



Mugabe, Gono and the Rule of Law

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The breakdown of the rule of law in Zimbabwe, and the extent thereof, is sometimes missed by those not paying attention, or who are insufficiently informed or equipped to assess the issue. This is because the approach of President Mugabe and ZANU PF to the rule of law, or its lack, has always been more nuanced than say, Sani Abacha style, simply issuing a proclamation to the effect that whatever the president decrees, *ipso facto*, becomes law. Simply, because the rule of men rather than laws is often (but not always) more subtle in Zimbabwe, this does not necessarily mean that it is not just as pervasive.

At the root of Mugabe's approach to the law is the notion that rules, including the national constitution, its subsidiary laws, and indeed, the ZANU PF party constitution are not inviolable. With this attitude as the foundation of governance by successive Mugabe-led regimes, the whole edifice of legality and constitutionalism has crumbled. For example, Mugabe and ZANU PF hold the new constitution to be a mere guideline that the government may adhere to at some unstated time in the future, rather than a sacrosanct document the provisions of which require immediate, absolute and fearful compliance. Zimbabweans appear to have become so inured to the former attitude that, although the country is in fact in the throes of a major, but silent, constitutional crisis - the symptoms of which are insouciantly brushed aside as inconsequential by government - has been inadequately commented upon. Where there has been a response, it mostly has been one of muted protest rather than a howl of indignant outrage and disbelief at the arrogant temerity of it all.

While not respecting the law as something which must invariably be obeyed, usually (but, not always) Mugabe does not simply do as he pleases, oblivious of legal requirements, and leave his aides to deal with the fallout. The approach is two pronged.

Firstly, when there can be useful and expedient compliance with the law, the fact of adherence is loudly advertised. Secondly, various factors appear to be placed in the scale when matters (il)legal are considered. These factors are the blatancy or subtlety of the violation; the clarity or ambiguity of the law breached; the possibility of judicial "assistance" and cover; the ease with which the law might be changed; the gravity or triviality of the law breached; the urgency or importance of the objective which necessitates the breach and the political cost of the transgression. The factors are obviously interlinked. The more blatant the breach, the more grave the violation, the more perverse the court ruling, the more transparent the objective, the higher the political cost. A key characteristic of Zimbabwe's successive governments has been the willingness to pursue self-serving short-term objectives regardless of an enormous concomitant and long term political cost.

Since political cost is regularly coupled with an economic cost borne by the long suffering and needlessly impoverished Zimbabwean majority, they can be forgiven a smirking *schadenfreude* when the cost of breaking the rules is miscalculated.

There are two recent instances of this. The first, and most notorious of the two, is the award of a PhD to Mugabe's wife, Grace, by the University of Zimbabwe in what appears to be blatant violation of the institution's own rules and procedures. The transparent selfishness of the objective, the grave implications for the integrity of a body which (despite its many other faults) had still, against the odds, managed to retain some academic credence, incurred a massive political cost. There seems to have been an assumption that the populace would simply ignore the matter as just another serving by the powers that be of the staple of presumptuousness and pomposity they are fed daily by those harbouring delusions of importance and respect. This was not to be. Mugabe and his wife may well have been surprised by the out-of-kilter fury of Zimbabweans, aroused by an award ostensibly acknowledging intelligence while affronting their own.

The second, but less overt instance, concerns the erstwhile Governor of the Reserve Bank, Gideon Gono, the incumbent during Zimbabwe's record-breaking hyperinflationary period. The bank, on his watch, appropriated the foreign currency it had forced companies, NGOs and aid organisations to deposit in its vaults and incurred 1.13 billion in debts - a large chunk of it incurred doling out largesse to ZANU PF supporters, though there is a singular coyness to reveal the identities of the precise recipients.

Gono's reign at the Reserve Bank came to an end after completing two five years terms. Section 14(3), to the following effect, prevented him from continuing in office:

No person shall hold office as Governor or Deputy Governor
(a) for more than two terms of office; or
(b) for a period or periods which, in the aggregate, exceed ten years.

In considering what to do about Dr. Gono, the clarity of the provision, the blatancy of the breach were he to remain in office, and the political costs, would have weighed heavily in the scale. The level of need to violate the law to achieve the desired objective, to save Gono from the political wilderness and reduction of status to that of mere citizen and chicken farmer, was low. Other means could be deployed to reward someone who had given so much during his tenure at the Reserve Bank.

In forming the government after the elections of July 2013, the President had the power to appoint persons as Ministers whom he deemed worthy of reward, but whom the electorate had thought otherwise. All other Ministers must be MPs. By the time Dr. Gono's term of office came to an end on the 30th November, 2013, this power already had been used to rescue the maximum of five allowed under the constitution.

