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# THE HERBERT CHITEPO MEMORIAL LECTURE ON SUPERIOR COURTS AND THE CONSOLIDATION OF THE RULE OF LAW

**Honourable Mr Justice L. Malaba<sup>1</sup>**

## **1 Introduction**

It is a privilege and distinct honour to address this audience on a topic that relates to the very cornerstone and foundation of our Constitution in celebration of a great advocate and champion of the rule of law. This inaugural Herbert Chitepo memorial lecture is a way for us to celebrate our Zimbabwean intellectual heritage. It is an opportunity to affirm the rule of law by reflecting on the contributions made to society by an outstanding lawyer.

It is a moment that we can take to reflect on the intellectualism of Herbert Chitepo, a man who was way ahead of his time. We can reflect on his concerted efforts which brought about the freedom and equality which we now enjoy as fundamental human rights. It has allowed us to sit here in all of our diversity to celebrate this great man and the existence of the rule of law in our country. His immense contributions to our history and the current state of our constitutional values cannot be overstated.

He was a celebrated leader who transcended social, academic and political barriers. His achievements and legacy serve as a beacon of hope and stand deserving of the honour bestowed upon him by this University. The memorial lecture is an affirmation of the unique culture and heritage that produced this celebrated and outstanding lawyer, who was committed to fighting for social inclusion for the marginalized and disadvantaged members of society. He left a legacy of responsibility to national values and social equity. A legacy that lives on, and which we still benefit from today.

Before we delve into the topic of this lecture and the consolidation of the rule of law, it is important to look back at the life and achievements of a man who championed equality and the rule of law many decades ago. It is only by taking a journey through history that we can fully appreciate where we are as a Judiciary and the role that the Superior Courts play in the consolidation of the rule of law.

An assessment of the meaning and impact of the rule of law, which is the very basis of our constitutional democracy, and this memorial lecture must begin with a consideration of Herbert Chitepo's formative years. We cannot fully understand what he stood for and the role that the courts have played in

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<sup>1</sup> Chief Justice of the Republic of Zimbabwe. He delivered this lecture at Great Zimbabwe University, Herbert Chitepo Law School on the 11<sup>th</sup> of October 2019. The lecture was attended by the Vice Chancellor, Prof R J Zvobgo, GZU staff, students and stakeholders in the legal fraternity.

achieving democracy and upholding the rule of law without looking back on his life. It will be clear, that almost forty-five years after his death, the commitment to the rule of law remains as important to a young aspiring law student, as it did decades ago to the young Herbert Chitepo, fighting for equality and justice for all.

## 2 Chitepo – The formative years

Herbert Wiltshire Pfumaindini Chitepo (“Chitepo”) was born on June 15, 1923 at Bonda in Nyanga to a poor peasant family.<sup>2</sup> Chitepo’s father died when he was only three years old. He was sent to St David’s Mission in Bonda where he grew up and received his primary education. He performed very well at primary school. That saw him being enrolled at the prestigious St Augustine’s High School Penhalonga in Mutare. Not surprisingly, he completed his secondary school studies with a distinction in the South African Union Junior Certificate (UCJ) examinations. His superb results opened an opportunity for sponsorship for him to train as a primary school teacher at the elite Adams College in Durban, Natal in South Africa in 1943. He briefly came back home and taught for a year at St Augustine’s High School before heading back to Adams College to matriculate.

For this achievement, he made early history by becoming the first black student from the then Southern Rhodesia to be admitted at that College. Building on these early successes, he later gained admission to the University of Fort Hare, where he studied for and obtained a Bachelor of Arts Degree in History and English. Chitepo was again sponsored to go to the United Kingdom in 1950 to teach elementary Shona at the School of Oriental and African Studies, where he worked as a research assistant. In 1952, he studied law at the famed King’s College at the University of London and at the Inns of Court where he graduated with a Bachelor of Laws (LLB) Degree. He was subsequently called to the English Bar at the Temple as an advocate in 1954.<sup>3</sup> This brief history became a pedestal upon which stellar legal and political careers were launched.

Chitepo returned home after completing his law degree. He was immediately admitted as an advocate of the High Court of Southern Rhodesia on 30 April 1954, becoming the first black person in the country to achieve that feat.<sup>4</sup> He setup private practice in Salisbury (now Harare). That decision required an amendment of the Land Apportionment Act of 1930, which prohibited black persons of African descent from occupying chambers in the city center.

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<sup>2</sup> F Muchivenyika and R Zinyuke “Emulate Chitepo’s patriotism” *The Sunday Mail* 20 May 2018.

