

The LEGAL MONITOR

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COST-FREE

SADC called to act

HARARE-Regional leaders meeting in Namibia next weekend should prioritise plans to prevent Zimbabwe from degenerating into another wave of political violence ahead of a possible general election next year, a coalition of civil society groups has said.

President Robert Mugabe's ZANU PF party has said elections are inevitable next year, raising fears that the electoral violence that engulfed the country in 2008 could haunt the country again should the polls go ahead without adequate monitoring and supervision.

Crisis in Zimbabwe Coalition said Southern African Development Community (SADC) leaders should take a firm stance on ensuring credible elections in Zimbabwe.

SADC leaders, the guarantors of the coalition government's power sharing agreement formed in February last year after the inconclusive 2008 elections, meet in Namibia from 15-17 August.

The leaders will discuss Harare's progress on implementing the Global Political Agreement, which forms the basis of President Robert Mugabe and Prime Minister Morgan Tsvangirai's coalition government. South African President Jacob



SADC mediator President Zuma with President Mugabe

Zuma's envoy, Mac Maharaj was in Zimbabwe last week to narrow differences between President Mugabe and Prime Minister Tsvangirai.

Civil society groups say while Maharaj's efforts are commendable, the human rights situation in Zimbabwe remained precarious due to the coalition government leaders' obsession with government appointments. In a statement, Crisis in Zimbabwe Coalition called on SADC to:

- Urge Zimbabwe to recognise the right of Zimbabweans in the Diaspora to vote and put in place necessary administrative mechanisms to facilitate that vote.
- Facilitate technical support to the newly appointed Zimbabwe Electoral Commission by more experienced regional electoral bodies such as the South African Electoral Commission.

- Bar Zimbabwe from taking up a position in the SADC Organ on Politics, Defence and Security for the duration of the on-going mediation process in Zimbabwe to preserve the independence of the Organ. Even in Zimbabwe, a player for one side cannot pull on a referee jersey.
- Ensure that Zimbabwe fully complies with SADC Principles and Guidelines Governing Democratic Elections – including impartiality of electoral institutions.

SADC Principles and Guidelines Governing Democratic Elections were adopted in Windhoek in 1992 to strengthen democracy in the region. Among the core principals dictated by the guidelines are: full participation of citizens in electoral processes, freedom of association, equal opportunity for all political parties to access the State media, equal opportunity to exercise the right to vote and be voted for and voter education, independence of the judiciary. The guidelines also dictate that losers of elections should accept the results instead of using violence and force to cling to power.

HIV/AIDS activists in constitutional campaign

HARARE-HIV and AIDS activists have called for the inclusion of provisions on non-discrimination and equal protection for people living with the pandemic in the planned new constitution.

The activists, under the banner of the National HIV/AIDS, Human Rights and Law Advocacy Roundtable, made the call after realising that most debate on the new governance charter was concentrated on political issues, leaving crucial social issues on the periphery. The National HIV/

AIDS, Human Rights and Law Advocacy Roundtable is facilitated by the Zimbabwe National Network of People Living with HIV and AIDS, the umbrella body that represents and coordinates activities and interests of the HIV/AIDS sector.

"Because People Living with HIV and AIDS in Zimbabwe continue to face grave challenges in accessing treatment, social services, basic health care, education, and other socio-economic rights, it is important to highlight the need for an expanded Bill

of Rights in the new constitution with provisions on non-discrimination and equal protection of the law that apply expressly to the rights of People Living with HIV/AIDS," the Roundtable said in a statement.

People Living with HIV/AIDS have become some of the worst hit casualties of Zimbabwe's economic recession largely blamed on political mismanagement.

Although the formation of the coalition government has resulted in a slight improvement in access to health-following

the re-opening of hospitals that had closed during the old government—those living with HIV/AIDS are still in a dire situation.

The Roundtable said the new constitution should guarantee social security for people living with HIV/AIDS and resultant vulnerable groups such as orphans.

"The recognition should identify the right to health as encompassing the provision of adequate and quality health care, diagnostic testing, access to treatment free ARVs to those who need them."

ZLHR FACT SHEET SERIES No. 1

What is a CONSTITUTION ?



What is a Constitution?

A constitution is a set of norms and rules that sets out a framework of the arms and institutions of government, their powers and how they relate to each other when governing a country. It also sets out the rights and obligations of citizens and the limits to which those rights can be exercised. It is usually in the form of a written document.

What is the importance of the Constitution?

