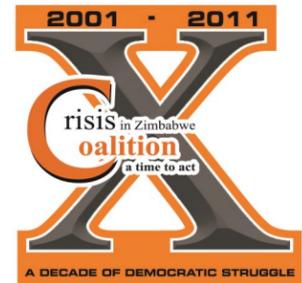


ZIMBABWE BRIEFING

a crisis in zimbabwe coalition regional office weekly report
17 - 22 October 2013

ISSUE 119



“The Government is not supreme at all, the Constitution is” – towards full implementation of the new Constitution



The Crisis in Zimbabwe Coalition has asked me to say a few points on what is evidently a pertinent subject of the need to align our laws to the new constitution. At the outset it is important to reaffirm that aligning our laws to be in compliance with the new constitution is a legal and constitutional obligation if the national values as codified in the new constitution are to be realized and for our constitution to be a living document rather than one for the archives. Aligning

the laws to the new constitution is also necessary to give legitimacy to those who govern as their election and assumption of office was in terms of the constitution and they swore to adhere to and uphold the constitution in the exercise of their public mandate.

Zimbabwe is a constitutional democracy. This means that there is constitutional supremacy. That the constitution of Zimbabwe is the supreme law, there is no question. You just need to refer to chapter 1 section 2 of the constitution of Zimbabwe, which unequivocally states that

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

The way in which this constitutional clause on constitutional supremacy is worded in sub-section 1 is critical and interesting. It categorically states that laws, practices, customs and conduct that is not consistent with the constitution is “invalid to the extent of the inconsistency” (own emphasis). This seems to place the obligation on authorities to make laws consistent with the constitution before they can validly apply such laws in the governance function. Put simply, the constitution does not compel citizens or people in Zimbabwe to comply with unconstitutional laws as they are invalid, rather than potentially invalid. In other words it is wrong or cannot be reasonable to expect law abiding people to comply with unconstitutional and therefore invalid laws.

Putting this in practice is going to place people in Zimbabwe into potential conflict with the authorities who would expect that people comply with any law on the statute books unless such law has been repealed, amended or declared unconstitutional by a court of law. This then takes us to sub-section 2 of Chapter 1 section 2 of the constitution. It places obligations that are binding “on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level.” (own emphasis). This clause is an important clause as it places an obligation on all branches of government to implement the constitution to make Zimbabwe realize its national values as per the new constitution. Given the purport of this clause, the previous approach of the Supreme Court of Zimbabwe sitting as a constitutional court in the ANZ case of adopting the dirty hands doctrine in constitutional challenges now looks untenable.

In the dirty hands doctrine case, the Supreme Court took the position that a person (juristic or human) who is challenging the constitutionality of a law, must first comply with that law before approaching the court for protection of constitutional rights. In essence given the new section, other than imposing a duty on the constitutional court to conduct itself in a way that is constitutional and legal (valid), it also specifically declares unconstitutional law invalid, raising the real logic that the dirty hands doctrine which presumes the law legal unless declared illegal is in itself potentially inconsistent with the new values that this constitution tries to espouse.

Human rights and constitutional litigation lawyers have been given an opportunity to test the resolve of the new constitutional court to play its role of contributing to the transformation of society to live by the new values. There are a number of laws and practices that immediately come to mind as creating fodder for potential floodgates in constitutional litigation. These include but are not limited to all laws that violate fundamental rights such as liberty, association, movement and expression. The new constitution reaffirms such rights as fundamental in the expanded bill of rights. Other areas of potential constitutional litigation include the justice ability of economic, social and cultural rights including the right to life, employment, education, health and safe environment.

Our investment laws may need reform and challenge to the extent that our desperation for foreign direct investment (FDI) has opened up the country to primitive extractive practices that have degraded our environment and exposed our citizens and indigenous communities to violations of their socio-economic rights.