<sup>3</sup> L White, ‘Chitepo, Herbert Wiltshire Pfumaindini (1923–1975)’, *Oxford Dictionary of National Biography*, Oxford University Press, May 2009 accessed on 7 Aug 2013.

<sup>4</sup> L White, ‘*The Assassination of Herbert Chitepo: Texts and Politics in Zimbabwe*’.

While this was a personal victory for Chitepo, it also strengthened his resolve to fight the injustice perpetrated against his fellow countrymen as a result of oppressive laws. He used his legal expertise to lobby for reform. In his early years of practice, the majority of Chitepo's briefs concerned Africans charged with contravening various offences relating to segregation laws of the colonial regime.

From 1957 Chitepo had become visibly Pan-African as he defended African nationalists who were arrested for breaking laws such as the Land Husbandry Act of 1951 and for breaching restriction orders. *Pro deo* representations were important to Chitepo. He felt that *pro deo* representation was vital for the poor and disadvantaged members of society to have access to justice. He believed in collaboration with others towards the achievement of the common good. He was a seasoned legal counsel who fought bravely and with respect.

Some notable cases in which he appeared included his 1959 appearance before the Beadle Tribunal on behalf of Africans detained under the state of emergency declared on 26 February of that year. Chitepo later appeared in the seminal case of ***The Queen v Simon Muzenda***.<sup>5</sup> In that case, the late nationalist Simon Vengesayi Muzenda was charged with uttering a subversive statement by reciting a passage from a popular Shona poem "*Nehanda Nyakasikana*". Chitepo argued that his client could not be accused of breaking the law by reciting a poem written in a published book. After some illuminating arguments, the accused was only cautioned and discharged.

His professional attributes enabled him to win most of the cases he handled because he gave radiant legal performances in the courts. He appeared in all courts, that is, in the Native Commissioner's Courts, the Magistrates Courts, the High Court, the Federal Supreme Court and also in various tribunals. His illustrious and diverse legal career resonated with his idea of access to justice as a conduit to the rule of law.

In all the cases he handled, Chitepo aimed to ensure equality. He fought for equality and accountability, as well as fairness in the administration of justice. Through those cases he advocated for fair treatment and asserted equality of all people before the law. In so doing, he inculcated a spirit of national justice.

The legacy of Chitepo is characterized by a life full of aspirations, ambitions, hard work and sacrifice. He lived a life inspired by the desire to follow the rule of law. Along the way, he set many records through his achievements. He used his intellectual ability and educational opportunities to read, study and push himself. He was prepared to venture into uncharted waters, thereby setting new

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<sup>5</sup> 1961 R & N 735.



records for black Africans. His life was decorated with many firsts. As I have already described, he was the first black lawyer in Zimbabwe; the first Zimbabwean lawyer to be admitted as a barrister in England; and the first black Solicitor General of independent Tanzania.<sup>6</sup>

He was well known for his unwavering stance as a strident advocate for the basic principles of human justice, democracy and the rule of law. At the African Conference on the rule of law held in Lagos, Nigeria in 1961, in his illuminating address to the Conference in an article "*Introductory Report to the Third Committee: The responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society*,"<sup>7</sup> he argued that the rule of law evolved as an attempt to balance the needs of legislation and administration for social organisation against the guarantees for the liberty of individuals in a manner that was consistent with social organisation.

According to Chitepo, the minimum institutional requirements for the rule of law were an independent judiciary, an independent Bar and an independent law school. Attaining these would ensure legal transparency, as well as the effective administration of justice.

The legal profession consists of judges, practitioners and teachers of law. It is to all these persons that the protection and defence of the rule of law is entrusted. He argued at the time that the administrative courts that had recently been established in the country did not give sufficient guarantees to those appearing before them. According to him, equal access to the law was an integral part of the rule of law. He posited:

*"If the principle of equal access to the law and equal protection of the laws are essential ingredients of the rule of law, as we submit they are, then it would appear that lawyers, particularly, lawyers in Africa, should continue to study ways and means of giving real effect to this essential principle of the rule of law, by ensuring that all who need legal representation shall not fail to get it."*

In a speech on a trip to Australia in 1973 Chitepo highlighted that the goal was to achieve liberation from all forms of political and economic exploitation. He said he would not rest until he achieved a society based not on exploitation but on true equality and true justice for all. Equality and justice were the ideals that guided Chitepo. In his view, there had to be a predominant ordinary law over every citizen, regardless of that citizen's standing or race. These are prominent and fundamental features of the rule of law that Chitepo championed. As an advocate of the rule of law in his lifetime, Chitepo envisaged a country where all people were equal in the eyes of the law.