The constitution is the supreme law of the land and derives its authority from the people. No other law should be enacted that is in conflict or inconsistent with the provisions of the Constitution. More importantly, government should not violate the constitution since it is itself a creature created by the constitution. Should the government do anything in violation of the Constitution then such action can be challenged in the courts of law and set aside. This is generally referred to as Constitutional Supremacy.

What is Constitutionalism?

Constitutionalism is the belief of limited government and that governmental power should be controlled so that it is not abused to the detriment of society. Most constitutions set out various limitations and restraints on government based on various principles such as separation of powers, protection of fundamental rights and the rule of law.

What is the Principle of Separation of Powers?

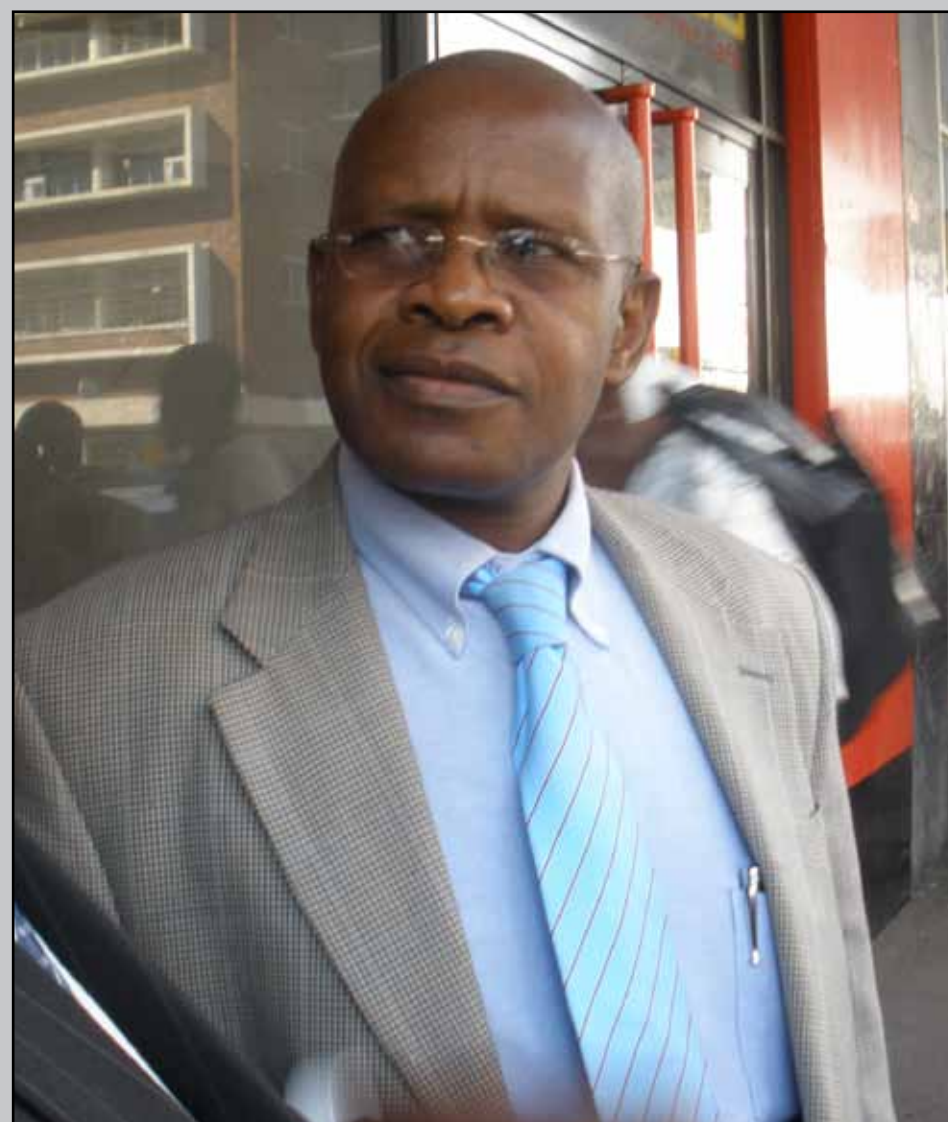
One of the most important functions of a constitution is the division of power among the three pillars of government, namely the Executive, the Legislature and the Judiciary. The idea in separating power between these arms of government is to set out the roles of each of the three pillars and provide checks and balances so as to avoid abuse or usurpation of power by any one of them.

Fundamental Rights

As mentioned before the constitution also entrenches and guarantees the protection of basic rights of all citizens. This is usually covered in a section of the Constitution called the "Bill of Rights." These rights are also referred to as Human rights and form a very important part of the constitution. The rights contained in a bill of rights should be consistent with and conform to International Human Rights Law. It is important that such rights should be enforceable in the courts of law.