Practices such as prolonged detention of suspects including through the use of section 121 of the Criminal Code will also be areas for potential constitutional litigation. The Criminal Law Codification Act, the Public Order and Security Act, the Access to Information and Protection of Privacy Act, the Broadcasting Services Act, the Money

laundering laws, the laws that allow for invasion of privacy including recording and documentation of private conversations in e-mails, phone calls including mobile calls, internet browsing may also be fertile for legal challenges and reform. Our investment laws may need reform and challenge to the extent that our desperation for foreign direct investment (FDI) has opened up the country to primitive extractive practices that have degraded our environment and exposed our citizens and indigenous communities to violations of their socio-economic rights.

The requirement for all state institutions and branches of government to conform to the constitution and to implement it also means that the laws that create constitutional bodies and their administrative and procedural framework also needs to be reformed in order to give greater independence, impartiality, accountability and professionalism to such bodies. Parliament has a responsibility to ensure that this happens. Some of the critical constitutional and legal bodies that need this alignment of laws and practices to meet their constitutional obligations and mandate include but are not limited to the Courts, the Human Rights Commission, the Electoral Commission, the anti-corruption commission, the land commission and the environmental management agency.

The judiciary is going to be a key branch of government in checks and balances to ensure that it contributes to society transformation. As former RSA Constitutional Court Justice Zak Yacoob said “if the judiciary is to transform, the values of the Constitution should be of the most importance when judges apply their minds and when they are appointed...Judges in those (Apartheid) days judged in favour of authority...The rich and poor were certainly not treated equally in our courts...and not judged equally. There was a great deal of arrogance and rudeness...everybody must be treated equally. The values of the Constitution are supreme.... **The government is not supreme at all, the Constitution is.**” (own emphasis)

In ending I need to reaffirm that the laws of Zimbabwe need to be audited to make them consistent with the new constitution. A serious audit needs to be done professionally and deliberately followed by a systematic advocacy programme by civil society. The wording of the constitutional supremacy clauses of our constitution has placed a huge onus on the government to embark on a sustained programme to re-align the laws to conform to the constitution. Sadly this is not happening at the speed that it needs to be done to give meaning to our new national values. Happily though, the constitution is worded in a way that will make it difficult for the government to implement unconstitutional and therefore “invalid” laws. Let us hope that our courts will stand up to the government and enforce separation of powers if and when, as it often happens, the government tries to implement invalid laws rather than embark on law reform to give meaning to our new constitution.

Hon Arnold Tsunga is a Member of Parliament of Zimbabwe and the outgoing Africa Director of the International Commission of Jurists. He is a renowned Lawyer & Human Rights Defender. He writes in his personal capacity.

Alignment of legislation to the New Constitution hinges on ZANU PF, political will

The new Constitution of Zimbabwe borne out of the protracted and controversial COPAC-led constitution making process and overwhelmingly voted for at the March 16 2013 referendum remains arguably one of the best outcomes of bipartisan politics in post-independent Zimbabwe. Given the polarised political environment that has always characterized Zimbabwe's body politic, it is remarkable that despite the imperfect nature of the process that birthed it, Zimbabweans across the political divide can proudly claim to have played a historic part in replacing the archaic Lancaster House Constitution with a home grown document embodying the fundamental principles upon which the Zimbabwe state should be governed. However, having a Constitution, no matter how perfect, is one thing while making it the supreme law to codify desired governance in reality is quite another. Zimbabwe finds itself somewhere between the old constitutional order and the envisaged new dispensation.



The challenges that have faced Zimbabwe since independence are numerous and can be explained with varying degrees of importance. However, if governance has been one of them, this makes the task of breathing life to the new constitution an even more urgent task. A closer look suggests that without ZANU PF's expected co-operation, such a day could be far off given the political implications of many of the new constitutional provisions. The alignment of existing legislation to the new Constitution is of course urgent to the extent that it is fundamentally what the people of Zimbabwe stated emphatically on March 16. This is however notwithstanding the fact that the process will be a careful one and a lot of patience needs to be invested by all and sundry.