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<sup>6</sup> F. Muchivenyika and R. Zinyuke "Emulate Chitepo's patriotism" *The Sunday Mail* 20 May 2018.

<sup>7</sup> See [ir.uz.ac.zw/xmlui/handle/10646/3715](http://ir.uz.ac.zw/xmlui/handle/10646/3715).

The vision was attained on 18 April 1980 when the country attained independence. The rule of law was established through the universal right to vote for all adults; repeal of segregatory laws such as the Land Apportionment Act which did not apply equally to all citizens; and the coming into being of the Lancaster House Constitution which entrenched, among other things, a justiciable Bill of Rights, the principle of constitutionalism and the separation of powers. The vision and ideology of Chitepo were a driving force for the fight towards an independent Zimbabwe.

This basic principle of the rule of law was as true then as it is now and has claimed its rightful position in our current Constitution. The present day courts have emphasized that:

*“The fundamental principle of the rule of law to the effect that all State power is bound by law and that everyone is bound by law means that there is equal application of law since the very nature of law demands universal application. Section 56(1) of the Constitution speaks to substantive equality<sup>8</sup>.”*

### 3 Superior Courts Consolidating the Rule of Law

The central theme of this lecture is “Superior Courts and the Consolidation of the Rule of Law”. To fully appreciate this theme, we must understand what the rule of law means and the role of the Superior Courts in Zimbabwe in consolidating the rule of law.

The rule of law is in itself a dynamic concept. It is invoked in many contexts, often with a casualness that leads easily to our underestimating its importance in defining the relationship of the State and the citizenry at large.

In its classical formulation, the rule of law entails that every citizen and every institution is subject to the law. This includes the courts, the executive and the lawmakers. In simpler terms, it is a characteristic of a democratic society that those to whom the power of governing is entrusted can only act under and within the authority of the law.

I quote extensively from a Zimbabwean author Moyo,<sup>9</sup> in addressing the rule of law. He described the concept in the following terms:

*“The rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which individuals may achieve their dignity and realise their legitimate aspirations.*

*Fundamentally the rule of law means that human rights and obligations must be determined by law rather than by individuals or groups of individuals exercising arbitrary discretion. In the*

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<sup>8</sup> *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Anor v The Minister of Public Service, Labour and Social Welfare & Anor* CCZ 2/18 at page 22 of the cyclostyled judgment.

<sup>9</sup> A Moyo “Basic Tenets of Zimbabwe’s new Constitutional order In A Moyo” (ed) Selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights (2019).

*modern sense, the concept of the rule of law:*

*Refers to a principle of governance in which all persons, institutions and entities, public and private including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*

*This idea of the rule of law was also recognised by Plato when he stated that ‘where the law is subject to some other authority and has none of its own, the collapse of the State in my view is not far off; but if law is the master of government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the Gods shower on a state.’<sup>10</sup>*

The UN Secretary-General Report: *The Rule of Law and Transitional Justice in Court and Post-Conflict Societies*,<sup>11</sup> describes the principle in the following manner:

*“The rule of law is a principle of governance in which all persons, institutions and entities, public and private including the State itself are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights.”*

In the speech I gave on the occasion of the opening of the 2019 legal year on “*Consolidating the Rule of Law*”, I remarked that:

*“The rule of law is the foundation of any democratic society and is essential to the cohesion of a community...In its elementary sense, the rule of law simply implies that no-one is above the law and that all existing laws must be respected by everyone. Individuals, corporate entities, the State and all its organs are subject to the law and are all equal before the law. The concept provides a framework for the orderly and objective relationship between citizens and the State and among the citizens themselves.”*

In short, I can describe the rule of law as the guiding principle of the administration of justice. It is the oxygen of any democratic system, without which it would become dysfunctional.

The rule of law is one of the values and principles, on the respect of which Zimbabwe is founded. This is now entrenched in the Constitution and is a principle which must guide and dictate the exercise of all powers and functions of all three arms of the State, the Executive, Legislature and the Judiciary.<sup>12</sup>

The Constitution provides for the independence of the judiciary and further entrenches this

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<sup>10</sup> Constitutional Rights Foundation, ‘*Plato and Aristotle on Tyranny and the Rule of Law*’ 26:1 Bill of Rights in Action (2010) available at [http://www.crf-usa.org/bill\\_of\\_rights\\_in\\_action/bria-26-1-plato-and-aristotle\\_on\\_tyranny-and-the\\_rule\\_of\\_law.html](http://www.crf-usa.org/bill_of_rights_in_action/bria-26-1-plato-and-aristotle_on_tyranny-and-the_rule_of_law.html).

<sup>11</sup> [S/2004/616].