The Rule of Law

Adherence to the rule of law is another critical component of constitutionalism. There are different formulations on what the rule of law is but all are based on the premise that the rule of law related to the supremacy of the law as opposed to the influence of arbitrary power. Furthermore the rule of law means that all no one is above the law and everyone is equal before the law.



Hon. Eric Matinenga

Constitutional and Parliamentary Affairs Minister Hon. Eric Matinenga says the Constitution Select Committee (COPAC) has held a total of 1 560 meetings where 288 951 people have attended.

ZLHR FACT SHEET SERIES No. 1

What are the features of a good constitution?

For a constitution to be effective it must reflect the wishes and aspirations of the citizens of a nation. Invariably it must conform to certain fundamental principles for it to be a good constitution. In Zimbabwe there is discussion about a constitutional making process that is people driven. Even a people driven process will produce a flawed constitution if it does not respect and uphold the rights of individuals and certain groups of people even where these are not in the majority. Generally a constitution should have the following primary characteristics:

- I. **Constitutional supremacy:** A constitution itself must be the supreme law of the land, deriving its authority from the consent of the governed, and expressing the will, values and aspiration of the people.
- II. **Independent branches of government:** A Constitution must outline the separation of powers amongst the judiciary, legislature and executive. No one branch should be able to usurp power from the others.
- III. **Human rights and fundamental freedoms:** The constitution must provide for and guarantee the respect, protection and promotion of universally recognized human rights and freedoms, including civil, political, social, economic, cultural and environmental rights.
- IV. **Equality under the law:** The constitution must guarantee the equality of all citizens before the law and ensure there is no discrimination on any basis whatsoever.
- V. **Representative democracy:** This includes but is not limited to guarantees of multi-party democracy, universal adult suffrage, regular elections which adhere to accepted international standards, and an independent and impartial electoral management body.
- VI. **System of governance:** The people need to agree on the system of governance that will be adopted and how and take into account the different provinces and their needs. There must be agreement on whether power must be centralized in all aspects in one administration or devolved to the various provinces that make up the country.
- VII. **International obligations:** The constitution must take into account, and be consistent with the state's international and regional obligations. The people must agree how international law will relate to domestic law. Generally we have the monistic approach whereby international law is automatically incorporated into domestic law, and the dualistic approach where international law first has to be incorporated into domestic law by parliament before it can become effective.
- VIII. **The Amendment Clause:** In order to safeguard the integrity of the constitution and ensure that it remains a reflection of the will of the people, Amendment procedures must be difficult, and must be subjected to a strict process that obtains the approval of the people, and the legislature.

Who writes the Constitution?

There are many methods that may be used to come up with a Constitution, however, the world over its now generally accepted that the best way is an inclusive all stakeholder process that ensures that all sections of society get a chance to contribute to the content of the document.

Thereafter the document should then be subjected to some form of verification such as a Referendum.

It is important to have a process of certification to ensure that the final constitution is in accordance with minimum international and regional standards and does not violate human rights.

An example is the South African process where the majority of the people wanted the death penalty and did not want the right to sexual orientation included in the constitution.

The Constitutional court considered the issue and refused to certify the constitution because it violated human rights.

ZLHR FACT SHEET SERIES No. 1

What are the features of a good constitution?

For a constitution to be effective and accepted, it must be owned by the people and reflect their wishes and aspirations. It must also conform to certain fundamental principles and respect and uphold the rights of individuals, including certain groups of people who are not in the majority. Generally a constitution should have the following characteristics:

I. Constitutional supremacy:

A constitution must be the supreme law of the land. It must derive its authority from the consent of the people, and express their will, values and aspirations.

II. Independent branches of government:

A constitution must ensure that there is separation of powers amongst the Judiciary, Legislature and Executive. One branch should not be able to exercise more power than the others, and the excesses of that branch must be able to be stopped and the violators held to account.

III. Human rights and fundamental freedoms:

A constitution must provide for and guarantee the respect, protection and promotion of universally recognized human rights and freedoms for all a nation's people, including civil, political, social, economic, cultural and environmental rights.

IV. Equality under the law:

A constitution must guarantee the equality of all individuals before the law and ensure that there is no discrimination on any basis whatsoever.

V. Representative democracy:

A constitution must provide guarantees of multi-party democracy, universal adult suffrage, regular elections which adhere to accepted international standards, and an independent and impartial election management body.

