

CIVIC ALLIANCE FOR DEMOCRACY AND GOVERNANCE

THE RULE OF LAW IN ZIMBABWE

A Politicised Judiciary

The rule of law is the heartbeat of democracy, without which democracy is dead and buried. It is the standard measure of the extent to which a government upholds constitutionality and subjects itself to the laws of the land as well as international law. It is also the protection of citizens from wide, arbitrary and discretionary powers of the executive. The rule of law reigns over government, protecting citizens against arbitrary state action and protects individual / private interests. It ensures that all citizens are treated equally and are subject to the law rather than to the whims of the powerful. Under the rule law, the law is applied indiscriminately irrespective of race, sex, religion or political persuasion.

The rule of law in Zimbabwe is in an intensive care unit for several reasons. Chief among them is the absence of an independent judiciary. An independent judiciary is a vital element of the rule of law. The bedrock of a constitutional democracy is an independent judiciary. The selection of judges must be done in a transparent, professional and ethical manner. Yet in Zimbabwe the constitution endows the President with a wide range of powers, which can ultimately undermine the rule of law. He determines the composition of the two superior courts through his constitutional powers to appoint High Court and Supreme Court judges. By reason of him being a political figure, President Mugabe appoints judges share some common political beliefs with him.

Recent utterances by High Court judges reveal that Zimbabwe's judiciary has all but surrendered its independence to the executive and the ruling ZANU PF. Officially opening the 2006 legal year in Bulawayo on Monday 6 January, Justice Maphios Cheda lashed out at lawyers involved in human rights litigation. He expressed his mistrust of legal firms that allegedly did not participate in defending the rights of ordinary people during the liberation war but were now championing the vilification of Zimbabwe for its damming human rights record

He is quoted by the Zimbabwe independent (13/01) as having said, 'it is some of these firms who are today in the forefront in singing loudly about human rights violations which they ignored during the war'. He further alleged that some of their associates chose to fight against blacks instead of denouncing the settler regime for human rights violations. He did not deny the existence of gross human rights violations in Zimbabwe but rather he attempted to set forth some sort of qualification for one to criticize the government for behaving like the white minority regime. His remarks borders on racism and xenophobia to say the least. The speech was vengeful and clearly political.

What is even more worrying about Cheda's remarks is his silence on the judiciary's commitment to protect human rights whilst at the same time speaking in support of those who violate the same rights. If the entire bench shares Cheda's utterances then Zimbabwe's judiciary system has become a cornucopia of contextual irrelevance. The judiciary must stand for justice - nothing more, nothing less. Cheda's remarks can also be implied to say those who supported the oppressive Smith regime must not speak out on human rights violations in Zimbabwe.

We note with shame and contempt how a high court judge entrusted with such a high calling of executing justice and upholding the equality and dignity of all humans can stoop so low to speak as if he were the ZANU PF secretary for information and publicity. Judges must defend the rights of people irrespective of color, tribe, political history or political affiliation. The law must protect even Ian Smith, the former Rhodesian Premier who thought Whites were superior to blacks. If the government feels Smith and the former Rhodesians have a case to answer let them press charges through the proper channels. That is the rule of law.

Also worrying is Chief Justice Godfrey Chidyausiku's criticism of human rights lawyers who roundly condemned Constitutional Amendment No.17 that made it illegal for anyone to challenge the government for compulsorily and arbitrarily dispossessing them of their land. The amendment bill barred the courts from hearing such matters. Chidyausiku's remarks in defence of the amendment bill are hardly surprising given that

some of the High Court Judges are beneficiaries of the violent land reform program the government is fighting hard to defend (Zimbabwe Independent, 13 / 01).

Furthermore, as mentioned earlier, the appointment of judges is the prerogative of the President. Having squandered his social capital and realizing that power was slipping out of his hands fast, President Mugabe and his ZANU PF decided to pack the bench with judges that are sympathetic to ZANU PF. But how could he remove the presiding judges before their terms of office expired? According to Sithole and Mair, (2002), the ruling party more and more resorted to unlawful means to prevent the judiciary from interfering with its absolute power strategy. It encouraged its party-militias, war veterans and youths to demonstrate against judges who were considered out of line. In November 2000, war veterans raided the Supreme Court building after the latter had ruled the government's land reform program unconstitutional.

In February 2001, High Court judges who ruled against the seizure of land by war veterans were physically threatened and attacked. A War Veterans Leader and ZANU PF official, Joseph Chinotimba, gave evidence on the attitude towards "disobedient" judges: "We didn't promote people like Makarau (one of the judges threatened) to be judges so that they can pass judgments against us." (Sithole and Mair, 2002). In 2001 justice minister Patrick Chinamasa told judges not to act like "unguided missiles".