<sup>12</sup> Section 3 of the Constitution.

fundamental principle as one of the pillars of constitutionalism and democracy.<sup>13</sup> The doctrine flows from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will.<sup>14</sup> It is therefore a system of values.

It follows therefore that no-one should be above the law, regardless of their political, economic and social standing. This also means that the law should be applied uniformly and equally to all. It must align with justice, fairness and equity to achieve the goal of the fundamental principle of the rule of law. Everyone, including the State, must be equal before the law and subject to it.

From this fundamental concept several principles are derived:

- **Principle of Legality:** People must not be deprived of their rights or freedoms through the exercise of wide discretionary powers by public officials. Rights and freedoms should be curtailed only by the ordinary courts applying the law.<sup>15</sup>
- **Principle of Equality:** No one is above the law and everyone is subject to the jurisdiction of the ordinary courts. State officials, and even the State itself, are subject to the law. Everyone is equal before the law and is equally entitled to be protected by the law. Following on from this principle -
  - laws should be enforced impartially;
  - as a rule, laws should apply generally and not just to particular individuals or classes of people.<sup>16</sup>
- **Separation of Powers:** There must be a separation of powers between the legislative, executive and judicial branches of government. If the executive makes the law and enforces it, that would amount to the rule of man and not the rule of law. The same applies if the legislature enforces its own laws; or if the courts make the law rather than determine rights and duties under the law. In practice, the different branches cannot be completely separate because there has to be some cooperation between the different branches. The concept of separation of powers may be defined more precisely as a governmental system of separation of functions with institutions sharing power.<sup>17</sup> The concept comes in several variations in different democracies.
- **Independence of the Judiciary:** The judiciary must be independent of the executive and the

<sup>13</sup> Section 164 of the Constitution.

<sup>14</sup> "What is the rule of law?" Online Source: lexisnexis.co.za accessed on 11 September 2019.

<sup>15</sup> Section 162 of the Constitution.

<sup>16</sup> Section 162 (2) of the Constitution.

<sup>17</sup> Section 3 (2) of the Constitution.

legislature. In that way, it is likely to give objective judgments on the law. The judiciary must not be a prisoner of influences in the execution of its duties. It must be immune to external pressures and influences. Such independence is crucial to the impartial application of the law and a cornerstone of the rule of law. In this regard, the courts are the machinery necessary for the attainment and the consolidation of the rule of law in the country. Their contribution cannot be overemphasised. The courts have to be independent and enforce the law uniformly and impartially against every individual. The resultant effect of this is the enhancement of the rule of law.

The 2013 Constitution made some giant steps towards safeguarding a truly independent judiciary by strengthening both institutional and individual independence. Apart from retaining security of tenure for judges and all judicial officers, the 2013 Constitution introduced a public interview system for the appointment of Judges. This new system ensures that a fair selection process is followed. The result is that those appointed will not feel beholden to anyone for their appointments, let alone the appointing authority.

Where the rule of law exists and is enforced, certain fundamental attributes of the legal system must be present. These are inherent in the principle of the rule of law.

- **Laws must be Certain** [*i.e. clear and definite*]: It must be possible for people to establish relatively easily the content of the law and the extent of their rights and duties under it.<sup>18</sup> The rule of law aims at legal security in the resolution of all disputes with a degree of certainty.
- **Laws must be Accessible**: If people are expected to obey laws they must be able to have access to these laws. The Government must ensure that all laws are published and that they are always available for people who want to read them. Laws should be drafted in a language that ordinary people can understand. In the Zimbabwean context, that means that laws should also be translated into the vernacular languages.<sup>19</sup> Every individual must be able to access courts for redress in any dispute without hindrance. This also connotes that court procedures must not be complex to the extent of hindering such access.
- **Laws must not be Retroactive**: Laws should apply only to the future and should not attempt to change rights and duties retrospectively. It is futile for anyone to find out what his or her rights and duties are under the law if a future law can convert what was lawful at the time it was done into something unlawful. The presumption against retrospectivity is an aspect of the rule of law and is the most practical constraint on retrospective civil and criminal litigation.

<sup>18</sup> Section 117 of the Constitution.

<sup>19</sup> Section 141 of the Constitution.



The only exception to this rule is when Parliament itself expresses the intention that the statute operates retrospectively in sufficiently clear and unambiguous language.<sup>20</sup>

- **Laws must be Objective:** As far as is possible, laws must leave no discretion to the persons who are to apply them.

#### 4. The Role of the Superior Courts in Consolidating the Rule of Law

The courts are the cornerstone of constitutional democracy and the protection of the rule of law in the same manner that Parliament is the hallmark of representative Government. The courts, and in particular the Constitutional Court, are subject only to the law.