VI. System of governance:

The people need to agree on the system of governance that will be used and how best to take into account the needs of people in different parts of the country. There must be agreement on whether all aspects of state power should be centralized in one administration or devolved to the various provinces that make up the country.

VII. International obligations:

A constitution must take into account, and be consistent with, the state's international and regional obligations. The people need to decide whether they want such obligations to be automatically incorporated into domestic law, or whether international law first has to be incorporated into domestic law by Parliament before it can become effective.

V. Accessibility:

Members of the public should be able to easily access the individuals or institutions involved in the constitution-making or reform process. They should also be able to understand the process and participate in it, which requires various programmes to educate and inform them.

VI. Blanket receptiveness and openness to views:

There should be willingness to accept diverse views on the process. Unfavourable views should receive equal attention.



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Teachers freed

KAROI-A Magistrate has freed three teachers who were arrested last week to answer assault charges after their lawyers applied for bail.

The teachers namely Rorden Matsaure aged 32, Innocent Nyoni (34), Clifford Muchingami (30) and Patrick Murira (39), a security guard were freed after the court granted them bail.

The teachers and the security guard paid \$20 each in bail money and were ordered to report to the police once every month on Fridays and to reside at their given residential addresses.

Matsaure, Nyoni, Muchingami and Murira, who are stationed at Hesketh Primary School, were arrested last Thursday and charged with contravening section 89 of the Criminal Law (Codification and Reform) Act Chapter 9:23 for allegedly assaulting a Karoi resident Freeman Svova.

The State alleges that the three teachers unlawfully and intentionally caused bodily harm to Svova when they assaulted him once on the forehead, using a brick, once at the back using a gum tree branch and all over the body using booted foot,

clenched fist, and open hands thereby causing inflicting injuries.

The State claims that the teachers, who are represented by Belinda Chinowawa and Tawanda Zhuwarara of Zimbabwe Lawyers for Human Rights (ZLHR), assaulted Svova after he alleged during a discussion whilst drinking beer in a bar that they were spoiling school children by teaching them Movement for Democratic Change (MDC) slogans at Hesketh Primary School resulting in some children singing some of the party's songs and slogans at home.

As a result of the alleged assault the State claims that Svova sustained some injuries on the head, wounds on his face, back ache, chest pains and a swollen eye.

However, the teachers have denied the assault charges and claim that they were being victimised for challenging some soldiers at a meeting convened two weeks ago near the school, where the soldiers were allegedly coaching people on making contributions during a meeting held ahead of a constitutional outreach meeting to solicit people's contributions to a draft constitution.



Belinda Chinowawa

GALZ worker pleads innocent

HARARE-Ellen Chademana, an employee of the Gays and Lesbians of Zimbabwe (GALZ) pleaded not guilty to charges of possessing prohibited material when her trial commenced before Harare Magistrate Don Ndirowei last week.

Chademana entered a not guilty plea after the charge had been put to her by State prosecutor Rufaro Mhandu.

Chademana is on trial on charges of possessing prohibited materials in contravention of Section 26 (1) (a) of the Censorship and Entertainment Control Act Chapter 10:04.

Prosecutor Mhandu tendered her first exhibit to the court, a file which she claimed contained some pornographic pictures and which was allegedly recovered from a shelf in the GALZ offices.

Mhandu led evidence from the State witness Detective Assistant Inspector Trust Gomo, who was part of the police team that raided



Detective Inspector Gomo, one of the police detectives who arrested the GALZ employees

the GALZ offices in May and allegedly recovered the pornographic material. In their defence outline

Chademana's lawyers Jeremiah Bamu and David Hofisi both of Zimbabwe Lawyers for Human

Rights (ZLHR) denied that their client was in possession of the alleged prohibited material as she was not in the office at the time of the police raid.

On Friday Magistrate Ndirowei relaxed Chademana's reporting conditions to allow her to visit her sick father.

Chademana, who had been reporting to the police twice a week on Mondays and Friday's as part of her bail conditions will now report to the police once a fortnight. She has also been allowed to travel beyond the 40 kilometre radius from Harare which she had been restricted to by the court.

Already, Ignatius Mhambi, a GALZ employee, who was arrested together with Chademana on almost similar charges of possessing prohibited or pornographic material, was acquitted by Harare Magistrate Sandra Mupindu last month.

Stop interference in food aid: NANGO

HARARE-The right to a decent living remains a dream unless the government shows commitment to ensure that all Zimbabweans access food and does not interfere with those trying to assist, the National Association of Non-Governmental Organisations (NANGO) has said.

