

**THE EROSION OF THE RULE OF LAW AND
THE FALL OF HUMAN RIGHTS: CASE STUDY
OF ZIMBABWE**

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By

KARISSA JOHNSON

Student number: 12189112

Prepared under the supervision of

Professor M Hansungule

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Chapter One

Introduction and Background

Introduction

The rule of law or its absence is seen and felt by and through both natural and juristic persons worldwide. It is an essential component in any country to ensure the welfare of that State and its people. The observance of the rule of law has however; proven problematic in post-colonial Africa and more specifically in Zimbabwe on which I have chosen to focus my research.

I will focus on Zimbabwe, its known failure to adhere to the rule of law and the resultant effect on human rights and the society as a whole. The centre of interest within the broad topic of the rule of law will be the accountability of the government. I will further analyse the effect of this aspect of the rule of law on human rights, specifically freedom of expression and personal liberty. The rule of law and human rights are extensively affected by politics and authoritative bodies.

Throughout this research one will find that the law in theory and the law in action or as practiced, especially in Zimbabwe, do not always align. Alternatively one can say that the law is adapted to align with corrupt practices. The rule of law seems to only exist in speeches made by leaders and in the instruments from which they read. In light of the above, Zimbabwe recently entered a new dispensation under President Emmerson Mnangagwa and, judging from his pronouncements thus far, there is renewed hope that he will make changes for the better.

Research Problem

Failure to adhere to the rule of law in Zimbabwe has resulted in the collapse of the notion of human rights.

Research questions

- i. What effect does an unaccountable government have on the basic freedoms of the citizens or inhabitants of Zimbabwe?
- ii. What are the laws that promote the rule of law and protect human rights in Zimbabwe?
- iii. How does the rule of law and human rights in Zimbabwe translate in everyday practice?
- iv. Is respect for the rule of law and human rights being restored in Zimbabwe?

Method of research

I am going to use the desk research method because I will make use of library resources and internet sources to access information for my research. I will focus on the law in books versus the law in action and uncover the political nature of law.

Limitations of Study

The limitations I could face when conducting this research are the lack of informative resources and books written by Zimbabweans within Zimbabwe; those experiencing the disregard for the rule of law. I would have wanted to use the field research method but I will not do so because respondents are hard to come by. There are not many Zimbabwe based journalists or activists willing to speak up about the injustices and instability in the country for fear of their welfare or those of their families. However, with the recent change in regime from Robert Mugabe to Mnangagwa, this is one of the areas in which change is hoped for. Beatrice Mtetwa, Evan Mawarire and Jestina Mukoko, amongst the few, are examples of activists or citizens who have suffered the hand of intimidation and imprisonment for exercising their rights to freedom under President Mugabe's long reign. A number of sources I have found and that I will find to corroborate my topic on the erosion of the rule of law and human rights in Zimbabwe are from people or Zimbabweans outside the borders of Zimbabwe. Further the raw material of this study is based in Zimbabwe while I am based in South Africa as I conduct this research. This could also be taken into account as a limitation to the study.

Literature overview

The research on the rule of law in Africa with a focus on Zimbabwe is relevant to the community of African people firstly because there are consequences that flow from either adhering to it or not, and specific to this research the consequence on human rights. This research topic is also especially relevant to a post-colonial Africa and the 21st century where more and more people are educated and in favour of the notion of democracy. Countries such as Zimbabwe claim to be democracies and as a result proclaim that power is not centralised and that everyone is equal under the law. Therefore this topic will not be losing relevance anytime soon.

The rule of law is embedded in the African Charter of Human and Peoples Rights; the African Charter on Democracy, Elections and Governance; and even in domestic law such as a country's constitution. This however, seems futile and rather ideological in a country such as Zimbabwe as there is not much evidence within the country of the effective exercise of the codified law. This research deliberately focuses on Zimbabwe because it best illustrates an African nation in which the observance of rule of law is nearly non-existent and will need time to be fully restored.

During the colonial era(1888- 1980) Zimbabwe (then known as Rhodesia) was plagued by racial discrimination, arbitrary arrests and imprisonment, invasion of homes and property, denial of fair public trial, freedom of speech and the press. These human rights violations were addressed and a large improvement was made upon independence in 1980. However, this great ending to a horror story was short lived as Zimbabwe found itself with the same human rights challenges which can be linked to the absence of the rule of law under former President Mugabe. An increasingly unaccountable government led by the only leader Zimbabwe had ever known for 37 years definitely had and still has an effect on the law being applied fairly and may, in some instances, affect the independence of the judiciary. The result is an oppressed Zimbabwean nation.

Human rights and peace in any country depend on the rule of law, the hope that people can rely on good governance. This topic of the rule of law is not a new one but it will never lose relevance and needs to be kept alive, particularly in light of African countries

like Zimbabwe. The importance of this research is best described by South African Chief justice Mogoeng Mogoeng in a speech about the rule of law:

Africa has what it takes not only to have its people bask in the glory of sustainable economic development and prosperity; but also to enjoy peace and all-round stability in an environment of good governance, facilitated by an independent, efficient and effective court system.¹

Mogoeng Mogoeng goes on to state that Africa is instead associated with corruption, political and social instability, abuse of human rights, and a uncontrolled disregard for the rule of law.² This research is a small contribution to a wider spectrum of those that wish to reverse this unfortunate situation in Africa.

The rule of law is not a new phenomenon and has been discussed and studied since time immemorial. There exists an array of literature already written on this topic and I will be referring to some of it in an effort to consolidate my discussion of the flaws in the law and shortcomings in the rulers of Zimbabwe. I will look at the effect it has had on the freedom of expression and personal liberty of the citizens of Zimbabwe.

The research will be conducted by first looking at the concept of the rule of law as defined in various sources and as incorporated in international law. I will also examine the legal system in Zimbabwe and the application of the law by the government and the judiciary (case law). I will further analyse what it means to enjoy the right to freedom of expression and areas or cases in which the right has been affected. Finally, I will look into the ways in which confidence in the law can be restored within Zimbabwe specifically and therefore Africa at large because the problems Zimbabwe faces are not unique.

I will begin the discussion of the rule of law and human rights with a brief overview of its origin. Even for a study based on Zimbabwe one needs to look back at the history of the rule of law in order to understand the importance of the topic. It was Albert Venn

¹ M Mogoeng 'The rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards' 25 July 2013 <http://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/> (accessed 2 April 2017).

² M Mogoeng 'The rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards' 25 July 2013 <http://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/> (accessed 2 April 2017).

Dicey who popularised the principle of “the rule of law”, and by which he meant the absence of arbitrary power on the part of the government, that every man is subject to the ordinary law of the land which is administered by the ordinary courts and that the constitution is the result of the law of the land. The general principles of law are the consequences of rights of the subjects and not their source.³ It is clear that even with Dicey the concept of the rule of law was not discussed or explained outside the rights of its subjects.

The rule of law overtly simplified in the context of this research would narrow down to mean that everyone is subject to the law and can be held accountable. A report by the research unit of the Zimbabwe Human Rights NGO Forum (a coalition of 21 human rights NGOs in Zimbabwe) describes the law as both unwritten and written law, common law and statutes passed by parliament. The report states that the rule of law goes beyond specific laws. “The rule of law stands in contrast to the law of the jungle, operated by the strong and powerful, where the weak and the powerless lose out.”⁴

With the importance attached to the rule of law and given its customary international law status⁵, it is interesting to hear statements that seriously undermine the rule of law such as the following; “What Zimbabwe does not want to see is a fixation on peripheral matters, such as the rule of law, democracy, good governance and political violence when the core issue is land.”⁶ This was a statement made by former President Mugabe of Zimbabwe in Nairobi, Kenya, in June of 2001 when referring to the issue of land seized by the colonial Rhodesian authorities from indigenous black people of Zimbabwe. This, regardless of past injustices⁷ does not reflect a post-colonial and progressive Africa. There is no excuse for a disregard of the rule of law. The rule of

³ A V Dicey *Introduction to the Study of the law of the constitution* (1961) xx.

⁴ ‘Enforcing the Rule of Law in Zimbabwe’ (2001) *Zimbabwe Human Rights NGO Forum: Special Report* 3 53.

A V Dicey (note 3 above).

Oxford Online Dictionary https://en.oxforddictionaries.com/definition/rule_of_law (accessed 1 July 2017).

G Devenish ‘The Rule of Law revisited with special reference to South Africa and Zimbabwe’ 675 675.

⁵ International Law Commission ‘Identification of customary international law’ sixty-seventh session A/CN.4/L.869.

⁶ The Herald Zimbabwe 21 June 2001, see also A D Smith ‘Straw to meet opposite number in first high level contact for a year’ 22 August 2001 <http://www.independent.co.uk/news/world/africa/straw-to-meet-opposite-number-in-first-high-level-contact-for-a-year-9146061.html> (accessed 10 March).

⁷ L Madhuku *Introduction to Zimbabwean Law* (2010) 17.

law is crucial for the effective functioning of a democratic country in all its aspects as it brings order and stability for the good of the people.

To address the dilemma of why the concept of the rule of law only seems to exist in theory i.e. speeches made by leaders and in instruments of law; the research will look at the domestic law of Zimbabwe and the extent to which and how law is observed. The Constitution of Zimbabwe is the supreme law of the country and any law, practice, custom or conduct inconsistent with it is invalid.⁸ The current Constitution states that it is binding on every person, even the State and the executive.⁹ It also states that Zimbabwe is democratic¹⁰ and founded on principles such as good governance, the rule of law, human rights and freedom¹¹ amongst many others. I will look at how the status of the constitution as supreme seems to only exist in theory and how there is enacted legislation that seems rather contrary to the constitution.

It is safe to state that some of the legislation in Zimbabwe is not in alignment with a democratic state and the freedom stated in the constitution.¹² Instead, it seems to take away freedom. In the case of *Handyside v the United Kingdom* freedom of expression is explained as “applicable not only to information or ideas favourably received but also to those which offend, shock or disturb the State. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.”¹³

In the case of *Biti and Another v Minister of Home Affairs*¹⁴ the applicant, Tendai Biti, a member of an opposition political party called Movement for Democratic Change (the MDC) party notified the officer commanding the police, as is required by the Public Order and Security Act, that the MDC would be holding 12 public meetings in Harare. In reply the officer commanding the police, Kupara, informed Biti that only four of the

⁸ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 2(1).

⁹ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 2(2).

¹⁰ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 1.

¹¹ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 3. See also the preamble of the Constitution of Zimbabwe.

¹² Public Order and Security Act sections 24, 25 and 26(1).

¹³ *Handyside v United Kingdom*, (5493/72) [1976] ECHR (7 Dec 1976) par 49.

¹⁴ *Biti and Another v Minister of Home Affairs and Another* ((34/2002)) [2002] ZWSC 9 (27 February 2002).