The power of the courts and the role that they play in the consolidation of the rule of law lies in the power of the courts to secure respect for the Constitution. The judiciary must guarantee the maintenance of the rule of law. It functions as a primary guarantor of the rule of law. The role of the courts must be premised on an emphasis on interpretation and defence of the Constitution. In carrying out the role of interpreting the Constitution, a court does not make policy but protects the many values that are subscribed to in the Constitution.

Through their decisions, superior courts are not only able to annul laws that are inconsistent with the Constitution and are found to be unconstitutional, they are also able to guide legislative and executive functions by setting clear interpretative parameters and limitations of their functions and powers as set out in the Constitution. A law that is not just and is not in line with the fundamental rights and freedoms enshrined in the Constitution is not a law. It must be set aside. This is what the rule of law dictates. Ensuring that law is used as a means of protecting fundamental human rights and freedoms is the critical and pivotal role of the courts in the consolidation of the rule of law.

The decisions of the courts are informed by constitutional precepts. What the courts must do is to safeguard the constitutional values against invalid inroads. If the courts do not heed legitimate and justified calls to set aside unconstitutional laws that violate fundamental human rights, the rule of law is under threat.

The courts “must also take into account the relevant historical, economic, social, cultural and political context and interpret the Constitution in a manner that advances the rule of law and contributes to good governance.” For this reason, the superior courts are critical in the development of our jurisprudence.

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<sup>20</sup> *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Anor v The Minister of Public Service, Labour and Social Welfare & Anor* CCZ 2/18 at pages 15 to 16.

In the post 2013 Constitution era, the judiciary has played its role towards consolidation of the rule of law. The Constitutional Court in particular has made decisions that have had far-reaching impact on the rights of persons. I will give a few examples.

In ***Mudzuru and Another v Minister of Justice***,<sup>21</sup> the Constitutional Court struck down section 22(1) of the Marriage Act<sup>22</sup> and any other practice or custom which authorised a person under the age of eighteen to marry as being inconsistent with the Constitution.<sup>23</sup> I am aware that the Legislature has now followed suit to align the laws with the Constitution in the current Marriage Bill that has been tabled before Parliament.

In ***State v Chokuramba***,<sup>24</sup> the Constitutional Court struck down section 353 of the Criminal Procedure and Evidence Act,<sup>25</sup> which authorised the imposition of a sentence of moderate corporal punishment on a male person under the age of eighteen who is convicted of a criminal offence. The Court found that this provision was inconsistent with and violated the Constitution, which protects the absolute and non-derogable right of every person not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.<sup>26</sup>

In ***Democratic Assembly for Restoration and Empowerment and Three Ors v Saunyama N.O. and Three Ors***,<sup>27</sup> the Constitutional Court declared section 27 of the Public Order and Security Act<sup>28</sup> (“POSA”) which gave the authority to ban a class of public demonstration for a period of up to one month unconstitutional. The Court found that the provision was a violation of the right to demonstrate and petition enshrined in the Constitution and failed to pass the test of fairness and reasonableness in a democratic society.<sup>29</sup> The Court held that it was not a justifiable limitation on the fundamental constitutional right.<sup>30</sup>

There are several other cases of declarations of constitutional invalidity which have been made by the High Court and are pending confirmation or discharge by the Constitutional Court.

In consolidating the rule of law, the superior courts have seized the opportunity, whenever it arises,

to reinforce the rule of law, bearing in mind that:

21 2016 (2) ZLR 45 (CC).

22 [Chapter 5:11].

23 Section 78 (1) of the Constitution.

24 CCZ 10/19.

25 [Chapter 9:07].

26 Section 53 of the Constitution.

27 CCZ9/18

28 [Chapter 11:17].

29 Section 59 of the Constitution.

30 Section 86(2) of the Constitution.

*“... the ‘rule of law’ is an essential principle on which any free and democratic society is based.*

*A rule of law embodied in the spirit of constitutionalism is an indispensable feature of a functional democracy. It is an integral part of the vision and way of life in a free society. Where there is rule of law, there is peace, justice and freedom. Law plays its proper role only if it takes due account of all the three elements.”<sup>31</sup>*

This pivotal role played by the Superior Courts cannot be overemphasised. It is both an obligation and a privilege placed on them by the Constitution which they must guard jealously. The rule of law goes hand in hand with the presence of strong institutions. We cannot talk of strong institutions when there is no rule of law. A weak and compromised judiciary is unlikely to enforce the rule of law. The presence of strong and independent institutions in any given society is the panacea to equal access to justice for communities.