"As NANGO we are proposing (that the) government should ensure that there is a conclusive operating environment for civil society to operate effectively without interference. (And) that there should be a political will in investing in the building of capacities of national NGOs so as to take advantage of the cost effectiveness associated," said NANGO's Moses Ndhlokoyo.

He said this last week when the United Nations launched a Consolidated Appeal Process (CAP) for about US\$479 million to rescue Zimbabwe from its humanitarian crisis. Zimbabwe is facing one of its worst humanitarian crises with over three million people estimated to be in hunger. Over a year after the formation of a transitional government which many expected to address the problem of hunger and starvation, Zimbabwe remains at the mercy of donors.



Prime Minister Morgan Tsvangirai: His entry into government is yet to stem the humanitarian crisis that has affected Zimbabwe for a decade

Humanitarian organisations which have tried to bring in food assistance in Zimbabwe have complained that the government interferes with their programmes.

At the CAP event, Tichaona Chifamba, the permanent secretary for the Ministry of Regional Integration And International

Cooperation said the government and aid organisations needed to share information of how the humanitarian aid programme would be taking place.

He added: "(This) is meant to improve information sharing so as to enhance aid effectiveness as well as mutual accountability.

In that regard the information sharing exercise should not be misconstrued as Government trying to police the activities of cooperating partners."

Launching the appeal, the UN's Humanitarian Coordinator in Zimbabwe Alain Noudenou said humanitarian access had improved since mid-2009. "There has also been a notable increase in cooperation between the Government and the humanitarian community, and between international and national humanitarian partners," added the UN envoy. He said were more significant increases in requirements for the health, food and agriculture clusters.

"The humanitarian situation in Zimbabwe requires a different approach than most crises. Small emergencies continue to develop into major crises requiring relief assistance, due to the unaddressed structural degradation in the basic sectors. With strong infrastructure in place, and with the right level and mix of support, Zimbabwe would have the capacity to rebound faster than most countries in crises. Recent examples prove the benefits of such a comprehensive approach," said Noudenou.

Quote of the week



Ambassador Charles Ray

"When America is treated in the manner it was treated on Sunday, I will react," U.S. Ambassador Charles Ray after he was summoned by Foreign Affairs Minister Simbarashe Mumbengegwi together with German Ambassador Albrecht Conze and the EU charge d'affaires Barbara Plinkert for walking out of the national heroes' shrine after President Robert Mugabe told western powers to go "to hell" for imposing sanctions on himself and his lieutenants.

Farmers: Spotlight on SADC

WINDHOEK-The spotlight is now on what the Southern African Development Community (SADC) Summit will next week say on Zimbabwe after the organisation's court last month ruled that Harare must face sanctions from the regional body.

The Windhoek-based SADC Tribunal referred Harare to the SADC Summit after President Robert Mugabe's government refused to comply with a ruling the court made in 2008.

White commercial farmers in Zimbabwe, once the breadbasket of the region, have since 2000 faced compulsory expulsions and the loss of their land turned over to blacks since the government embarked on a controversial land reform claiming to correct a colonial legacy that left whites owning most of the best farmland.

The SADC heads of State will meet in Windhoek from this weekend and on the agenda will be the issue of Zimbabwe.

The SADC Tribunal last month ruled that Harare was in contempt of the Tribunal. This followed a request by some white commercial farmers to suspend the Zimbabwe government from the group over its seizure of their land.

In 2008 the Tribunal ruled that 78 white farmers fighting against the seizure of their land by President Mugabe's government, but Harare ignored the verdict.

"There are a number of sanctions that SADC Summit can impose on Zimbabwe since the

Tribunal has no army or a deputy sheriff to enforce its ruling," David Drury, the farmers' lawyer told The Legal Monitor recently.

"The sanctions include termination or suspension of Zimbabwe's membership in SADC. The Tribunal was established to protect SADC citizens and that must be seen to be happening."

The farmers had asked the Tribunal to refer their matter to the Summit to consider suspending Zimbabwe until it upholds the tribunal's order to return confiscated land or compensate farmers for lost property.

"All we want is full compensation as per 2008 ruling," added Drury. "But that has not been forthcoming."

The government has refused to comply with the SADC Tribunal's rulings and is instead challenging the court's legitimacy. Attorney General Johannes Tomana has since stopped sending lawyers to tribunal hearings.

Earlier this year High Court judge Bharat Patel declined to register the Tribunal's 2008 ruling, saying it violates Zimbabwe's Constitution. However Justice Patel ruled that SADC Tribunal's rulings were binding on Zimbabwe.

Zimbabwe's chaotic land reform campaign was marred by deadly political violence and wrecked the farm-based economy, leaving the country dependent on international food aid.