HONOUR AMONG THIEVES? CONSTITUTIONALISM AND INVESTMENT IN ZIMBABWE

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"This country is a constitutional democracy which prides itself with its adherence to the rule of law" – Justice Mathonsi[1]

Constitutionality in Zimbabwe needs to be viewed against an important aspect of President Mugabe's style of governance. Successive Administrations under Mugabe have tended to regard executive power as plenary – in other words, that government officials may do whatever they deem necessary to govern, unless constrained by legislation. For this reason, in addition to the Constitution, general statutes are frequently regarded by Mugabe and his Administration as restricting executive power, rather than, as is usual in a constitutional democracy, enabling and authorising its use. Mugabe has little tolerance for any constraints place upon his executive power, and few have been. However, under the Constitution establishing the Inclusive Government (2009 - 2013) and the new Constitution (which became law on 22nd May, 2013[2]) Mugabe's powers were marginally restricted. Mugabe's response to these constraints has been to simply ignore them. The examples which follow are but a few of the many possible.

In terms of the Constitution establishing the Inclusive Government, the President's extensive powers remained intact except for two important limitations. One was that all key appointments in terms of the then Constitution, and under any statute, had to be made with the consent of the Prime Minister first obtained. [3] This provision was repeatedly ignored.

The Inclusive Government Constitution also fettered Mugabe's power to appoint Ministers. The number of Ministers he could appoint was set at 31. The establishment of the Ministries appeared in Article 20.1.6 of Schedule 8 of the Constitution of the Inclusive Government, which was as follows:

> *There **shall** be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M*

On the 13th February, 2009, President Mugabe purported to swear into office 35 Ministers and, on the 19th February, 2009, a further six Ministers, bringing the total to 41, ten more than were permitted by the Constitution, and agreed in the GPA. As such, the appointments of these ten additional Ministers were unconstitutional, unlawful, and void – a literal case of executive excess. Which Ministers were unconstitutionally in office depended upon the order of the swearing-in: once the quota of 15 ZANU PF nominees was reached, the purported assumption of office by any ZANU PF nominee thereafter was unconstitutional. The same considerations applied once the quota of 13 MDC-T and 3 MDC-M Ministers had been reached. Ministers are required to both take and subscribe to oaths of loyalty and of office. While they all took the verbal oaths simultaneously on the date of their swearing in, the process was not completed until they had subscribed in writing to these oaths. The ten that did so after the quotas had been reached were not constitutionally appointed as Ministers. Of the ten, three were MDC-T nominees, one an MDC-M nominee and six ZANU PF nominees.[4]

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[1] Quoted in the Mail & Guardian May 2 to 8 2014 *Judge Cracks Down on Land Outlaws*

[2] Specified sections of the new Constitution became law following publication in the Government Gazette on 22nd May, 2013– "publication day". The remainder came into force on the "effective date", the day the President was sworn into office following the first general election under the new Constitution. That election took place on the 31st of July, 2013 and President Mugabe, after a short delay, was sworn into office on the 22nd of August, 2013.

[3] Paragraph 20.1.3(p) of Schedule 8 to the Constitution as read with Section 115 of the Constitution.

[4] The Ministers in question were as follows: MDC-T Henry Madzorera [Elected Senator] Health and Child Welfare; Giles Mutsekwa [MP Manicaland] Home Affairs; Sekai Holland [no parliamentary seat] National Healing. MDC-M

It was not open to ZANU PF and the MDC formations to argue that they had an agreement amongst themselves to provide for the increased number of Ministers. As part of the law of Zimbabwe, the number of Ministers was set by Schedule 8 to the Constitution and not by any inter-party agreement. Any alteration to the Schedule required a constitutional amendment.

The issue was brought before the High Court by a concerned governance NGO and an individual taxpayer. In a legally questionable ruling[5], the Judge President, George Chiweshe,[6] held that the "*anomalous*" appointments did not "*outrageously exceed*" the number provided for by the Constitution, and, that if they were set aside:

> *it would destabilize the government of national unity and cause unnecessary confusion within the body politic and prejudice the public interest at large. That cannot be said to be consistent with the intention of the legislature in enacting Schedule 8 to the Constitution.*

The obvious flaw in this "reasoning", apparent even to lay persons, is that (even if this kind of approach were jurisprudentially permissible, which it is not) if the intention of the legislature was to create stability, as Chiweshe JP simply declared was so, it had determined that this was to be accomplished with and by an establishment of 31 Ministers, and not 41.