What is worrying, however, is that despite Parliament approving the new Constitution as far back as 9 May 2013, there seems to be no desire at the political level, to comprehensively expedite the process of realigning the Lancaster and 'COPAC' documents in what will obviously be a painstaking, but important agenda. The delay has several implications, including possible conflicting interpretations of the law, leading to complications, which hopefully will not lead to a constitutional crisis. One would thus have expected a swift, genuine and pragmatic approach aimed at minimizing the attendant, if not obvious problems and inconveniences further delays are likely to bring. Granted, some of the new provisions are not urgent per se as they will only take effect over the course of the next ten years. Nonetheless, one would have expected that others, especially those concerning fundamental human rights under the Bill of Rights would already be a priority.

What is abundantly clear in the political economy of constitutionalism in Zimbabwe is that ZANU PF has demonstrated, over time, and sometimes even openly, its desire to maintain the status quo.

ZANU PF has either been strongly opposed to a constitution making process that it is not a driver of, or opposed totally to the very idea of a new Constitution on the basis that the old one could simply be amended, where and when necessary. Reference can be made to the 2000 situation when calls for a new, democratic constitution led by the National Constitutional Assembly (NCA) but supported by a broad based civil society movement reached a crescendo, ZANU PF simply responded by creating an alternative platform, the ill-fated Constitutional Commission of Zimbabwe. This background is important in shedding light on the fate of the new constitution; in particular the alignment of legislation for what would basically be a new constitutional dispensation in Zimbabwe.

By far the most significant factor in Zimbabwe's political dynamic going forward is the fact that ZANU PF is now firmly back in the driving seat following a defining electoral outcome, and thus determines the governance and government agenda. ZANU PF has generally been known to be consistent in its approach, and most crucially, is not well known for compromising on its core interests and values, and as recent history has shown, power retention is high on the list. The complication is that ZANU PF has over the years managed to portray party interests as inextricably linked to the "national interest" with the implication that threats offered by other parties in political contest are invariably threats to Zimbabwe.

The new constitution, if wholly embraced and followed to the letter, offers a potentially different ball game that ZANU PF may not be ready for. For instance, ZANU PF might be reluctant to repeal key pieces of legislation such as the Access to Information and Protection of Privacy Act (AIPPA), the Public Order and Security Act, the Criminal Procedure and Evidence Act (CPEA), the Official Secrets Act, among other laws, which have undoubtedly been very central in power politics in Zimbabwe. There is not much optimism in expecting the government to immediately do away with them for it may not be politically prudent to do so. Issues to do with devolution, where ZANU PF prefers its own tried and tested version of decentralisation, could cause the new government some discomfort.

For want of space, it must suffice to say that it would require nothing short of a miracle for ZANU PF to act in the best interests of the country by realigning the country's laws with the new constitution sooner rather than later regardless of how this might compromise its own political interests. Zimbabwe, though not a failed state is an imperfect democracy because it is a constitutional democracy officially, but a guided Presidential one in real practical terms. The institutional framework and mechanisms that would ordinarily ensure that the constitution is realigned are thus ineffective. ZANU PF is aware of the complications brought about by a new constitutional dispensation different from the Lancaster document to its own type of rule that it wants to entrench in Zimbabwe.

Politics is conceptualised in three ways: politics as government, the public or authoritative allocation of values. In Zimbabwe's developing democracy, it is still less about the public, but more about government meaning the formal political machinery of the country as a whole, its institutions, laws, public policies, and key actors. The history of ZANU PF rule shows that the party contends that it still has certain priorities to deliver to the 'people' and it can only fulfil its mandate better without the bothersome checks and balances of a 'liberal' order. Certain provisions, for example that there be equal representation of women and men in public administration bodies at the national and local government levels have already been ignored. Going forward, it would be unfortunate if the government continues to cherry-pick what laws to realign and what laws to retain or defer realignment on.

Edson Ziso is a PhD Candidate (Politics and International Studies) at the University of Adelaide, Australia. He writes in his personal capacity.

Ends//