12 meetings could be held. Biti approached the court alleging that section 24¹⁵ of the Public Order and Security Act infringed the applicants' rights to freedom of expression and freedom of assembly.

The court stated that the applicants were not successful in proving that section 24 contravened section 20 and 21 of the Constitution of Zimbabwe which entrenched freedom of expression and freedom of assembly. The case is not clear as to why the applicants were not permitted to hold all 12 meetings. The Public Order and Security Act therefore seems to give State officials arbitrary power to prohibit opposition parties from holding meetings. It is submitted that freedom of expression should be guaranteed to all citizens and should not be limited arbitrarily without good reasons proffered.

In discussing the aspect of freedom of expression and personal liberty, I shall look at the case of activist Evan Mawarire. He attempted to stand up to the injustices of the country by rallying up citizens to stand up for their constitutional rights under his "This Flag" movement. As a result he was arrested in July 2016 for inciting public violence in terms of section 36¹⁶ of the Criminal Law (Codification and Reform) Act.¹⁷ During the trial, his charge was changed to that of subverting a constitutionally elected government and then he was later released after the magistrate ruled that his arrest was unconstitutional. This case of July 2016 has not yet been reported but it was well publicised and covered by media world-wide. Although the events, such as Mawarire's case among others, were well publicised at the time they happened, they quickly died down and were forgotten about within days as if the cause for which they fought not important.

I shall also discuss the case of *Mukoko v the Attorney General*.¹⁸ This case reported the permanent stay of criminal prosecution because of the torture and inhuman and degrading treatment which Jestina Mukoko experienced at the hands of State agents

¹⁵ (note 12 above).

¹⁶ Criminal Law (Codification and Reform) Act 2004.

¹⁷ M Dzirutwe '#This Flag; Zimbabwean Pastor Evan Mawarire released from police custody' (2016) Mail and Guardian.

'Zimbabwean activist arrested' (2016) eNCA News.

'Zimbabwean pastor Evan Mawarire charged with inciting violence' (2016) BBC News.

¹⁸ *Mukoko v the Attorney General* (36/09) 2012 ZWSC 11 (20 March 2012).

of Zimbabwe. Jestina Mukoko was, in a nutshell, accused of trying to overthrow the government of Zimbabwe. It was ruled that the manner in which evidence was obtained from her, through torture, was unconstitutional and she was released from police custody. Despite this ruling, the question of what happens to her kidnapers and the State agents that tortured her does not seem to be addressed. Neither the State agents nor the State for which these agents work were not held accountable.

To further address government accountability, the case of *Zimbabwe Lawyers for Human Rights and Another v President of the Republic of Zimbabwe*¹⁹ is of importance. The Zimbabwe Lawyers for Human Rights applied for the reports of the Dumbutshena Commission and Chihambakwe Committee to be published as there had and still has been failure or refusal to publish these reports. The reports were in connection to the Gukurahundi genocide that occurred in Zimbabwe in the early to mid-1980s. The commission and committee were set up to inquire into the genocide and identify the persons responsible for planning or promoting it.

The reports were also to make recommendations for the resolution of the problems identified. Both the Dumbutshena Commission and Chihambakwe Committee reported to the then Prime Minister Mugabe at the end of their deliberations. The court in this case stated that the applicants showed no good cause for wanting the reports published and that the respondent had made it clear that the Dumbutshena report cannot be located. The court ruled that no good cause was shown for the report to be published and that even if good cause was shown, the report cannot be published if it cannot be located. These reports were never made public and this horrific past was never redressed. Again responsibility and accountability for an atrocious event was never addressed. Justice was not served. I will therefore, in my research, briefly examine the judiciary, its independence, what the constitution states about it and some of the decisions the Zimbabwean courts have made.

Judicial independence is entrenched in section 164 of the Constitution of Zimbabwe which states that the courts are independent and are subject only to the constitution

¹⁹ *Zimbabwe Lawyers for Human Rights and Another v President of Republic of Zimbabwe and Another* ((311/99)) [2003] ZWSC 12 (20 November 2003).

and the law, which they must apply impartially without fear, favour or prejudice. Further section 164(2) states that the independence, impartiality and effectiveness of the courts are central to the rule of law. The rule of law would therefore be compromised should the judiciary not function as per sections 164 and 165. Section 180(1) of the Zimbabwe constitution further states that the Chief Justice, Deputy Chief Justice, Judge President of the High Court and all other judges are appointed by the President of Zimbabwe. This unchecked authority is further confirmed by section 180(2) of the Zimbabwean constitution through the Constitution of Zimbabwe Amendment Act number 1 adopted in September 2017. Sections 180(2) as mentioned above states that the President shall appoint, after consultation with the Judicial Service Commission, the Chief justice, the Deputy Chief Justice and Judge President of the High Court. Although the Judicial Service Commission makes submissions to the President of nominees for judicial positions, the fact that the President has the final say on who to appoint could lead to the appointment of a judge with political allegiance to the ruling party.

Judges should be free from executive interference and any other person for that matter when acting within the scope of their employment. In 2003 Zimbabwean Justice Benjamin Paradza was arrested on allegations of subverting the course of justice soon after he ordered the release of the then City of Harare Mayor Elias Mudzuri from police custody.²⁰ The Mayor was part of the opposition MDC (Movement for Democratic Change) party. Justice Paradza was detained under conditions in which the Constitutional Court found to be cruel and inhuman. This creates the impression that he was targeted for ruling against the executive and the interests of the ruling ZANU-PF (Zimbabwe African National Union-Patriotic Front) party.²¹ If the judiciary is compromised because of an unaccountable government the question must be asked as to who bears responsibility for consequences that arise from actions and decisions that are not satisfactorily justified. This question is actively avoided as not many are willing to confront the situation and as a result it is the people oppressed by a malfunctioning system that bear the burden and face the consequences.

²⁰ Annexure A- 'The independence of the Judiciary' <http://hrforumzim.org/wp-content/uploads/2010/06/SR14-Shadow-Report-Annexures.pdf>

²¹ Annexure A- the independence of the judiciary <http://hrforumzim.org/wp-content/uploads/2010/06/SR14-Shadow-Report-Annexures.pdf>

When there is interference with the dignity and functioning of the judiciary and where the judiciary can no longer act without fear, favour and prejudice; the judiciary of a country loses respect and trust from the people. This can be seen in the case of farmers who had to resort to the SADC (Southern African Development Community) Tribunal in a matter involving expropriation of land by the government of Zimbabwe according to the land reform policy which denied them compensation or access to courts.²² These farmers had to seek justice outside the borders of their country yet this should have been readily accessible within the borders of their country.

In light of the above, this study seeks to support academics who have studied and written about the rule of law and human rights because they recognised its importance, even if my contribution is just a small one as I focus on Zimbabwe. Further this research will hopefully shed light on the eroded state of the rule of law in Zimbabwe and provide meaningful suggestions as to how to restore what has been lost or rather rebuild a law abiding nation for the people and their welfare.

Chapter Outline

Chapter One - Introduction and Background to the Study

This chapter introduces the topic, questions that will be addressed in the chapters to come, the method which will be used to address the topic and outlines briefly what will be discussed in further detail.

Chapter Two - The Rule of Law and Human Rights

This chapter discusses a brief history of the rule of law and defines the concept. The definition of the rights to freedom of expression and personal liberty are also discussed and how they are meant to work in theory.

Chapter Three - Zimbabwe, the Law, the State and Human Rights

²² Government of the Republic of Zimbabwe v Fick 2013 5 SA 325 (CC).

This chapter discusses four cases in detail. These cases deal with the rule of law and human rights issues. It illustrates the way in which the law is applied in Zimbabwe, whether it is legislation that does not fall in line with the rule of law or legislation that has been ignored because it supports the rule of law.

Chapter Four - Reform in Zimbabwe and Restoration of the Rule of Law

This chapter mentions solutions that can be implemented in Zimbabwe to restore the rule of law and respect for human rights. The chapter also looks at what has already been accomplished under the new president.

Chapter Five - Dissertation Conclusion and Recommendation

This chapter concludes the study by extracting the main themes of the preceding chapters and drawing conclusions from them.

Chapter Two

The Rule of Law and Human Rights: Government Accountability, Freedom of Expression and Personal Liberty

In Chapter One I introduced the topic and outlined the direction of the study. Chapter One was a summary and a broad scope of the research as a whole. In this chapter I will be looking at the background and definition of the rule of law, as well as focusing on what the specific human rights of this research (freedom of expression and personal liberty) entail. This chapter, although not focused on the crux of the matter which is the rule of law and human rights in Zimbabwe, is important. History enlightens us of the importance of this subject. In order to discuss the rule of law and human rights in the specific context of Zimbabwe we need to first discuss the rule of law and the specific human rights in isolation.

The focus of this research will specifically be government accountability in the broad scope of the rule of law and personal liberty and freedom of expression within the scope of human rights. I will give an outline of the rule of law and its relationship with human rights or its resultant effect on human rights. I will briefly state how they fit into this study and in the next chapter continue an in depth discussion of Zimbabwe, as the focus of the study.

History of the rule of law

The rule of law is not easy to define and many scholars have written lengthy articles in attempt to define or foster an understanding of this concept. I will begin with the Oxford Dictionary definition of the rule of law which states that the rule of law is “the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws”.²³ This rule of law, according to this definition, is sovereign law that prevents the abuse of power by those in positions of authority as they are also subject to the sovereign law. The law in this context must be well-defined and established; therefore clear, precise and operative.

²³ Oxford Online Dictionary https://en.oxforddictionaries.com/definition/rule_of_law (accessed 1 July 2017).

I would like to submit that the concept of the rule of law has been made complex by legal academics who have come up with several opinions regarding the concept.²⁴ However, the same principles run through all the explanations of the rule of law namely equity, sovereignty of the law, impartiality, uniformity and certainty.²⁵ Therefore, there may not be agreement on one definition of the rule of law but there is agreement that the rule of law is universally valid and important. Tamanaha rightly points out that “amidst a host of uncertainties there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the rule of law is good for everyone.”²⁶

The topic of the rule of law can be traced as far back as Plato and Aristotle, the famous ancient Greek philosophers.²⁷ I will however, start with Albert Venn Dicey who popularised the principle although he did not invent it.²⁸ Although Dicey’s work on the rule of law is said to be defective and incomplete²⁹ and not exhaustive of the full ambit of the rule of law, nevertheless, the rule of law and its genesis or history is rarely mentioned without him also being included in the discussion. His writings are therefore of clear importance when it comes to understanding the rule of law.