Justice Chiweshe's ruling came only weeks after a judgment given by the Supreme Court in an analogous matter which did set aside the appointment of an official, the Speaker of Parliament. The Supreme Court had ruled that election of the Speaker of Parliament was invalid as the Standing Orders of Parliament, as read with the Constitution, required that Parliament "*shall* conduct the election of the Speaker *by a secret ballot*." The Chief Justice stated that "*the golden rule of interpretation is that one has to give the words of a statute their primary meaning*". Accordingly, the word "*shall*" had to be read as meaning precisely that. The use of the word "shall", his honour ruled, rendered the use of a secret ballot peremptory. The matter would be different, he stated, if the word "*may*" had been used. The failure to comply with the peremptory requirement of secrecy rendered the election of the Speaker and thus his appointment invalid. The "explicit" language of the statute allowed no variation, the court ruled.[7] Justice Chiweshe, contrary to this ruling of Supreme Court, felt the peremptory and explicit language requiring that there *shall* be 31 Ministers, no more and no less, could in fact be varied.

Justice Chiweshe's judgement was appealed and argued on 10th July 2012.[8] Neither Counsel for the State nor the Supreme Court seemed to find any merit in the Justice Chiweshe's ruling in the High

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Gibson Sibanda (who lost his Ministerial post in any event on account of having no parliamentary seat and is since deceased) Minister of State in Deputy Prime Minister Mutambara's Office; ZANU PF John Nkomo [Appointed Senator] Minister of State in President's Office; Flora Bhuka [MP Midlands] Minister of State in Vice-President Msika's office; Sylvester Nguni [MP Mashonaland West] Minister of State in Vice-President Mujuru's office;Saviour Kasukuwere [MP Mashonaland Central] Youth Development, Indigenisation and Empowerment; Joseph Made [Appointed Senator] Agriculture, Mechanisation and Irrigation Development; Walter Mzembi [MP Masvingo Province] Tourism and Hospitality Industry

[5] *Moven Kufa & Ors v The President of the Republic of Zimbabwe* HH 86-11 – judgment delivered on 06.04.11.

[6] Justice Chiweshe was appointed as Judge President without the consent of the Prime Minister and his appointment as such is thus questionable – see below.

[7] See *Moyo & Ors v Zvoma N.O. & Ors SC28/10*, judgment delivered on 11.03.11.

[8] Past judgments relating to matters of this ilk have usually been determined by the Supreme Court on procedural grounds and the merits avoided, often with the claim that those opposing the State lack the necessary *locus standi.*

Court. His "reasoning" was not referred to by either. However, during the hearing the Chief Justice, Godfrey Chidyausiku, displayed considerable discomfort at the prospect of having to declare that certain Ministers had been unconstitutionally appointed by Mugabe. He suggested to Counsel for the Appellants that perhaps it would suffice merely to order the reduction of the number of Ministers to 31, leaving it to Mugabe to select who these should be. This approach would overlook the initial unlawfulness of the appointments. The Chief Justice then surprised some of those observing proceedings by descending in to the arena and suggesting to the Counsel for the State that he might want to consider whether there was some procedural defect in the appeal, thus rescuing him from having to rule on the substance of the matter. The Chief Justice, for example, suggested to State Counsel that perhaps ZANU PF should have been cited as a party in the application. The hapless Counsel could not, however, find any argument to lend support to this and other similar suggestions from the bench.

Neither the erstwhile enthusiasm for compliance with the explicit language of the Constitution and the nullity which accompanies any failure in this regard, nor the assurance displayed in setting aside the appointment of the Speaker of Parliament, was evident when called upon to set aside the appointment of the extra Ministers. What did the Chidyausiku Court thus do in the face of the "explicit" language of the Constitution, which seemed to "allow no variation" to the quota of 31 Ministers? Unable to immediately see any basis upon which the case could be dismissed on procedural grounds, the Court has simply not ruled on the matter. Two years have gone by, the Inclusive Government has ended, and the unlawfully appointed Ministers have completed their full tenure without any judgment issued. This instance of unconstitutional executive excess has thus effectively been allowed to pass by the Courts. The matter is not, however, now merely academic. Regulations were introduced by some of the invalidly appointed Ministers, rendering the validity of these regulations themselves suspect. Most notable amongst these are the Indigenisation and Economic Empowerment (General) Regulations 21 of 2010, a key component of government policy, made by Saviour Kasukuwere.

Fast forward to the introduction of a new Constitution for Zimbabwe on 22nd May 2013, and we see little change in the modus operandi of the Mugabe administration in regard to constitutionalism. Due to political considerations, the new Constitution became law very shortly after it had been agreed. Inadequate time was left to prepare for the establishment of various Commissions and institutions required by the new charter, or for the amendment of numerous pieces of legislation to bring them into line with the Constitution. The result was a plethora of constitutional violations the moment the new Constitution became effective.