It is only a judiciary that is truly independent and decides matters impartially and without fear, favour or prejudice, solely on the basis of the relevant facts and the applicable law, and is impervious and immune to extraneous influences (more particularly of the executive or other State organs) that can attain the standards expected by the principle of the rule of law.

It is not enough that the Constitution entrenches fundamental human rights and the value of rule of law. Through the courts, citizens must benefit from the consolidation and protection of the rule of law. The courts can only truly perform their duty as the custodian of the Constitution and the guarantor of the rule of law if cases are brought before them by the citizens to enforce their rights. Access to justice is an integral part of the consolidation of the rule of law.

The Constitution has gone a long way towards ensuring access to justice and access to the courts in respect of the enforcement of constitutional rights and freedoms.<sup>32</sup> It has expanded the legal standing of citizens to be able to bring their cases before the courts. This must always be supplemented with policies and practices that allow adequate access to the courts to give life to the rights enshrined in the Constitution, which provides that every person has the right of access to the courts, or some other tribunal or forum established by law for the resolution of any dispute.<sup>33</sup>

Chitepo laid the basis for the application of the principle of access to justice and the rule of law in our country. He was a visionary who emphasised that there were three key players whose duty it is to uphold the rule of law - the judiciary, the legal profession and law schools.

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<sup>31</sup> *Chimakure and Ors vs AG* 2013 (2) ZLR 466 (S) at 496 C-D.

<sup>32</sup> Section 85 of the Constitution.

<sup>33</sup> Section 69 (3) of the Constitution.

## 5. The Role of Legal Practitioners in Upholding the Rule of Law

The judiciary and the legal practitioners are inseparable in relation to the application of the concept of the rule of law. The courts are the final arbiters of any legal dispute. They are the vanguard of the troops striving to uphold the rule of law: but legal practitioners are similarly indispensable foot soldiers in the crusade.<sup>34</sup>

It is essential that any democratic society has an independent legal profession, as advocated by Chitepo as early as 1961. This requires a profession that preserves professional ethics and the absence of external influences on the exercise of the legal duties by the members of the profession.

Legal practitioners play a critical role in ensuring access to justice. Citizens need representatives who will stand by them and present their cases to the courts. Legal representation is notably expensive, but who will stand for the disadvantaged and marginalised in society? These impoverished and vulnerable members of our communities need assistance. They too have the right to access justice.

*Pro deo* representation has been a part of our legal system for many years. It is a way in which legal practitioners can give back to society and be the mouthpiece for the disadvantaged and marginalised members of society who cannot afford legal fees. I encourage lawyers to take up these cases and assist those that cannot afford their fees. In doing so, there must be no difference in terms of preparation between cases for a fee-paying client and the one *in forma pauperis* or *pro deo*. When enlisted to take up cases *in forma pauperis* or on a *pro deo* basis, a lawyer is duty bound to meticulously represent the accused or a party in a case as he would do to his fee-paying client.

I commend the International Commission of Jurists (“ICJ”) for supporting legal aid clinics in law schools. This will certainly improve access to justice for the impoverished and marginalised communities in the area and will also be an opportunity for law students to develop and enhance critical skills for their professional legal careers. To the students of law, it is important that you participate in legal aid clinic programmes. It will allow you to assist the poor and learn to be a voice for the voiceless. The experience will be invaluable to your professional development.

Chitepo stood for democracy and justice and he is remembered for his vigorous campaign to uphold the rule of law.<sup>35</sup> By so doing, he managed to foster a sense of responsibility to national good and social equality in the country. By advocating for the rule of law, Chitepo managed to instil a nationalist spirit, coupled with a commitment to the development of Zimbabwe. Chitepo emphasised the need

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<sup>34</sup> F Kroom ‘*The Rule of Law: the role of the Judiciary and legal practitioners*’ South African Judicial Education Journal (2018) Vol. (1).

<sup>35</sup> F Muchivenyika and R Zinyuke “Emulate Chitepo’s patriotism,” *The Sunday Mail* 20 May 2018.

for equal access to the law in the following words:

*“It is well known that in modern circumstances the declaration of human rights in a constitution or their theoretical recognition in law may be rendered worthless, if the litigant is not able to enforce the right. His ability to enforce or protect these rights before the courts often depends on his ability to secure adequate legal representation...”*

And further that:

*“...lawyers in Africa should continue to study ways and means of giving real effect to this essential of the Rule of Law by ensuring that all who need legal representation shall not fail to get it. This need is more important in Africa where there are so many who are poor and ignorant-and who may suffer unwarranted invasions on their rights either without realising it, or realising it, are powerless to defend their rights.”*

As the judiciary, we have been playing our part to see a fulfilment of the aspirations that people like Chitepo represented. In our access to justice programme, we have collaborated with some law-based organisations in a help-desk initiative. In this programme, organisations such as ZWLA, WLSA, LRF and Justice for Children Trust - provide free legal aid to the indigent, while we provide office accommodation and furniture for their officers at our courts. This initiative has cascaded to all stations countrywide. We also work with the Department of Legal Aid and the Law Society of Zimbabwe to provide *pro deo* legal representation for persons facing serious offences such as murder.