Dicey maps out three conceptions, as he calls them, in order to understand the rule of law.³⁰ Dicey states that firstly the rule of law means that there should be an absence of arbitrary power on the part of the government. Therefore, no citizen or inhabitant of a state should be punished except in the case of a breach of law that is established and clear.³¹ The law should therefore be clear and legitimate so that everyone knows when they have acted out of the ambit of law and what consequences will arise as a result. Secondly, Dicey states that no man is above the law and that the law is supreme.³² The rule of law in this context means equality under the law, whether for the leader or the ordinary man. This emphasises the supremacy and sovereignty of the law which allows for checks and balances to its subjects, despite their rank. Even

²⁴ G Devenish ‘The Rule of Law revisited with special reference to South Africa and Zimbabwe’ 675 675.

²⁵ G Devenish (note 24 above) 675.

²⁶ BZ Tamanaha *On The Rule of Law: History, Politics, Theory* (2004) 1.

²⁷ BZ Tamanaha (note 26 above) 10.

²⁸ J De Ville ‘the Rule of Law and Judicial Review: Re-Reading Dicey’ *University of Western Cape* 62 64.

²⁹ G Devenish (note 24 above) 677 & 678.

³⁰ AV Dicey *Introduction to the study of the law of the constitution* (1915) 110.

³¹ AV Dicey (note 30 above) 110.

³² AV Dicey (note 30 above) 114.

the government officials of a nation may not act outside the scope of their lawful authority. Thirdly and finally, Dicey states that the rights within the constitution have come about as a result of judicial decisions.³³

The first two points that Dicey makes are relevant to this study and tie in well with the aspect of the rule of law that this research touches on, which is, that the law should be legitimate and the government should be held accountable for their actions by the law. The concept of the rule of law and all that it represents has undoubtedly evolved over time but the first two points mentioned above remain the core of the rule of law,³⁴ the idea that the law must rule.

The rule of law can be seen as the legal order within which human beings can exist and exercise their rights, or as more about the regulation of the law in order for the economy to develop and grow in a stable environment. In other words it is simply an affirmation of the supremacy of the law and states being ruled by law and not men.³⁵ It all stems from Dicey's argument that the citizen has the right to make law, elect representatives to enforce the law so that we can live in harmony, a flourishing economy and under good governance.

It is important, in the context of this research, to distinguish between the rule of law and the rule by law.³⁶ John Locke's famous saying still holds true that "wherever law ends, tyranny begins".³⁷ I would like to submit that the law Locke was talking about was unbiased law with unbiased law enforcers. It is law which places necessary restraints on the state. Under the rule of law, the law is most important and can serve as a deterrent to the abuse of power; whereas under the rule by law, the law is used as a tool to oppress the subjects of the law.³⁸ In this case, under the rule by law, it is usually those in leadership or in a position of power that enact unjust laws to protect and justify their abuse and misuse of power. A state without the rule of law creates instability and insecurity. This very unstable and insecure position is where Zimbabwe now finds itself, a position which will be discussed in depth in Chapter Three.

³³ AV Dicey (note 30 above) 115.

³⁴ Lord Bingham 'The Rule of Law' (2007) *66 the Cambridge Law Journal* 67 69.

³⁵ K Shoemaker The History of the Rule of law https://history.wisc.edu/history459_fall2010.pdf (accessed 7 July 2017).

³⁶ BZ Tamanaha (note 26 above) 3.

³⁷ J Locke *Second Treatise of Government* (1960) 400.

³⁸ BZ Tamanaha (note 26 above) 3.

A tree is always known by its fruits and this is similar when a country has the rule of law. Lord Bingham mentions eight implications of the rule of law³⁹ and therefore evidence that the law is sovereign. I shall mention a few of the eight. Lord Bingham states firstly that the law must be accessible, clear and predictable. This accessible, clear and predictable law should then apply equally to all with the exception of justifiable differentiation. The law should further protect all fundamental human rights and officials at all levels should exercise their powers in good faith and without exceeding the limits of the power bestowed on them. Bingham states that separation of powers is important and that both the judiciary and the executive must act in strict conformity with their roles. If they act independently it will create a transparent regime. Lastly, the rule of law demands that the state abides by international law and obligations. The above are good indicators of a country that functions within the rule of law with the only addition being that the law should be accepted by the majority of the nation.

The absence of the rule of law and the use of arbitrary power does affect the liberty of individuals and the exercise of basic human rights. Human rights will not be and cannot be protected or respected without the rule of law. Human rights are guaranteed by both domestic and international law. It is a state's obligation to respect and protect human rights.⁴⁰ At the very least Zimbabwe is a member of the United Nations and the United Nations Charter affirms the importance and purpose of upholding human rights.⁴¹ Zimbabwe should therefore, through law, uphold human rights in theory and practice. The main concern of this research is the effect that the lack of the rule of law in Zimbabwe has had on freedom of expression and personal liberty. It is therefore necessary to discuss these two human rights; freedom of expression and personal liberty.

³⁹ Lord Bingham (note 34 above) 70-82.

⁴⁰ United Nations Human Rights: Office of the High Commissioner <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 29 June 2017).

⁴¹ Charter of the United Nations (1945). The Charter of the United Nations continually reiterates the importance of human rights starting with its preamble and further within articles 1(3), 13(1)(b) and article 55(c) just to name a few.

Freedom of expression

Freedom of expression is seen as the cornerstone of any country that claims to be a democracy, it is therefore not to be seen as a privilege or an exclusive western value as Sorabjee states.⁴² Freedom of expression has been described as a predominant right which is essential for the rule of law to function effectively.⁴³ Burchell states three main justifications for freedom of expression namely that freedom of expression is the best way to discover the truth (market place of ideas theory); it is important for the democratic process and; that it is the manifestation of the right to self-government.⁴⁴

The market place of ideas theory embodies the notion that people should be able to debate free from government interference.⁴⁵ This right enables the truth to be exposed and promotes a society in which law and order prevails.⁴⁶ It also creates an atmosphere in which new ideas can be introduced and necessary change in society can be brought forth. A platform in which disgruntled citizens can speak out and present new ideas will enhance the progress of a state⁴⁷. Government officials or those involved in government conduct may be guilty or responsible for error and malpractice. The market place of ideas justification would support that such incompetence by government conduct should be exposed publicly as this is a “powerful disinfectant”.⁴⁸

The second justification for freedom of expression is one familiar to most, which is that without this right an effective democracy cannot exist. If democracy is a government by the people and for the people, freedom to express oneself becomes necessary. Freedom of expression secures the rights of citizens to participate in the governing of their nations and therefore contribute meaningfully to the democratic process. New, relevant and current ideas about how to improve the state or the government should be welcome and this can only be possible where freedom of expression is guaranteed.

⁴² SK Sorabjee ‘Freedom of expression’ (1993) *Common wealth law Bulletin* 1712 1713.

WJ Van Vollenhoven ‘The Right to Freedom of Expression: the Mother of Our Democracy’ (2015) 18 2299 2306.

⁴³ R Clayton & H Tomlinson *Privacy and Freedom of Expression* (2010) 184.

⁴⁴ J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 1.

⁴⁵ J Burchell (note 44 above) 10.

⁴⁶ SK Sorabjee (note 42 above) 1712-1713.

⁴⁷ WJ Van Vollenhoven (footnote 42 above) 2307.

⁴⁸ R Clayton & H Tomlinson (note 43 above) 186.

Lastly and similar to the second the justification, the third justification speaks of people making up their own mind of what is acceptable, what is not, what is true, what is false and what is bad in life and bad in politics.⁴⁹ This right creates a more capable citizen who has the power to change those that govern.⁵⁰ The freedom to express oneself as stated above basically points towards the freedom to communicate and hence one's right to express themselves by words or conduct.⁵¹ Only by speaking out, using the media as a platform and exercising the right to demonstrate or associate can people truly express themselves.⁵²

The primacy freedom of expression is further shown by its connection to other rights. It is often used to protect and to access other rights.⁵³ If people of a nation are free to express themselves through the media, speech or other actions they can exercise and protect their right to hold the government accountable, their right to life, economic stability, their right against unjustified deprivation of freedom and human dignity. In order to make informed political choices, citizens need to be able to access information freely and hear different perspectives.⁵⁴ Unpopular or controversial views should be expressed freely and the public should have the option to either support or defeat the views expressed.⁵⁵

It is important to note that freedom of expression is a basic human right guaranteed in international law and is therefore not confined to domestic legal systems.⁵⁶ Freedom of expression is guaranteed in Article 19 of the International Covenant on Civil and Political Rights⁵⁷, Article 9 of the African Charter on Human and Peoples Rights⁵⁸ as

⁴⁹ J Burchell (note 44 above) 13.

⁵⁰ A Cox *Freedom of Expression* (1981) 3 and 4.

⁵¹ J Burchell (note 44 above) 30.

⁵² A Cox (note 50 above) 3.

⁵³ SK Sorabjee (note 42 above) 1713.

M Seleoane 'Towards an African Theory of Freedom of Expression' (2001) 20 *Group Democracy and Governance, Human Sciences Research Council, Pretoria, South Africa* 5 18.

⁵⁴ WJ Van Vollenhoven (note 42 above) 2309.

⁵⁵ WJ Van Vollenhoven (note 44 above) 2308.

⁵⁶ SK Sorabjee (note 42 above) 1713.

⁵⁷ International Covenant on Civil and Political Rights (1966) Article 19(2) "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

⁵⁸ African Charter on Human and Peoples Rights (1981) Article 9(1) "Every individual shall the right to receive information." Article 9(2) "Every individual shall have the right to express and disseminate his opinions within the law."

well as Article 19 of the Universal Declaration of Human Rights⁵⁹ just to name a few places in which it is recognised in international law. However, despite the supremacy of this right it is not absolute.⁶⁰ A subdivision can be made between those who believe freedom of expression should be absolute and those who believe that it is not. The absolutist theory would not permit any limitations on this right, not even a limitation under the law against defamation to protect another's right to their reputation.⁶¹ I will submit that freedom of expression is not without its limitations because an absolute freedom of expression will infringe other valuable human rights. The right to human dignity as an example supports this assertion well. Freedom of expression is a facet of human dignity, if looked at from a broader perspective. One of the functions freedom of expression serves is to protect human dignity.⁶² We cannot therefore then use the very same right (freedom of expression) to infringe human dignity. Freedom of expression must be balanced in light of other rights.

The right can be subject to justifiable limitation in the event that, for instance, this freedom will infringe on the interests of national security, public safety or the limitation of this freedom will prevent disorder or crime. A practical example which we will discuss later in connection with the Gukurahundi genocide that occurred in Zimbabwe, is the publication of reports at a particular time when that publication could aggravate tension between those concerned and result in violent conflict.⁶³ The court that adjudicated the case on whether the reports on the Gukurahundi massacre should be published or not stated that this was a justifiable limitation. This stance is subject to debate⁶⁴ but nevertheless is an example of how freedom of expression can be and was limited in the interest of social harmony.⁶⁵

The International Covenant on Civil and Political Rights as well as the African Charter on Human and People's Rights acknowledges that freedom of expression may be

⁵⁹ Universal Declaration of Human Rights (1948) Article 19 "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

⁶⁰ SK Sorabjee (note 42 above) 1713.