But, in addition to these passive violations of the supreme law of the law, there have been active violations of the Constitution by the President, seemingly simply because he and his Administration do not like the certain provisions thrust upon them by the negotiating process that led to drafting of the document.

Two examples will suffice to illustrate the point: firstly, the use of the Presidential Powers (Temporary Measures) Act.[9] This Act granted the President sweeping powers to make law by way of presidential regulation. Laws made in this way overrode the provisions of any Act of Parliament to the contrary. However, a part of the new Constitution pertaining to elections which became

[9] Chapter 10:20.

effective on the 22nd May, 2013 provides that elections must be conducted under an "*Act of Parliament*",[10] not Presidential Regulations. An "*Act of Parliament*" is specifically defined in the Constitution as a Bill which has been presented to and passed by Parliament, and assented to and signed by the President.[11] Regulations made under the Presidential Powers (Temporary) Measures Act do not fall within this definition. Notwithstanding this clear provision, the elections were conducted under provisions introduced by Mugabe in the form of the Presidential Powers (Temporary Measures) (Amendment of Electoral Act) Regulations.[12]This use of the Presidential Powers (Temporary Measures) Act was challenged in the Constitutional Court in four election related cases. Nearly a year after the cases were brought, the Court has yet to give a judgment on the point.

Once the new Constitution became fully effective, the use of the Presidential Powers (Temporary Measures) Act in any manner at all became unconstitutional. Section 134 proscribes the ability of Parliament to delegate its "primary law-making function"[13]allowing only the delegation of the power to make statutory instruments by way of an Act of Parliament which "*must specify the limits of the power, the nature and scope of the statutory instrument that may be made and the principles and standards applicable to the statutory instrument."*[14] Such legislation is referred to in the Constitution as "subsidiary legislation". The Presidential Powers (Temporary Measures) Act clearly conferred primary law making powers upon the President, allowing the President to make Regulations which "*may provide for any matter or thing for which Parliament can make provision in an Act*". Given that any laws made under this legislation prevailed over any Act of Parliament to the contrary, notwithstanding the fact that they could be revoked by Parliament, or lapsed after six months if not approved by Parliament, they could hardly be described as subsidiary legislation - the only category of law making power that the Constitution now allows to be delegated. Furthermore, since the Presidential Powers (Temporary Measures) Act conferred a general and primary law making power, it did not specify the limit of the power, nature and scope of each instrument to be made under the Act. It is likely that this section was introduced into the new Constitution precisely with the intention of rendering the Presidential Powers (Temporary Measures) Act unconstitutional. Although the Presidential Powers (Temporary Measures) Act is only supposed to be used in cases of urgency when exigencies prevent the passage of necessary legislation through Parliament, this requirement has often been ignored, and the Act deployed on numerous occasions.

The Mugabe Administration found the Act a means to introduce legislation without the inconvenience of approaching Parliament and became heavily reliant upon it. Accordingly, section 134 of the Constitution has been treated by the new government as having no impact upon the Presidential Powers (Temporary Measures) Act. Mugabe has continued to legislate using its provisions. In January 2014, the President purported to bring three sets of Regulations into law – The Presidential Powers (Temporary Measures) (Amendment of Money Laundering and Proceeds of Crime Act) Regulations; The Presidential Powers (Temporary Measures) (Amendment of Criminal Law (Codification and Reform Act) Regulations; and Presidential Powers (Temporary Measures) (Trafficking in Persons Act) Regulations.[15] This is all primary law, not subsidiary legislation.

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[10] Section 157(1) of the Constitution.
[11] Section 131(1) of the Constitution.
[12] S.I. 85 of 2013.
[13] Section 134(a) – "*Parliament's primary law-making power must not be delegated*"
[14] Section 134(d)
[15] [Chapter 9:24] S.I. 2/2014; [Chapter 9:23] S.I. 3/2014; and S.I. 4/2014 respectively.

The second aspect of the new Constitution of concern, for present purposes, is that pertaining to devolution. During the negotiation process ZANU PF made it clear that it wished to retain the powerful control of central government over local government and rural administration. Other than in the metropolitan provinces, a key component of this control had been exercised previously by Provincial Governors appointed in terms of the Provincial Councils and Administration Act[16] for two year terms of office. The importance of this means of control to President Mugabe is reflected in the fact that, when Provincial Governors' terms of office expired during the course of the Inclusive Government, he proceeded to appoint party stalwarts into these posts in blatant violation of the then provisions of the Constitution[17], and in violation of a reported understanding that these ten posts would be apportioned to the parties in an agreed ratio. These Provincial Governors exercised a power in the provinces far beyond that contemplated by Provincial Councils and Administration Act[18], including chairing all Provincial Lands Committees which play an often determining role in the allocation of land within the Province.