## **6 The Importance of an Independent Law School**

One of the important pillars of justice and the rule of law that was identified by Chitepo was an independent law school. The purpose of it was to ensure that it taught aspiring lawyers accurate law. It is to develop in the students a scholarly and technical approach to all legal problems and to enhance the sense of personal and professional integrity. Law schools must equip lawyers with the values and skills to defend the Constitution and play their part in upholding the rule of law.

The role of law schools and academics must be that of assistance to the courts, developing areas of the law in a technically sound and substantively insightful way. Academia are critical to the development of jurisprudence and to prescribing the standards of conduct for citizens and the State in terms of the law.

To all young aspiring law students, I encourage you to defend the rule of law with the same enthusiasm and strong will that Chitepo did. Even in the face of resistance, it is the duty of the profession to do so. It is the cornerstone of the democracy that our heroes like Chitepo fought for, and which we must



all strive to maintain.

In defending the rule of law, you must understand that, in a democracy, legal practitioners are the first responders and the last defenders of the rule of law. You must not let it come under siege. You must play your role and make your contributions towards ensuring access to justice for all. The rule of law is undermined when a segment of society does not have access to justice and access to legal representation.

There will be differences in opinions and views on laws and issues within the legal profession. This is expected and such is the beauty of an independent legal profession with well-trained and well-resourced members. Treasure your diversity and learn from it. Respect the views, ideals and opinions of your peers, academia and even the judiciary. Interrogate and debate social and economic issues affecting our fundamental rights and freedoms in the Constitution. The rule of law and its enforcement can only be enhanced and never limited by fostering a spirit of open and honest engagement on issues affecting us. Remember to always be ethical. Once you qualify you are officers of the court. Adhere to and uphold the highest standards of professionalism.

You must hold the judiciary accountable. It is your duty and your responsibility in your role in consolidating the rule of law. The courts cannot fully protect and consolidate the rule of law without contributions from the legal profession.

In the words of MR JUSTICE MICHEL BASTARACHE of the Supreme Court of Canada:

*“Academic commentary that is useful to Judges is that which assembles and rationalises judicial decisions in a given field of law, draws out the general principles that these decisions imply, criticizes judicial decisions and suggests different approaches to particular areas of law.”<sup>36</sup>*

The Hebert Chitepo Law School must therefore take its place and play a leading role in the development of jurisprudence in the country. A vibrant academia that critiques not only court judgments but legal practice in general through publications in journals and law reviews is what enhances and consolidates the rule of law.

Above all, I encourage you to work hard, as Chitepo did. The values and rights that Chitepo fought for since the 1950s have now been embraced and entrenched in the Constitution. It is almost forty-five years after his death and we still celebrate his achievements. His astuteness as a lawyer did

not go unnoticed. In one instance CHIEF JUSTICE FIELDSSEND acknowledged Chitepo’s hard work when <sup>36</sup> M. Bastarache, “*The Role of Academics and Legal Theory in Judicial Decision-Making*” (1999) 37 *Alberta Law Review* 739.

he noted that:

*“Chitepo’s capacity for hard work, his care in preparing cases, his ability to see past the smoke-screen of detail to the essential facts of the case, his prodigious memory and all his knowledge of the law and how to apply it, made everyone in his profession realise his abilities.”*

Thorough preparation for a case is one of the integral duties imposed upon a lawyer towards the court. It is paramount that as an officer of the court, a legal practitioner is bound to ensure that justice and the truth are attained. It is imperative for a legal practitioner to meticulously research the law and direct his or her mind to the controlling points of the case at hand. The greatest service that a lawyer can render to a judge in the administration of justice is to be at all times prepared and attentive. As one Judge once remarked:

*“It is a comfort to have a lawyer appear in court who knows his case, and he will rout his adversary if his adversary is unprepared. ... one of the greatest ills that the Judge is heir to is to try an important case in which the lawyer is unprepared and knows nothing of what he is trying to do.”*<sup>37</sup>

There is no substitute for hard work; there is no substitute for preparation for court. Assist the courts in reaching correct decisions and in consolidating the rule of law. It is your duty, take it seriously.