⁶¹ J Burchell (note 44 above) 2.

⁶² J Burchell (note 44 above) 17.

⁶³ (As above).

⁶⁴ (Refer to Chapter three Page 31 where the limitation of freedom of expression with reference to these specific reports is discussed.)

⁶⁵ *Zimbabwe Lawyers for Human Rights and Another v President of Republic of Zimbabwe and Another* (311/99) 2003 ZWSC 12 (20 November 2003).

restricted.⁶⁶ Freedom of expression can be subject to abuse by those with intentions to destroy a nation or attack a minority group and should therefore be exercised within the limits of the law. It should, however, not be limited arbitrarily. The power to limit freedom of expression should itself be limited. A restriction cannot be said to be justifiable simply because it was codified and made law.⁶⁷ In the case of uncertainty or doubt freedom of expression should be chosen over suppression.⁶⁸

Freedom of expression is a cherished right and ensures that governments are heard by the people and that the people consent to the actions of the government. It is the essence of a democracy that the governed are not silenced and rendered powerless. The tolerance of one another's opinions is important for the development of a democratic state.⁶⁹

Personal Liberty

Personal liberty is defined by Tamanaha as “the minimum degree of autonomy individuals retain even after they consent to live under the law”.⁷⁰ Personal liberty can also be defined as the freedom to do one's will within the confines of the law and to not be subjected to arbitrary imprisonment, arrest or any other physical coercion.⁷¹ If someone is ill, imprisoned or impoverished they will not have the chance to do what they wish. Personal liberty inevitably cannot exist without the rule of law because its

⁶⁶ International Covenant on Civil and Political Rights (1966) Article 19(3) “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided for by the law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”.

African Charter on Human and Peoples Rights (1981) Article 27(2) “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”.

⁶⁷ B Patel ‘Freedom of Literary Expression and Censorship in Zimbabwe’ (1997) *Zambezia* 1 3.

⁶⁸ SK Sorabjee (note 42 above) 1720.

⁶⁹ SK Sorabjee (note 42 above) 1712.

WJ van Vollenhoven (note 42 above) 2310.

⁷⁰ BZ Tamanaha (note 26 above) 35.

⁷¹ AV Dicey (footnote 30 above) 124.

deprivation has to be legally justified. Where this right is entrenched, it is a guarantee that detention or arrest will not be unlawful.⁷²

As with the right to freedom of expression, the right to personal liberty is protected by law. Universally we can see the right to personal liberty protected in Article 9 of the Universal Declaration of Human Rights⁷³ and in Article 6 of the African Charter on Human and People's Rights.⁷⁴ The general rule across the board, as incorporated in legislation, seems to be that deprivation of liberty is only allowed if it is carried out within the confines of the law and even so in accordance with procedure as laid down in domestic law.⁷⁵ The minimum procedural requirements are usually that a detained person should be informed of the reason for his arrest, he or she should be allowed to take *habeas corpus* proceedings before court and that the person held in custody shall be brought before court usually within a few days.⁷⁶ The judge or presiding officer will either release the person detained or authorise further detention pending the next trial. The right to personal liberty is therefore enhanced and effective where there is a full separation of powers.⁷⁷ When this right is deprived it requires an independent judiciary to make a clear, unbiased decision concerning a person's wrong doing and whether or not that individual can enjoy freedom.

Personal liberty also includes the right to one's privacy.⁷⁸ Deshta and Deshta describe an atmosphere where personal liberty exists as one where people can live and grow without fear and restriction.⁷⁹ I would like to add that knowing that someone or a group of people can invade your privacy at any moment can instil fear into another's atmosphere and life. Nevertheless the right to personal liberty in connection with one's

⁷² Icelandic Human Rights Centre 'The Right to Liberty' <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-liberty> (accessed 3 July).

⁷³ Universal Declaration of Human Rights (1948) Article 9 "No one shall be subjected to arbitrary arrest, detention or exile".

⁷⁴ African Charter on Human and Peoples Rights (1981) Article 6 "Every Individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained".

⁷⁵ Icelandic Human Rights Centre (footnote 74 above).

⁷⁶ (As Above).

⁷⁷ (As Above).

⁷⁸ Universal Declaration of Human Rights (1948) Article 12 "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

⁷⁹ S Deshta & K Deshta *Fundamental Human-Rights: The Right to Life and Personal Liberty* (2004) 3.

right to enjoy their privacy will have to be determined on a case to case basis. We will further look at personal liberty in this context with the Jestina Mukoko case.

Personal liberty is an inalienable right and it is of great importance, especially when looked at together with other rights; particularly freedom of expression for this study. Without respect of the right to freedom of expression, personal liberty can easily be infringed. If one person's expression is regarded as illegal they can be deprived of personal liberty as a consequence. The one right leads to the success of the other and the two rights work in support of the other.

Conclusion

In the preceding discussion I have endeavoured to define the rule of law and give a very brief overview of its background. The rule of law has been established as the absence of arbitrary power and the supremacy of the legitimate law which serves as a standard to be kept against the abuse of power. Freedom of expression was then discussed as the cornerstone of democracy and the right of citizens to express themselves through any avenue they see fit such as the media or through demonstration under the limits of the law. Personal liberty was also discussed as a citizen's right to be in control of their privacy, mind and person. This chapter sought to provide a foundation for the broader research topic and an understanding of how the rule of law is intertwined and connected to the human rights of freedom of expression and personal liberty. The lack of respect for the rule of law has affected freedom of expression and personal liberty in Zimbabwe.

In light of all of the above, the rule of law and human rights are connected in that the one enhances the protection of the other. The government can only be held accountable if the law is clear, public, accepted and effective. As mentioned above the separation of powers will ensure the independence of the executive, legislative and judicial divisions which will prevent the concentration of total power in a single division. Citizens or individuals will therefore have confidence in the law and be able to exercise their right to freedom of expression and enjoy personal liberty without fear of arbitrary arrest or unlawful treatment.

The rule of law is directly linked to the implementation of human rights.⁸⁰ Without the rule law to enforce and protect human rights, they remain “lifeless paper promises”⁸¹ rather than a reality. The rule of law further guarantees political stability which is important and plays a huge role in rights performance.⁸² Undeniably, instability and mismanagement of a country is a threat to the exercise of freedoms and rights. The rule of law may not be an antidote to the abuse of human rights but it is central to the effort to hold leaders accountable and central to towards creating a rights respecting nation.⁸³ The desire for the rule of law may not be important to those who have it because they cannot miss it and care nothing of it, they may even belittle it, but those who suffer from its absence appreciate it. Zimbabwe has a history of being mismanaged and power being concentrated in the executive. The failure to exercise the right to freedom of expression and the deprivation of personal liberty has become a norm in Zimbabwe, whether justified or not. This will be discussed in depth in the next chapter.

⁸⁰ R Peerenboom ‘Human Rights and the Rule of Law: What’s the Relationship?’ (2004) xx 1 3.

⁸¹ R Peerenboom (note 80 above) 3.

⁸² (As Above).

⁸³ R Peerenboom (note 80 above) 65.

Chapter Three

Zimbabwe: The Rule of Law and Human Rights Applied

In this part of the research I have resolved to show how the rule of law, freedom of expression and personal liberty as discussed in the previous chapter have not practically worked in Zimbabwe. I discuss four key cases that deal with human rights and rule of law issues. This chapter shows how citizens tried to search for truth, to create a better world for themselves within their country, to exercise their rights as citizens and ultimately stood up for the rule of law.

Zimbabwe's founding values and principles in terms of section three of the current Constitution include, inter-alia, the respect for the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, good governance, transparency, justice, accountability and responsiveness. There is a duty, mentioned in section 44 of the current Constitution, on the need for the state and every person to respect, promote, protect and fulfil the human rights and freedoms stated in chapter four of the Constitution. Personal liberty is protected in section 49 and freedom of expression is protected in section 61. Also relevant to this chapter is human dignity protected in section 51 in which every person has the right to their private and public life and, in terms of section 53, freedom from torture or cruel, inhuman or degrading treatment or punishment.⁸⁴

Biti and Another v Minister of Home Affairs

The case of *Biti and Another v Minister of Home Affairs*⁸⁵ deals with the right to freedom of expression and freedom of assembly. The facts are that the applicant, Biti, a member of the Movement for Democratic Change (the MDC) party at that point notified the officer commanding the police (Chief Superintendent Kupara at the time) as is required by the Public Order and Security Act, that the MDC would be holding 12

⁸⁴ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

⁸⁵ *Biti and Another v Minister of Home Affairs and Another* (34/2002) ZWSC 9 (28 February 2002).

public meetings in Harare. The date, time and venue of each meeting was stated in the letter notifying Kupara in terms of section 24 of the Public Order and Security Act⁸⁶. In reply, Kupara, informed Biti that only four of the 12 meetings could be held. The rest of the meetings were prohibited for various reasons not reported in the case judgment. Biti approached the court alleging that section 24 of the Public Order and Security Act infringed the applicants' rights to freedom of expression and freedom of assembly. The court stated that the applicants were not successful in proving that section 24 contravened section 20 and 21 of the 1980 Constitution of Zimbabwe⁸⁷ which entrenched freedom of expression and freedom of assembly and that it must reconcile freedom of expression and assembly with government responsibility to ensure sound maintenance of public order. The court further mentioned that section 24 does not arbitrarily or excessively invade the enjoyment of freedoms and that there is a similar provision in the United Kingdom Public Order Act 1986 section 11.

There are a number of issues one may find with this judgment however. Firstly, the courts' comparison of Zimbabwe's Public Order and Security Act with the Public Order Act in the United Kingdom as similar and as a reason why section 24 does not infringe freedom of expression cannot stand. Although one can argue that the texts of section 11 of The Public Order Act of the United Kingdom and Zimbabwe's Public Order and Security Act are not as similar as the court makes them out to be, this contention is not necessary as one need only discuss the different contexts in which these provisions operate. Western democracy is progressive, mature and the specific legislation in the United Kingdom is purely for procedural purposes. Whereas the context in which the Public Order and Security Act in Zimbabwe was enacted and operated within 2002 (the year this case was brought forward) must be understood.

The government of Zimbabwe passed two pieces of legislation before the contentious presidential elections of 2002⁸⁸, the Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act. The Public Order and Security

⁸⁶ Public Order and Security Act section 24- Organiser to notify regulating authority of intention to hold public gathering.

⁸⁷ The Constitution of Zimbabwe 1980 (since repealed and replaced) sections 20 and 21- Protection of freedom of expression and protection of freedom of assembly and association.