One was ZANU PF spin doctor, Professor Jonathan Moyo, rejected by the Tsholotsho electorate. Although, the new constitution had abolished provincial governors, intending the ten posts to be replaced by the Chairpersons of Provincial Councils, Mugabe simply appointed ten people as "Ministers of State for Provincial Affairs". Five of the ten had been Provincial Governors under the previous government. They simply continued where they had left off, albeit with new, improved titles and perks. Two of these five governors, had not even made it past party primaries. Martin Dinha had withdrawn as a potential ZANU PF candidate after an alleged assassination attempt. But, as someone who had been so accommodating to

Dr. Grace Mugabe in his capacity as Provincial Governor and Chair of the Provincial Lands Committee, by assisting the First Lady to acquire the large tracts of land she required in Mazowe for her much lauded philanthropic projects, he apparently deserved to retain his post. He was thus appointed by President Mugabe as Minister of State for Provincial Affairs in Mashonaland Central, where Mazowe is situated, and is thus able to continue his helpful role.

However, as a result of the full complement of five appointments, of dubious constitutionality, but surprisingly low political cost, this avenue was not a means by which Dr. Gono could be elevated to Ministerial status. Rumors that the elevation of Dr Gono was President's Mugabe's intention were strengthened when the President made an unannounced and apparently unscheduled tour of Gono's farm in March 2014. Thereafter, as political gossip would have it, Mugabe instructed that the means be found to get Gono into Parliament – the means so unearthed was through Zimbabwe's peculiar system of proportional representation. 210 of the 270 House of Assembly seats are allocated on a first past the post system. The electorate knows the individual for whom they are voting. The candidate who gets the most votes gets the seat. The remaining 60 seats in the House of Assembly (reserved for women) and 60 of the 80 seats in the Senate are allotted through proportional representation.

A more usual system of proportional representation requires a party to draw up lists of candidates, which are published and made known to the electorate in advance. The voters vote for the party, and the seats are allocated to those on the lists according to the proportion of votes attained by the party. The idea is that if the voters do not like those on the party list, they will vote for the party with the more desirable candidates.

In Zimbabwe, however, the unusual system has been adopted whereby the ratio of votes cast in the first-past-the-post ballot for the House of Assembly is used to determine the proportional representation allocations. Thus a voter's ballot counts twice, once for each system. This could present a voter with a dilemma if he or she supports the first past the post candidate but detests those on the party list. However, this consideration could be rendered redundant, as Zimbabwe has a second peculiarity in the proportional representation system.

Where a vacancy occurs in the Senate after the election, the obvious method of filling the vacancy would be to appoint the next person in line on the party list. After all, in theory, it is on the basis of that party list that the electorate would have voted for that party that won the seat. The next person in line on the party list for Manicaland in 2013 was Shadreck Chipanga, a former director of Zimbabwe's notorious secret police, reportedly identified by witnesses as being at the wheel of a pick-up truck carrying ruling party supporters who disembowelled a young man on the bonnet of the vehicle for having opposition party pamphlets during the run-up to the violence-wracked 2000 parliamentary elections.

Fortunately, in this instance, in Zimbabwe, rather than the next person on the party list filling the vacancy, the Zimbabwe Electoral Commission (ZEC) is enjoined under section 39(40)(b) to:

*invite the political party in writing to submit the name of a **qualified** person to fill the vacancy*

With this provision in mind, the untimely death of Kumbirai Kangai, in August, 2013, (the first male on the party list of six, which alternates between women and men) left a vacancy in a senate seat for Manicaland Province.

So the solution seemed to be to submit the name of Gideon Gono to fill the vacancy. However, past constitutional indiscretions by the President presented obstacles to his objective.

The new constitution demanded extensive changes to electoral law before the election, including a requirement that:

(1) An Act of Parliament must provide for the conduct of elections and referendums to which this Constitution applies, and in particular for the following matters—

- (a) ...*
- (b) the registration of voters, and requirements for registration on particular voters' rolls;*
- (c) ..*
- (d) a system of proportional representation for the election of persons to the seats in the Senate...and the procedure for filling vacancies in those seats...*

Instead of an Act of Parliament catering for these issues, as the constitution explicitly stated, the President purported to introduce these provisions by Presidential Regulations under the guise of the deployment of the Presidential Powers Temporary Measures Act – though the Act does not allow Presidential Regulations to be made to govern electoral law. Again the political cost of these transgressions was surprisingly low, partly due to the cover provided by the tacit nod of approval by the Constitutional Court, when challenges to the process were brought before it.