## **6.1 The Significance of the GZU Law School being named after Chitepo**

The Great Zimbabwe University (GZU) Law School must take pride in having an established Law Faculty named after an illustrious man who used his exceptional intellectual abilities to play a pivotal role as an advocate for the rule of law, access to justice and equality before the law for all.

Like Chitepo, the Law School must instil values of dignity and strive towards the achievement of equality and the advancement of human rights and freedoms.<sup>38</sup> This is the vision and mission of the Herbert Chitepo Law School and I have no doubt that all the students who enroll and graduate from this institution will aspire to continue the work that was started by Chitepo many decades ago.

We have come far towards achieving a society that fully upholds the rule of law, but we can do more. We have laws that need to be aligned to the Constitution. We must ensure that every piece of primary and secondary legislation in our jurisdiction, both existent and to be enacted in future, is consistent with the Constitution. This is a job for all of us in the legal profession. The courts cannot

<sup>37</sup> I M. Meekins “*The Lawyer as an Officer of the Court – His Duty to the Court in the Administration of Justice*” (1926) *North Carolina Law Review* 95-103.

<sup>38</sup> See <http://www.gzu.ac.zw/law-school-vision-and-mission/> last accessed on 11 September 2019.

do it without the cases being brought before them and argued by lawyers.

I am confident that the Law School will produce lawyers who will be celebrated in decades to come for championing human rights and defending the rule of law. It is my fervent hope that this Law School will succeed in its quest to be a centre of excellence that inspires students to follow in the giant footsteps of Chitepo, whose views were influenced by the rule of law. I have no doubt that it will be the epitome of wisdom, dedication to general good, fearlessness and intellectual and academic excellence. By associating itself with such an inspirational role model, the Herbert Chitepo Law School has set itself a high standard of achievement lest it used this iconic figure's name in vain.

I have my own views on what it takes to be a good lawyer. I expressed them in the foreword to the book by Theophilus Pharoah Gambe titled "*ETHICS, THE LEGAL PROFESSION AND PRACTICE MANAGEMENT*" (Tallantyre Enterprises (Pvt) Ltd 2012). I said:

"The principle that knowledge of the rules of ethical conduct must be assimilated and lived through practice imposes on each legal practitioner a duty of personal self-enquiry, by the exercise of which it is recognised and accepted as the truth that the legal ethics is the foundation of proper behaviour in legal practice. By knowing the conduct required of him or her as a member of the profession and acting according to it, the legal practitioner begins to know himself or herself as a member of the honourable profession, proud to espouse its values in all his or her dealings with the public, courts, colleagues and staff. Knowing to self-know and be known in the context of professionalism becomes for the legal practitioner an objective standard to be satisfied as a pre-condition for a successful career as a lawyer. In other words, knowing the ethics of the profession and practising it at all times is always the key to knowing oneself as a true lawyer. Not everyone who carries the title is a true lawyer.

To conduct oneself in accordance with the rules of ethical practice is to satisfy a fundamental condition which predisposes oneself to act in the pursuit of the interest of justice. One cannot be able to act fairly towards others or to administer or assist in the administration of justice to others when one is unable to act accordingly. Being able, because of one's ethical predisposition, to act in accordance with the requirements of law is the essence of a good lawyer."

## **7 Conclusion**

Fully understanding the difficult road that Chitepo travelled to establish constitutionalism, we must appreciate that courts, law schools and the entire legal profession are bound to safeguard and uphold justice and the rule of law for social cohesion and political and economic development of the nation.

Chitepo used his profession to further the interests of his country. He symbolised the ideal nationalist, through his deep sense of belonging and unwavering convictions. There is no better way of honouring and celebrating the life of this giant man than to inculcate and nurture the values that he believed in, in our law students and practicing lawyers of today. That way, his legacy will truly be preserved.

As I conclude, I must emphasize that the judiciary remains committed to upholding and consolidating the rule of law. The judiciary cannot attain full adherence to the principles that underlie the concept of the rule of law without co-operation from the other arms of State. The rule of law reflects a fundamental principle of governance. The executive and the legislature must equally observe and respect the rule of law. The Constitution demands it and takes no exception to this founding value and principle.

In celebrating the life of Chitepo, a principled man who believed in equality, unity and hard work and fought for the rule of law, I conclude with a challenge to all: Be inspired to be selfless in the quest of attaining a fully democratic nation that observes the supremacy of the Constitution and respects the rule of law absolutely without derogation. This is a duty placed upon us all as members of the legal profession and one which I hope we all hold dear to our hearts.



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