⁸⁸ Human Rights Watch 'Universal Periodic Review of Zimbabwe' 29 March 2011 <http://www.refworld.org/docid/506580ef56.html> (accessed 1 July 2017).

J Jafari 'Attacks from within: Zimbabwe's Assault on Basic Freedoms through Legislation' (2003) 10 *Human Rights Brief* 1.

Act replaced the Law and Order Maintenance Act of 1960 (LOMA), which was considered an oppressive piece of legislation enacted to favour the white colonialists. LOMA served effectively to suppress any opposition towards the colonial government. POSA came in to replace LOMA after years of criticism as to why this colonial legislation was still in place but ironically POSA maintained the same standard of LOMA. POSA criminalised the making of any insulting comment towards the president in section 16, prohibited the making of any false statement towards the government in section 15 of which the executive determined what was a false statement and further affected any local or foreign journalist writing about human rights in Zimbabwe.⁸⁹

It should be noted that some of the sections of POSA have now been repealed in terms of section 282 of the Criminal Law and Codification Act as of 2010 but there are still problems with POSA and its discussion is relevant for the present case and the context in which this case was tried. During the 2002 election period the MDC was the main opposition party to Zimbabwe's ruling party ZANU-PF (Zimbabwe African National Union- Patriotic Front) and POSA was widely believed to have been enacted to suppress any opposition although the government claimed that it was lawful and essentially upholding the rule of law.⁹⁰ The 2002 elections were described by observer missions as having a "lack of transparency", a "biased legislative environment" and involving political violence.⁹¹ POSA allowed ZANU-PF to address many more rallies than its opposition parties during the election.⁹²

POSA has been criticised by many as imposing harsh restrictions on civil liberties and facilitating executive interference in freedom of expression and assembly.⁹³ The sections in question, sections 24 to 27 as referred to in the Biti case, have specifically been pointed out as arbitrarily enabling police to approve or disapprove any public gathering at will.⁹⁴

⁸⁹ J Jafari (note 88 above) 2.

⁹⁰ J Jafari (note 88 above) 1.

⁹¹ The South African Institute of International Affairs 'The 2002 Zimbabwe Presidential Election: Analysing the Observation' (2002) 28 *SAIIA Report* 1 5.

A Musiyiwa 'Under Siege: Zimbabwe's Human Rights Activists' (2006) – In 2002 Raymond Majongwe was arrested under section 17 of POSA and assaulted by the police while leading a peaceful teachers strike.

⁹² J Jafari (note 88 above) 3.

⁹³ A Musiyiwa (note 91 above).

D Matyszak 'Democratic Space & State Security: Zimbabwe's Public Order and Security Act' (2005) *Kubatana.net*.

⁹⁴ J Jafari (note 88 above) 2.

Lastly the question of what the various reasons were for not permitting the other eight meetings were not mentioned in the judgment. Although this question may not lead to a direct answer to the legal question before the court which was whether section 24 of POSA contravened sections 20 and 21 of the Constitution of Zimbabwe of 1980, the reasons for refusal could have shed light on whether section 24 arbitrarily gives power to police officers and hinders freedom of expression and assembly. Looking into and investigating the reasons given by the officer commanding the police for the prohibition of the meetings would have provided more clarity as to why the applicants were not permitted to hold all 12 meetings and why section 24 does not infringe on freedom of expression and freedom of assembly and association. Preventing peaceful political gatherings cannot be considered reasonably justifiable in a democratic society.

Mukoko v the Attorney General

In the case of *Mukoko v the Attorney General*, we see a violation of personal liberty and human dignity at the very least.⁹⁵ The applicant, Jestina Mukoko, sought an order from the court for a permanent stay of a criminal prosecution because of torture, inhuman and degrading treatment which she was subjected to by state security agents prior to being brought to court on a criminal charge. The manner in which she was treated prior to being brought to court constituted a violation of the right not to be deprived of personal liberty under the Zimbabwean constitution (1980) and not to be subjected to torture, inhuman or degrading treatment.⁹⁶ The court ruled that the state through its agents violated the applicant's constitutional rights and therefore granted a permanent stay of criminal prosecution associated with the above violations.

The events leading up to the court hearing are worth mentioning and give a broader perspective to the gross human rights violations displayed by the state. The facts further show how the arbitrary use of power and lack of respect for the rule of law promotes this. On the 3rd of December, 2008, at 5am, Mukoko was kidnapped from her home by eight state security agents who blindfolded her with a jersey and drove her to an unknown location. There she was interrogated and told to become a state

⁹⁵ *Mukoko v the Attorney General* (36/09) 2012 ZWSC 11 (20 March 2012).

⁹⁶ The Constitution of Zimbabwe 1980 (since repealed and replaced) sections 13(1) and 15(1).

witness in a case under investigation or be killed. The agents sought to solicit information from her that she had used her organisation's funds to enable an ex-police officer, one Ricardo Hwasheni, to leave Zimbabwe and undergo military training in insurgency and terrorism. When the applicant could not give them the information they wanted from her, they tortured her with a hosepipe and a coiled piece of iron and they continued to torture her over the period of this interrogation in other ways mentioned in the case judgment facts. At some point Mukoko was given a paper and forced to write a statement whilst being told what to write by the interrogators. On the 14th of December she was forced to record a video in which she made a statement about how she met Hwasheni. On the 22nd of December she was transported from solitary confinement in the unknown location to Braeside police station in Harare, Zimbabwe, where she was then detained for another day. The following day she was charged with contravening section 24(a) of the Criminal Law (Codification and Reform) Act 23 of 2004. The charge was that of recruiting or training insurgents, bandits, saboteurs or terrorists.⁹⁷

The court commented on the facts and stated; "No exceptional circumstance such as the seriousness of the crime the person is suspected of having committed, or the danger he or she is believed to pose to national security can justify infliction of torture, or inhuman or degrading treatment. There cannot be a value in our society over which there is so clear a consensus as the prohibition of torture, inhuman and degrading treatment of a person in the custody of a public official."⁹⁸

The court mentioned that the actions against Mukoko go against the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment 1987 and against Article 5 of the Universal Declaration of Human Rights 1948 which prohibits torture, inhuman or degrading treatment or punishment on any person. The court further emphasised that kidnapping is a criminal offence and that at the time the applicant was kidnapped and detained the state agents did not have reasonable suspicion of Mukoko having committed the criminal offence she was charged with.⁹⁹

⁹⁷ Mukoko (note 95 above).

⁹⁸ Mukoko (note 95 above).

⁹⁹ The Constitution of Zimbabwe 1980 (since repealed and replaced) section 13(1)(e). Section 13(1)(e) is one of the justifications for the deprivation of a person's liberty and the only one that could have been applicable in this case according to the court.

This judgment of *Mukoko v the Attorney General* was well written and justly decided, however there are still a few questions left unanswered. It was established that state security agents abducted Jestina Mukoko but the identity of these officials was not disclosed. The State Security Minister simply filed an affidavit that stated that it would not be in the interest of state security to disclose the agents' identities.¹⁰⁰ The state will therefore not be held accountable for its brutal actions against a citizen of Zimbabwe. On being released from unfair detention one should have the right of redress for wrongful arrest against his or her oppressors for the harm suffered. Citizens of a country should rest in the knowledge that the law will protect them. The court rightfully stated that section 18(1) of the Constitution of Zimbabwe entitles protection of the law to every person.¹⁰¹ At the very least Jestina Mukoko should have been entitled to compensation in some form or manner but the court made no order as to costs as is within their discretion. Section 13(5), although not discussed in the judgment, would have been relevant in this case. The section entitles any person who is unlawfully detained to compensation from the official that carried out the unlawful detention or from the authority on whose behalf the official was acting. The state security minister or the unnamed state security agents should have compensated Mukoko for the wrong suffered.

In many instances here international law and the Zimbabwe Constitution were reduced to mere words as there was torture, kidnapping, violation of fundamental rights and freedoms. Most importantly there was no justice for Mukoko besides being released from being charged with a crime in which there was no credible evidence to charge her.

Zimbabwe Lawyers for Human Rights Case

A major contributor to the evidence of the fall of human rights in Zimbabwe was the Gukurahundi genocide. Gukurahundi is a Shona word meaning "the rain which washes away the chaff". It is common and well documented knowledge in Zimbabwe that about 20 000 civilians were killed during the early to mid-1980s by the army's North Korean-

¹⁰⁰ Annual Conference of the Canadian Association of African Studies 'Beatrice Mtetwa and the Rule of Law' 1 May 2013 <https://youtu.be/U1XfZvIU8Y> (accessed 11 May 2017).

¹⁰¹ Mukoko (note 95 above).

trained Fifth Brigade for the reason of dealing with those that supported political opposition namely Zimbabwe People's Revolutionary Army (ZPRA) and Zimbabwe African Peoples Union (ZAPU).¹⁰² Besides murder there were other offences committed such as rape, torture, assault, arson and genital mutilations.¹⁰³ The facts on Gukurahundi are based on the general knowledge of the population of Zimbabwe passed down by those who experienced it and those who write and publish about it in the media although a publication entitled *Breaking the Silence* by the Catholic Commission for Justice and Peace in Zimbabwe largely remains the most authoritative study of the violations.

These gross human rights violations are not openly discussed in Zimbabwe and there was never a report by the government published about it.¹⁰⁴ The reports by the Dumbutshena Commission and Chihambakwe Committee which were assigned to investigate Gukurahundi and to identify the persons and organisations responsible for planning or promoting the disturbances, have never been published. The government has not done anything to bring those responsible to justice and compensate the victims.

In the case of *Zimbabwe Lawyers for Human Rights and Another v President of the Republic of Zimbabwe*¹⁰⁵ the applicants sought an order for President Mugabe to make public the Dumbutshena and Chihambakwe reports. The applicants argued that they had a right to receive information based on section 24(1) of the Constitution of Zimbabwe which entitles application to the Supreme Court for address. They contended that they were being hindered the enjoyment of their right to freedom of expression by the President's failure or refusal to publish the reports. The applicants relied on section 20 of the Constitution of Zimbabwe which guarantees the protection of freedom of expression and includes, as relevant to their application, "freedom to hold opinions and to receive and impart ideas and information without interference,

¹⁰² D Ngwenya & G Harris 'The consequences of not healing: Evidence from the Gukurahundi violence in Zimbabwe' (2015) 15 *African Journal on conflict Resolution* 35.

M Killander & M Nyathi 'Accountability for the Gukurahundi atrocities in Zimbabwe thirty years on: Prospects and Challenges' (2015) 48 *Comparative and International Law Journal of Southern Africa* 463.

Catholic Commission for Justice and Peace in Zimbabwe 'Gukurahundi in Zimbabwe: a report on the disturbances in Matabeleland and the Midlands, 1980-1988' (2007).

