman A. "South Africa and the Rule of Law" SALJ (1968) at 42

Thesis

1. Devenish, G. E.; Constitutional Change and Reform in South Africa, (1986) Pretoria: University of South Africa 1986. Thesis (LLD)- UNISA.