"I wish to emphatically state that we will push them out ...The present composition of the judiciary reflects that the country is in a semi-colonial state, half free, half enslaved", said Chinamasa (Zimbabwe Independent, 13 / 01)

It is therefore crystal clear that the government, as announced by the Justice Minister in 2001, has "pushed out" independent judges and replaced them with bootlickers of the Mugabe regime. Judges must never be bedfellows with politicians as doing so compromises the virginity of justice and democracy. Sadly, the Zimbabwean judiciary has sold its independence and credibility for a piece of land.

UNJUST LAWS

Whenever civic groups threaten to demonstrate against the government, or to invite the government to address certain issues, Police Commissioner Augustine Chihuri or his Assistant, Oliver Mandipaka, are quick to warn them that ‘they will face the full wrath of the law’. Frequently the government has applied maximum force against unarmed citizens ostensibly ‘to enforce law and order’. In fact, The Public Order and Security Act (POSA), passed in February 2002, make it unlawful for two or more people to hold a public meeting without police permission. Further, the law makes it a crime to criticize the President or any public official in a derogatory manner. According to this legislation, criticizing the Head of state and other public officials will cause alarm and despondency.

One of the controversial laws passed in recent years was the Access to Information and Protection of Privacy Act (AIPPA). This act forces journalist to be accredited by a government-appointed panel – the Media and Information Commission. The act also requires newspaper publications to be registered by the same body. Under this law several independent newspapers were forcibly closed. Among its victims was the country’s leading daily – The Daily News. The passage of these two draconian pieces of legislation epitomized ZANU PF’s concerted effort to close the space for freedom of expression, association, and movement and from torture. According to these laws those suffering and expressing their anguish publicly are criminals. The question that begs an answer is: Should these laws be obeyed. Martin Luther King Jr, himself a victim of unjust laws, gives us an insight. Writing from a jail in Birmingham where he had been confined for demonstrating against racial segregation, he said he was a victim of unjust laws:

“ You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court’s decision of 1954 outlawing segregation in the public schools, at first glance it seems paradoxical for us consciously to break laws. One may well ask: “How can you advocate breaking some laws and obeying others?” The answer lies in the fact that there are two types of laws: Just and unjust. One has not only a legal but a moral responsibility to obey

just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'An unjust law is no law at all'.

"Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law or natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "i-it" relationship for an "i-thou" relationship and ends up relegating persons to the status of things.

"Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make a binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal". (Luther, 1963)

Luther's remarks demystify the concept of rule of law. Not all laws are just. Laws that are oppressive and contrary to the law of God must be dismissed with righteous indignation. It is the moral duty of all Zimbabweans to guard their freedoms jealously by refusing to lend their obedience to draconian, devilish and segregationist laws. It is also our moral and constitutional responsibility to speak out against the passage of such laws, as not doing so is tantamount to approval of such unholy and inhuman legislations. We roundly condemn laws that are meant to close our God – given democratic space. Luther warns us: "We will have to repent in this generation, not merely for the hateful words and actions of bad people, but for the appalling silence of good people".

The Mugabe regime is a caricature of the Smith regime because it has used the same laws used by Rhodesians to suppress Black Nationalism. The Public Order and Security Act

(POSA) of 2002 is simply the reintroduction of the Law and Order Maintenance Act (LOMA) of 1960, used by Smith to contain the Liberation struggle. Mugabe is behaving in the same manner Smith reacted when his reign drew to an end. Martin and Johnson, (1982), noted that increased pressure on the White minority regime 'led to a marked shift towards greater settler oppression of the African majority.' The Law and Order Maintenance Act (LOMA), also known as Unlawful Organizations Act placed constraints on the right to strike if it was deemed against the 'public interest'. The same constraints characterizes POSA.

A letter written by the Police turning down an application for permission to hold a public meeting read, in part: *"In terms of section 26 (1) of the Public Order and Security Act Chapter 11:17 the application has been turned down because of the following reasons: The current political environment is tense and the opinion results of your survey may trigger public discontentment amongst the audience".*

As other Zimbabweans were being denied the right to meet and discuss issues of national interest, ZANU PF supporters were holding public meetings of a wide range of activities ranging from political rallies, all-night vigils, illegal road blocks to anti-MDC demonstrations. One wonders whether the police sanctioned all these activities. If police sanctioned these activities then why deny other citizens their right to associate and move freely. This is selective application of the law.

Conclusion

Here is the conclusion of the whole matter. As responsible citizens we have the moral responsibility to uphold and obey just laws. We must urge one another to obey these laws in the same way preachers exhort Christians to obey God's law. Conversely, we also have a moral duty to disobey and denounce unjust laws. We must likewise urge one another to disobey and abhor unjust laws in the same way preachers urge their followers to resist and shun the Devil and his demons. We must therefore encourage one another to uphold what is just and trample under our feet unjust laws.