¹⁰³ M Killander & M Nyathi (note 102 above) 463.

¹⁰⁴ M Killander & M Nyathi (note 102 above) 464.

¹⁰⁵ *Zimbabwe Lawyers for Human Rights and Another v President of Republic of Zimbabwe and Another* (311/99) 2003 ZWSC 12 (20 November 2003).

and freedom from interference with his correspondence.”¹⁰⁶ On the applicants’ contention the court stated that there was no reason given for the request by the applicants except for the reason that they were entitled to the reports and that 20 years later there is no good reason to still withhold the reports. The Court further mentioned that the right to freedom of expression that the applicants relied on is not absolute and that no constitutional right is. The court pointed out the limitation of this right in section 20(2) of the Constitution (1980). Most notably and importantly the court relied on the following provisions of section 20(2):

Section 20(2): Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision

(a) in the interest of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

The court, in relation to this section, stated that the inquiries were ordered by the President, the reports were made to him and therefore he is the one who can determine whether it was in the interest of defence, public safety, public order, or in the interest of the State, or not to publish the reports. The court reiterated in its final word that there is no obligation on the President to publish the reports in terms of the Commission of Enquiry Act; the reports were solely for the use by the government and not to divulge the information to the public and lastly that because of the sensitivity of the matter it was not reproduced and now can no longer be located.

¹⁰⁶ The Constitution of Zimbabwe 1980 (since repealed and replaced) section 20(1).

The court added, it seems, to the respondents' argument that the applicants have not shown that there is prejudice to any person resulting from these reports not being published and that if the President declines to publish the reports on the basis that it is in the interest of the State then he cannot be compelled to publish them. The court also stated that the argument that there is no good reason to keep the reports confidential any longer after 20 years is not a legal decision to be made by the courts but a decision for parliament. Lastly, the court mentioned that "no good cause has been shown for the above Report to be published and that, in any case, it cannot be published when it cannot be found."¹⁰⁷ The application was therefore dismissed.

I would like to agree with the court that there are limitations on the right to freedom of expression. However, even limitations should be limited in certain circumstances, regardless of the limitation seeming just. In this instance, Zimbabwe cannot be said to choose protecting reputations of those involved in terms of section 20(2)(b)(i)¹⁰⁸ at the expense of the many innocent lives lost without being accounted for. The question needs to be asked if the right to life outweighs the right to protect the perpetrator that took the life with not as much as an explanation of what happened or redress to those that suffered the loss of loved ones.

The court rightly states that the provisions of section 20(2) "can only be exercised subject to observation of, and respect for, other people's rights, or those rights stipulated in section 20(2)(a)."¹⁰⁹ These reports and closure is in the interest of the State and all its people. It is not reasonable and justifiable in a democratic society that the rule of law and the notion of people being held accountable for a genocide is ignored. Without the reports published and the identity of those responsible revealed, the law has not served its purpose. Burchell rightly states that "government insults its citizens and denies their moral responsibility when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous and offensive convictions."¹¹⁰ The refusal to give information that citizens are entitled to belittles people as unfit to hear, consider the information and form an opinion.

¹⁰⁷ Zimbabwe Lawyers for Human Rights (note 105 above).

¹⁰⁸ The Constitution of Zimbabwe 1980 (since repealed and replaced) section 20(2).

¹⁰⁹ Zimbabwe Lawyers for Human Rights (note 105 above).

¹¹⁰ J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 13.

The court incorrectly stated that the President is the one who received the information and the one who can determine whether publishing the reports is in the interest of defence, public safety and order, or in the interest of the State, or not. This amounts to interpretation of legislation and it is the judiciary's responsibility to determine what is or what is not in the interest of society according to the legislation it is confronted by, section 20 of the Constitution of Zimbabwe in this case. It is the duty of the court to judge the matter before it in light of the statute concerned and not the duty of the executive to interpret legislation.¹¹¹

The reports and the issue surrounding the matter is marked as sensitive both by the respondents and the court but is also said to have been lost. This is rather oxymoronic because such important sensitive documents should be well kept. This portrays a lack of sensitivity for an issue that is still close to the hearts of many Zimbabwean citizens and one in which many seek closure and redress.

Evan Mawarire, the Freedom Pastor

Lastly and most recently the case of Evan Mawarire cannot go without mention. While this case may be unreported on the Zimbabwe (in the Zimbabwe Legal Information Institute), there is no denying the events that took place as it was well reported in the media not only nationwide but worldwide. There is much corroboration from different sources on the Evan Mawarire case or the "Freedom pastor" as he has been called. This is a 2016 case that most Zimbabweans supported and closely followed every step of the way. It is my opinion that this is the first time Zimbabweans united and spoke publicly about the state that Zimbabwe now finds itself in, with a very high unemployment rate, a poor economic environment and a government that is not held accountable for the state of the nation or the human rights violations that have been committed over the years.

Evan Mawarire started a citizens' campaign called the "ThisFlag" movement in April 2016. The movement encouraged citizens of Zimbabwe, through videos posted on

¹¹¹ D Kleyn & F Viljoen *Beginner's Guide for Law Students* (2010) 43.
L Chiudza 'Towards The Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions On Judicial Independence Suffice?' (2014) 17 *Potchefstroomse Elektroniese Regsblad* 368 369.

social media, to do something about the corruption and the poverty in Zimbabwe. On the 6th of July there was a mass stay away in Zimbabwe led by Mawarire. It was peaceful and yet Evan was arrested and charged with inciting public violence on the 12th of July. At his court hearing on the 13th of July hundreds of citizens came out to support him along with over 100 lawyers that volunteered to defend him. His charge was then changed during his trial, to subverting a constitutionally elected government. Evan was, however, released on a technicality as he was arrested under one charge and now faced another.¹¹² Evan was harassed and his family's security was also threatened because of his public speeches about the state of the nation and the rights of the citizen. This is an example of the continued cycle of harassment experienced by human rights defenders in Zimbabwe who spoke up against corruption.

The lack of the rule of law is shown in arbitrary arrests. On the 2nd of February 2017 when Evan Mawarire returned from the United States of America, where he had gone with his family to seek refuge, he was arrested on the charge of treason only to be released and arrested again in June, 2017, for praying with University of Zimbabwe medical students who were protesting fee increases. Amnesty International's deputy regional director for Southern Africa, Belinda Moses said, "His arrest unfortunately shows that he continues to be targeted by a government hell-bent on criminalising him for exercising his rights to freedom of expression and peaceful assembly."¹¹³

¹¹² J Nordlinger 'Zimbabwe's Freedom Pastor Evan Mawarire, the anti-Mugabe' (2017) 69 *National review* 20.

The guardian 'Zimbabwe shuts down in peaceful protest against corruption' 6 July 2016 <https://www.theguardian.com/world/2016/jul/06/zimbabwe-shuts-down-peaceful-protest-against-corruption-thisflag-harare> (accessed 30 August).

MacDonaldDzirutwe '#Thisflag: Zimbabwe pastor Evan Mawarire released from police custody' 13 July 2016 <https://mg.co.za/article/2016-07-12-thisflag-pastor-evan-mawarire-summoned-by-zimbabwean-police> (accessed 30 August).

DW-Breaking World News 12 July 2016 <http://www.dw.com/en/this-flag-opposition-leader-pastor-evan-mawarire-arrested-in-zimbabwe/a-19396073> (accessed 30 August).

C Gaffey Newsweek 'Zimbabwe Pastor Evan Mawarire Arrested And Charged With Subversion' 2 February 2017 <http://www.newsweek.com/zimbabwe-pastor-evan-mawarire=thisflag-551818> (accessed 30 August).

SABC 'Zimbabwean police arrest activist pastor' 12 July 2016 <http://www.sabc.co.za/news/a/f51137804d782e3c8dc1cf45facb1b5/Zimbabwean-police-arrest-activist-pastor-20161207> (accessed 3 August).

eNCA News 'Zimbabwean activist arrested' 12 July 2016 <http://enca.com/africa/zimbabwean-activist-charged> (accessed 30 August).

IOL news 2 August 2016 <https://www.iol.co.za/news/africa/interview-with-pastor-evan-mawarire---part-1-205204> (accessed 30 August).

¹¹³ Amnesty International 'Zimbabwe: Pastor Mawarire's arrest a case of history repeating itself' 26 June 2017 <https://www.amnesty.org/en/latest/news/2017/06/zimbabwe-pastor-mawarire-arrest-a-case-of-history-repeating-itself/>. (accessed 3 August).

Yet the peaceful protests Mawarire and his “This Flag” movement led were neither inciting public violence, subverting the government nor did they amount to treason. These actions are well protected by the Constitution. The arbitrary arrests only go on to show that the country’s supreme law has been reduced to mere words on paper as constitutional rights are ignored.

Political rights are protected in terms of section 67 of the Constitution of Zimbabwe. Every citizen has the right to campaign freely and peacefully for a political party or cause as well as to participate in peaceful political activity. Further every citizen has the right to participate individually or collectively in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the government or any political or whatever cause.¹¹⁴ Also Mawarire has the right to personal liberty in terms of section 47 of the Constitution, which includes the right not to be deprived of liberty arbitrarily or without just cause.¹¹⁵ Given the provisions of the Constitution stated, Mawarire’s human right to personal liberty was infringed upon because of the arbitrary use of power.

It is pertinent at this point to cite the case of *Munhumeso and Ors* in which the court stated that “the importance attaching to the exercise of the right to the freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are one of the basic conditions for progress and for the development of every man.”¹¹⁶

The role of the judiciary

The role of the judiciary in Zimbabwe should be discussed as they are there to protect the rule of law but cases continuously come before them where the law is being misused or ignored. The pertinent issue here is to unravel the extent to which the judiciary is politicised. The independence of the judiciary is very important for the protection of human rights. Interference with this independence compromises effective

G Cotterell Forbes Africa ‘#Thisflag Pastor Mawarire arrested for praying with students’ 27 June 2017 <https://www.forbesfarica.com/current-affairs/2017/06/27/thisflag-pastor-mawarire-arrested-praying-students/>. (accessed 3 August).

¹¹⁴ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 67(2)(b)/(c)/(d).

¹¹⁵ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 49(1)(b).