Unfortunately for the President and Dr. Gono, Presidential Regulations have a six month life span. So when the time came to appoint Dr. Gono to the vacancy in senate, the provision relating to such vacancies had expired. There was simply no law in place to deal with vacancies or numerous other electoral matters, including the system of proportional representation itself as required by the constitution. The law or rather regulations drawn up by Mugabe which had been used to conduct his election into office had lapsed.

The solution? Mugabe pressured his Ministers to put the electoral law into place post haste. The urgency could be justified by trumpeting the rule of law. The country, to be compliant with this, and general democratic principles, had to have an electoral law in place without further delay. True. But it ought to have been electoral law which paid heed to the requirements of the constitution. The Bill presented to Parliament did not. There was considerable protest from civil society that the Bill failed to align the law with the constitution. Yet in the face of these objections the legislation was railroaded through Parliament. The resultant Act was almost entirely a reproduction of the Presidential Regulations – repeating all the errors and omissions of the previous law. It also repeated the provision that the Commission could invite a party to submit the name of a person to fill a vacancy in the Senate left by a party member.

Had the President's plan to get Dr. Gono appointed to Parliament thus come to smug fruition through the diligence of his Ministers? Not quite. The provision only allows the name of a "qualified" person to be submitted to fill the vacancy. And to be qualified as a senator for Manicaland, one needs to be registered as a voter in that province. Thus section 45D(1) of the Electoral Act:

Subject to subsection (2), a person shall not be qualified for nomination as a party-list candidate for an electoral province in terms of section 45C if he or she:

- (a) *is not registered on a voters roll in a ward belonging to a constituency in the electoral province...*

Dr. Gono is registered as a voter in Ward 18, Harare North. However, in anticipation of this problem, the prescient Dr. Gono, in December 2013, had enlisted the help of the ever obliging Registrar-General to transfer to Buhera West in Manicaland. Presumably, even though Mr. Gono is resident in Greystone Park in Harare, he may have sought the transfer on the basis that, in terms of the provision to section 23(1) of the Electoral Act, the Registrar-General could so register him if satisfied that he:

intends to be a candidate for election as a member of Parliament for a particular constituency in which he or she is not resident

To suggest that Dr. Gono “intends to be a candidate” for the senate seat in Manicaland by virtue of anticipating that he will be appointed to fill a vacancy in is stretching things a bit. The law however, is sufficiently obscure to prevent political fallout on this account.

Unfortunately, for Dr. Gono the law is perfectly clear when it comes to the registration and transfer of voters. Although the Registrar-General had interim authority to register and transfer voters ahead of the 2013 elections, when the President assumed office, following the election, on 22nd August, 2013, and the new constitution became fully effective, that power became solely that of ZEC. Thus all the provisions in the Electoral Act prescribing this authority as that of the Registrar-General became void as unconstitutional. The Registrar-General thus had no authority to register Mr. Gono as a voter in Manicaland.

It was a provision such as this that civil society stridently asserted need to be aligned with the constitution. As the law now stands, there are no valid provisions dealing with voter registration and transfer. In the haste to enact the Electoral Act, these vital amendments had been omitted. The very provisions needed in the Bill to facilitate Mr. Gono’s appointment, were absent. ZEC has stated that it cannot register Mr. Gono in Manicaland until this position is rectified. However, although the provisions for filling the vacancy were re-introduced, fortunately for the President and Dr. Gono, no time limit is given for the presentation of the name of the person to fill the vacancy.

With the fractious nature of ZANU PF politics, Dr Gono was going to have difficulty in believing that the omissions in the Electoral Act were by accident and not design. Matters could not have been helped by the fact that it was Emerson Mnangagwa who presented the defective Bill to Parliament. And with the approach to the law outlined here, Dr. Gono must be wondering why there is presently a sudden predilection for applying the law and constitution to the letter in regard to this issue, asserted most volubly this time by Jonathan Moyo.

Despite the fact that the ink on the Electoral Amendment Act is scarcely dry, without any apparent embarrassment ZANU PF, will no doubt introduce another piecemeal amendment to deal with this single problem. Didymus Mutasa was quoted as having the following to say on the matter:

The Politburo wants Dr Gono to be a Senator and if it means that the law would be amended, then let it be. No one will reverse the decision of the Politburo. We will ensure that the law fits with the requirements of the party.

The requirements of the country are, it seems, of no account. There, in a nutshell is the rule of law, a la Zimbabwe. In the event, according to the Herald newspaper, of 02/10/14, the Politburo determined that the “*the law could not be tailored to suit the circumstances of an individual*”. The point that the law still needs to be tailored to suit the constitution (which would also coincidentally accommodate Dr. Gono) seems to have been lost on all concerned, regarded as of lesser importance, or as irrelevant to their concerns.