One such Provincial Governor was Martin Dinha. In late 2012, Dinha in his capacity as Provincial Governor for Mashonaland Central and Chairman of the Lands Committee for the province was able to help the First lady, Grace Mugabe acquire more land for the advancement of her philanthropic projects in Mazowe[19], which apparently have been much admired by visiting dignitaries.

The new Constitution abolished the posts of Provincial Governors. Instead of local government in the provinces conducted through appointees of the President, Provincial Councils ought to be established.[20] Rather than being headed by appointees of central government, the Councils are to be headed by Provincial Chairpersons, elected by the Councils themselves from lists of two people submitted by the National Assembly members with the majority in the province.

These provisions in the new Constitution have been ignored by Mugabe and his Administration. The new Constitution requires that "*an Act of Parliament must make provision … for the establishment and functions of Provincial Councils*"[21]. No such enabling Act has been passed or even seems to form part of the immediate agenda for the Eighth Parliament. There is no apparent allocation[22] for the operations of the Provincial Councils in the budget for 2014.[23]

Furthermore, in direct conflict with the principles of devolution set out in the Constitution, Mugabe has appointed ten Ministers of State for Provincial Affairs. These Ministers are essentially Provincial Governors in all but name, and have seamlessly continued with the same activities and functions carried out by Provincial Governors.[24] But they do so without any legislation which confers such power, and have simply arrogated to themselves the authority they hold is necessary to exercise whatever power they deem appropriate to their position.

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[16] Chapter 29:11.

[17] Schedule 8 to the Constitution as read with section 115, provided that appointments the President was required to make under and in terms of the Constitution or any Act of Parliament must be made after securing the consent or agreement of the Prime Minister. The High Court has yet to adjudicate on the legal challenge to these appointments.

[18] See section 10 which sets out their functions.

[19] An orphanage and school.

[20] Section 268 of the Constitution.

[21] Section 273(1).

[22] See *Blue Book: 2014 Estimates of Expenditure* Zimbabwe Government presented to Parliament on 19.12.14.

[23] See also *No Budget for Provincial Councils* The Zimbabwe Independent 23.08.13.

[24] See for example *Flood Wreaks Havoc in Masvingo* The Herald 05.02.14; *Minister Threats to Expel NGOs* SWRadio 01.10.13 *Bhasikiti Vows to Fight Corruption* The Zimbabwean 26.11.13.

That the clear intention of the Constitution in regard to devolution has been circumvented is starkly illustrated in the fact that many of the people appointed as Ministers of State for Provincial Affairs by Mugabe were in fact the Provincial Governors of their respective provinces before the abolition of these posts[25], thus effectively continuing in their offices with their work under different titles, with no devolution of governance having taken place. One such person appointed as Minister of State for Provincial Affairs for Mashonaland Central by President Mugabe is Martin Dinha. Martin Dinha was thus conveniently on hand to be helpful (as he had been when Provincial Governor) once more when Mrs Mugabe once more required more land in the Province.

President Mugabe has declared zero tolerance for corruption, regardless of the quarter from which it emanates. This and other considerations mean that there is no absolutely no suggestion here of any impropriety in this transaction. Mr Dinha has clearly stated Mrs Mugabe's "*request for more land was justified considering the great work she was carrying out*."[26]What is suggested, however, is that the totality of the circumstances is unlikely to result in favorable comment in the reports of risk assessors detailing the investment climate in Zimbabwe.

The few examples given here are merely a small corner of a larger picture showing a disregard for the principles of constitutionality and the rule of law by Zimbabwe's policy makers. Yet this aspect of Zimbabwe's policy is extremely important when assessing Zimbabwe's investment climate. When to this governance style is added the fact that successive Mugabe Administrations have a long track record making policy decisions oblivious, and seemingly unconcerned about their economic impact, it is likely that in order to attract investment to Zimbabwe more will be needed than nebulous statements that "Zimbabwe is open for business". What is required is a somewhat cathartic event which signals, to those wishing to engage with Zimbabwe, a clean break with the past. I leave it to the imagination of others the nature of such an event.

[25] Jason Machaya (Midlands), Chris Mushowe (Manicaland) Martin Dinha (Mashonaland Central) Faber Chidarikire (Mashonaland West) and Cain Mathema (Matabeleland North – moved from Bulawayo)

[26] See First Lady Needs More Land for Expansion The Herald 05.10.14.