¹¹⁶ *re Munhumeso & Ors* 1994 (1) ZLR 49 (S) 56F-H.

functioning of the rule of law and citizens will no longer be able to trust the courts. The independence of the judiciary is protected in section 164 of the Constitution of Zimbabwe. The President, in terms of the Constitution, however has the power to remove and appoint judges. The tribunal of three members that investigates into the removal of any judge in terms of section 187 of the Constitution is appointed by the President. These provisions raise questions about and challenge the independence of the judiciary and the tribunal stated above. These provisions in the Constitution are of great concern.¹¹⁷

For judges who do protect the rule of law, there is already evidence that they will be harassed if their protection of the rule of law is at the expense of State action. For example, the judge who gave an order for Beatrice Mtetwa, a human rights activist, to be released from arrest was disciplined. The allegations against this judge, Charles Hungwe, included misconduct and negligence because he allegedly heard a case in the middle of the night and ordered the release of Mtetwa. Justice Hungwe also issued a warrant for alleged corrupt ministers to be searched, which resulted in him not obtaining great favour with State officials.¹¹⁸ Another case in point is that of Chief Justice Gubbay who was forced to retire after he delivered a judgment in the case of *Commercial farmers v Minister of Lands, Agriculture and Resettlement 2000 2 ZLR 469 (SC)*, where he granted an interdict barring further land acquisitions by the government. These land acquisitions had been unconstitutionally carried out.¹¹⁹

Conclusion

In conclusion, it is apparent that from the time when Zimbabwe gained independence the rule of law was set up to fail with the Gukurahundi massacres happening in the

¹¹⁷ The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 sections 180 and 187(2)/(3)/(4). L Chiudza (note 111 above) 388, 405, 408.

¹¹⁸ L Chiudza (note 111 above) 408.

Annual Conference of the Canadian Association of African Studies Documentary film presentation 'Beatrice Mtetwa and the Rule of Law' 1 May 2013 <https://youtu.be/U1XfZvIU8Y> (accessed 3 May). Southern Africa Litigation Centre "Persecution of Judge who ordered Beatrice Mtetwa's release points to ongoing rule of law crisis in Zimbabwe" 3 April 2013 <http://www.southernafricalitigationcentre.org/2013/04/03/persecution-of-judge-who-ordered-beatrice-mtetwas-release-points-to-ongoing-rule-of-law-crisis-in-zimbabwe/>. (accessed 3 May).

McDonald Dzirutwe 'Zimbabwe investigates judge who ordered release of rights lawyer' 5 April 2013 <https://www.google.co.za/amp/mobile.reuters.com/article/amp/idUSL5N0CS0M820130405> (accessed 3 May).

¹¹⁹ L Chiudza (note 111 above) 368.

1980s. The cases cited in the foregoing discussion have illustrated that without the rule of law, fundamental rights as enshrined in the Constitution of Zimbabwe cannot be protected or respected. Reversing this toxic culture and rebuilding respect for law in the country is definitely not an easy task neither can one expect it to occur overnight but it is necessary and worth the effort.

Chapter Four

Final thought: Restoring the Rule of Law and Human Rights in Zimbabwe

The preceding chapters focused on the rule of law and the two human rights, freedom of expression and personal liberty. The chapters discussed their meaning, scope and relevance in Zimbabwe. This final chapter will proffer solutions that can be implemented to restore the rule of law and respect for human rights in the context of what has already been done under the rule of President Mnangagwa. It must however, be borne in mind that simply drafting well written legislation will not change the practice of the government of Zimbabwe and further that there is no stated blue-print to restoring a country that has not known the rule of law and respect for human rights in decades.

There are critical issues that need to be dealt with in order restore the rule of law and respect for human rights in Zimbabwe. One can look at issues of constitutionalism and a president who had been in power for 37 years. There are also issues to do with the social contract and media reform to name a few. Zimbabwe's former president, had been in power since independence in 1980. This must never happen again and effective laws must be put into place to prevent this. The power of the people's voice must be restored as this will be the most potent deterrent to a dictatorship under any president again.

Tendai Biti states that "the American model of a powerful executive president has not served Zimbabwe well".¹²⁰ Biti suggests that Zimbabwe should instead have a prime minister, who is accountable to parliament.¹²¹ Despite having a reasonably well drafted constitution which states that Zimbabwe is a democracy,¹²² it is clear from the discussion above that this is not the case. Moving forward under a new president, the question should rather be how Zimbabwe can successfully transition from a Mugabe-led autocracy to a true democracy.

¹²⁰ African Centre for Strategic Studies 'An Agenda for Renewal in Zimbabwe- Our conversation with Tendai Biti' 23 May 2016 https://youtu.be/M8m5Z_JFzGE (accessed 19 June).

¹²¹ (As above).

¹²² The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 section 1.

The main challenge to democratic governance in Zimbabwe and Africa at large has been identified as a lack of competent institutions of democracy.¹²³ These institutions include the media, judiciary, civil service and an independent electoral commission. Zimbabwe needs a complete overhaul of these institutions to ensure that they serve citizens in an impartial manner.¹²⁴ Zimbabwe's current independent commissions as mentioned in Chapter 12 of the Zimbabwe Constitution of 2013 are the Zimbabwe Human Rights Commission, the Zimbabwe Electoral Commission, the Zimbabwe Media Commission, the National Peace and Reconciliation Commission and the Zimbabwe Gender Commission.

A truly independent media ensures freedom of expression. Media practitioners and human rights activists should not be harassed or arrested arbitrarily.¹²⁵ This is one crucial area where change needs to be seen as the media is a platform for people to express ideas and convey information. The Commonwealth Latimer House principles on a plan of action for Africa¹²⁶ state that the media should contribute to democratic and accountable governance through accurate and responsible reporting. Governments should encourage and even enable the media to function instead of suppressing it.

One cannot speak of the restoration of the rule of law without mentioning the judiciary. We have seen in the previous chapter how the judiciary was influenced by politics and the executive. An impartial and honest judiciary is needed in Zimbabwe as this is crucial in upholding the rule of law. The executive should not compromise the independence of the judiciary as this undermines the power of the judiciary to hold the government accountable and brings justice to naught.¹²⁷ Justice cannot only be served at the will and wish of the government.

A story recorded by Hatchard emphasises the importance of judicial integrity. He records that a certain judge, Sisamnes, during the rule of King Cambyses II of Persia, accepted a bribe and delivered an unjust verdict. King Cambyses had Sisamnes arrested and flayed alive. His skin was used to cover the seat on which Sisamnes' son

¹²³ N Songurua & J Udombana 'Human rights and contemporary issues in Africa' (2003) *Malthouse press limited* 91.

¹²⁴ African Centre for Strategic Studies (note 120 above).

¹²⁵ N Songurua & J Udombana (note 123 above) 93.

¹²⁶ Commonwealth Latimer House Principles on the three branches of Government (2008) 1 33.

¹²⁷ Commonwealth Latimer House Principles (note 126 above) 10- 13.

would later sit as successor.¹²⁸ This is the seriousness with which we should take the role of judges, and set examples of compromised judges so as to prevent such action in future. Perhaps not going as far as skinning judges' alive but serious repercussions should ensue. As much as the judiciary is there to keep citizens and the government in check, it too needs to be held accountable. Further appropriate protection needs to be offered for judges who uphold the law at the expense of being unfairly criticised or dismissed.¹²⁹

Electoral reform is also necessary in restoring the rule of law and the rights of the people in Zimbabwe as it is clear the current system has not served Zimbabwe well. There can be no other explanation for a single president being exclusively elected into power over a period of 37 years.¹³⁰ It has been suggested that free access to Zimbabwean elections by the international community could be of assistance in ensuring free and fair elections as well as the existence of independent electoral bodies.¹³¹

This leads to another resolution which is the eradication of corruption. Human rights such as freedom of expression and personal liberty cannot exist in a country in which corruption is the norm. I would like to submit that the rule of law and corruption cannot co-exist. Failure to punish corrupt officials in Zimbabwe, such as the police and the ministers, could seriously undermine transparency and accountability.¹³² The United Nations General Assembly resolution 3514 emphasised that states must take legal action against corruption within their jurisdiction.¹³³ If public officials do not support good governance, government stability will be compromised and the rule of law will be non-existent as the behaviour from the high level officials affects a country as a whole.¹³⁴

The social contract in Zimbabwe is in need of complete reform. In an effort to restore the rule of law, trust between the State and the citizens needs to be established.

¹²⁸ J Hatchard *Combating corruption – legal approaches to supporting good governance and integrity in Africa* (2014) 202.

¹²⁹ J Hatchart (note 128 above) 221.

¹³⁰ African Centre for Strategic Studies (note 120 above).

¹³¹ K Olaniyan *Corruption and Human Rights Law in Africa* (2014) 57. African Centre for Strategic Studies (note 120 above).

¹³² (See the cases of Beatrice Mtetwa and Evan Mawarire above in chapter three above).

¹³³ United Nations General Assembly Resolution 3514 (1975).

¹³⁴ J Hatchart (note 128 above) 25.

People of Zimbabwe have for so long been used to a lawless nation where they were afraid to speak out and where they mistrust the government and the law enforcement institutions within the country.¹³⁵ In order to restore a healthy working relationship between the state and the citizens human rights that have been violated in the past must be redressed. Article 2(3) of the International Covenant on Civil and Political Rights obliges states to provide effective remedies to parties whose rights have been violated.¹³⁶

The very existence of human rights means there is a duty tethered to them to address violation of the rights.¹³⁷ Zimbabwe could begin where it ought to, with redress for the Gukurahundi¹³⁸ massacres. Research has shown that lack of an apology has continued to hinder healing and encouraged feeling of fear and insecurity. Transgenerational trauma is transmitted and a cycle of violence is created as people seek revenge on those that harmed them.¹³⁹ Revenge is not only sought against the perpetrators but the entire ethnic group that the perpetrators represent. Some Ndebele people, as subjects of the massacre have confessed to hating all Shona people in Zimbabwe.¹⁴⁰ Individual perpetrators and those in command must be held accountable in a forward looking democratic Zimbabwe.

For those that experience violation of their rights, as with freedom of expression and personal liberty (as discussed previously) an effective remedy should be available to them. Compensation, reparations or punishment for the wrongdoers are appropriate remedies.¹⁴¹ Further, an effective remedy would be considered available if someone could pursue it without being subject to threats by powerful perpetrators or being ostracised for seeking remedy. The remedy should also be responsive to the needs of the victim.¹⁴² Article 8 of the Universal Declaration of Human Rights states that

¹³⁵ African Centre for Strategic Studies (note 120 above).

¹³⁶ International Covenant on Civil and Political Rights (1966).

¹³⁷ G M Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Journal* 442-442.

¹³⁸ (See chapter three above).

¹³⁹ D Ngwenya & G Harris 'The consequences of not healing: Evidence from the Gukurahundi violence in Zimbabwe' 35 *37-52*.

¹⁴⁰ (As above).

¹⁴¹ G M Musila (note 137 above) 446.

¹⁴² L M Mute 'General comment no. 4 on the African Charter on Human and Peoples' Rights: the right to redress victims of torture and other cruel, inhuman or degrading punishment or treatment' (2017) article 5 *African commission on Human and Peoples Rights*.

G M Musila (note 137 above) 447.

everyone has the right to an effective remedy by competent national tribunals for violation of human rights granted by law or the constitution.

Overall, Zimbabwe needs to develop. In countries where the rule of law does not exist, development cannot occur.¹⁴³ Development increases the prospects of respect for human rights. The United Nations General Assembly adopted a declaration which states that all people have the right to development.¹⁴⁴ This includes the entitlement to participate, contribute and enjoy social, political economic and cultural development.¹⁴⁵ The African Charter on Human and Peoples' Rights also recognises as a human right, the right to development.¹⁴⁶ If the rule of law is restored and both citizens and the government are subject to the law, Zimbabwe will inevitably develop. The rule of law serves as a powerful tool to fight against authoritarianism and dictatorship.¹⁴⁷ Where the rule of law is present, democracy flourishes and human rights are in turn protected.

In light of the solutions suggested for a better Zimbabwe and the fact that this cannot all change in the blink of an eye because Zimbabwe has a new president, one must look at what the new leadership has already accomplished and what it has set out to do to improve the country. This addresses the question of whether respect for the rule of law and human rights is being restored in Zimbabwe.

The Mnangagwa regime

At his inauguration President Emmerson Mnangagwa stated that his government will be committed to “compensating those farmers from whom land was taken”¹⁴⁸ and that the government will work towards ensuring that the pillars of the State assuring democracy in Zimbabwe are strengthened and respected. He also stated that he

¹⁴³ P T Zeleza & P J McConnaughay *Human Rights, The Rule of Law and Development in Africa* (2004) 112.

¹⁴⁴ United Nations General Assembly resolution 41/128 (1986).

¹⁴⁵ (As above)

¹⁴⁶ African Charter on Human and Peoples Rights (1981) article 22.

¹⁴⁷ K Olaniyan (note 131 above) 62.

¹⁴⁸ President Emmerson Mnangagwa inauguration speech 24 November 2017

<https://www.youtube.com/watch?v=n6h7L9LiBA> (accessed 26 January).

President Mnangagwa's inauguration speech in full 25 November 2017

<http://www.chronicle.co.zw/president-mnangagwas-inauguration-speech-in-full/> (accessed 26 January).

appreciated that over the years politics in Zimbabwe had become “poisoned, rancorous and polarised”.¹⁴⁹ President Mnangagwa seems to be making the right noises as he speaks against corruption, injustice and supports a democratic nation.

Progress can be seen with Robert Smart, a white farmer, being the first to receive his farm back that was unjustly taken from him during the so-called fast-track land reform programme.¹⁵⁰ We have also witnessed an innocent victim gaining his freedom as the subversion charges against Evan Mawarire have been dropped.¹⁵¹ Corrupt ministers and officials have been arrested and brought to court. These include former Finance Minister Ignatius Chombo, former police Commissioner General Augustine Chihuri, former Foreign Affairs Minister Walter Mzembi, former Energy Minister Samuel Undenge and many more.¹⁵² Mnangagwa describes it as an “unending list”, as he speaks out against these arrests and his preaching his drive for zero tolerance to corruption.¹⁵³ The rule of law and the respect for human rights is being restored in some parts as we see government officials being held accountable for their actions and people’s rights being restored. The Zimbabwean people will slowly learn to use their voice and express themselves freely without fear. Mnangagwa has made himself accessible to the citizens of Zimbabwe by communicating and responding to questions on his newly opened facebook and twitter accounts. Through this he has even been called a “man of the people”, which was a foreign concept to Zimbabwe as they have never had a reachable president.¹⁵⁴

¹⁴⁹ (As above).

¹⁵⁰ White farmer gets land back under Zimbabwe’s new leader 22 December 2017

<http://www.telegraph.co.uk/news/2017/12/22/white-farmer-gets-land-back-under-zimbabwes-new-leader/> (accessed 26 January).

White farmer gets back Zimbabwe land after community appeals 23 December 2017

<https://www.youtube.com/watch?v=dkdglXB7OvM> (accessed 26 January).

¹⁵¹ Amnesty International ‘Zimbabwe: Dropping of Pastor Evan Mawarire charges must signal fresh start for Zimbabwe’ 29 November 2017 <https://www.amnesty.org/en/latest/news/2017/11/zimbabwe-dropping-of-pastor-mawarire-charges-must-signal-fresh-start-for-zimbabwe/> (accessed 24 January 2018).

¹⁵² BREAKING: Chombo, Chipanga arrested 15 November 2017

<https://news.pindula.co.zw/2017/11/15/chombo-chihuri-arrested/> (accessed 25 January).

¹⁵³ President Mnangagwa: Zimbabwe Economy Interview at Davos WEF 2018 24 January 2018

<https://www.youtube.com/watch?v=pTkGgyMyzgM> (accessed 25 January 2018).

<https://www.zimcitizen.com/home/page/4> (accessed 25 January 2018).

¹⁵⁴ Man of the people Mnangagwa opens Twitter account to interact with public 15 January 2018

<https://www.myzimbabwe.co.zw/news/14215-man-of-the-people-mnangagwa-opens-twitter-account-to-interact-with-public.html> (accessed 23 January).

At the World Economic Forum held in February 2018 in Davos, Switzerland, Mnangagwa answered many questions and set out his vision for Zimbabwe.¹⁵⁵ He stated that Zimbabwe will have free and fair elections as an Independent Electoral Commission will manage the elections. He further mentioned that there will be transparency and that the European Union is welcome to send in observers to Zimbabwe's 2018 elections. He, however, was reluctant to discuss the Gukurahundi massacre where it was mentioned, and correctly so, that at the time of the massacre he was the minister of National Security and not president of the country. His argument is that although he worked for many years closely with Mugabe and even rose to the position of vice president, Mnangagwa may not be solely responsible for the massacres that occurred. However, it cannot be denied that he played a critical role as Minister of National Security. In his interview at Davos he refused to make an apology to the victims of the massacres and he also refused to comment on his position during that time. Mnangagwa instead said that he has signed the National Healing and Reconciliation bill into law to address the issue of Gukurahundi.¹⁵⁶ This goes some way towards atoning for the abuses perpetrated during that dark period of independent Zimbabwe's history.

Currently Bulawayo pressure groups have sued former President Mugabe and President Mnangagwa inter alia, for the release of the findings of the Chihambakwe Commission on the Gukurahundi massacres.¹⁵⁷ No one knows how this will pan out but there seems to be renewed hope in the new dispensation in the wake of Mugabe's fall from power. However, whilst the rule of law is being addressed by the new government and human rights are well on their way to being protected, Zimbabwe will never fully move forward as a nation if the past is not addressed.

Conclusion

Human rights are interrelated and a lack of one means a lack of all. It has been shown previously that where freedom of expression was violated it more often than not led to

¹⁵⁵ President Mnangagwa: Zimbabwe Economy Interview at Davos (note 153 above).

¹⁵⁶ (as above).

¹⁵⁷ Zim Citizen 'Pressure groups sue Mugabe, Mnangagwa over Gukurahundi report' 10 January 2018 <https://www.zimcitizen.com/single-post/2018/01/10/Pressure-groups-sue-Mugabe-Mnangagwa-over-Gukurahundi-report> (accessed 24 January).

a violation of personal liberty and many other rights. This study has endeavoured to show that the rule of law likewise goes hand in hand with human rights; a respect for the supremacy of law means a respect for people and their fundamental rights. While Zimbabwe has had a long history of a lack of both the rule of law and human rights, it seems to be slowly recovering. The new regime under Mnangagwa may not be as fresh a start as Zimbabwe would have ideally wanted after 37 years under Mugabe, however a new president and the steps he has already taken is progress. Small progress is still progress.

Chapter 5

Dissertation Conclusion and Recommendations

I began the discussion of the rule of law and human rights in Chapter Two with an overview of the theory of these wide-ranging topics. The focus in Chapter Two was specifically government accountability within the broad scope of the rule of law and freedom of expression and personal liberty within the scope of human rights. In essence, the rule of law embodies the principles of sovereignty of the law, equity, impartiality, uniformity, certainty and the notion that there should be an absence of arbitrary power on the part of governing authorities. Where there is, instead, an absence of the rule of law one can expect corruption, abuse of power and disregard for human rights. The rule of law is a deterrent to the rule by law where the law is used as a tool to oppress its subjects.

The human rights relevant to this study, namely freedom of expression and personal liberty, were discussed. Freedom of expression is regarded as the cornerstone of democracy and enables citizens to participate in the governing of their nation. It is the right to self-government. Personal liberty is the right not to be subjected to arbitrary arrest, imprisonment, or any other physical coercion. After a discussion of what the rule of law and the specific human rights entail it was concluded that these human rights cannot exist without the rule of law because the deprivation of a human right has to be legally justified. Chapter Two mapped out the theory of what a country that embodies the rule of law should look like and how freedom of expression and personal liberty should function. Ideally a forward moving Zimbabwe should aspire to operate within this scope in order to have effective implementation of the rule of law and a respect for human rights.

In Chapter Three the focus was on how the rule of law, freedom of expression and personal liberty practically operate in Zimbabwe. Through four case studies dealing with issues from the time Zimbabwe gained its independence in 1980 up till 2017, it was clear that the State was not held accountable for the many human rights violations it has committed. Zimbabwe, since the Gukurahundi massacres in the early to mid-1980s until this very day knows no notion of the effective functioning of the rule of law and protection of human rights. Through the case law discussed one can further see

that the judiciary, which is meant to protect the rule of law, has been politicised. The lack of judicial independence has hampered the effective functioning of the rule of law.

Complete reform is necessary in Zimbabwe. Zimbabwe needs a legislature that creates just laws, an independent judiciary that acts without fear or favour and zealously protects the law, and an executive that operates within the ambit of the authority given to it by the people of Zimbabwe. Chapter Three gave a glimpse of the Zimbabwean history, in the context of the rule of law and human rights. It highlighted the political climate which the Zimbabwean people have adapted to. This history has definitely hindered any development in Zimbabwe and is something to now move away from.

Chapter Four focused on restoration of the rule of law and upholding of human rights in Zimbabwe. The chapter suggested improvements that can be made by looking at what was previously done. The chapter also highlighted President Mnangagwa's achievements so far as far as restoring the rule of law and human rights in Zimbabwe is concerned and concluded that the country is willing to accept any progress no matter how small it may be. It is also very early into the new president's tenure and maybe too early to make a final judgment. It must be acknowledged also that Zimbabwe needs a new culture of doing things. Institutions that support democracy need to function effectively for the benefit of the people. The citizens of Zimbabwe need to learn how to use their voice and how to exist in a democracy, whilst the government needs to unlearn corruption and dominance.

There is however much more that needs to be resolved in Zimbabwe in order for stability and security to be maintained and this study has not addressed all the issues the country is facing. It must also be borne in mind that there can be no perfectly functioning country, but rather a better functioning country.

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