CONSTITUTIONALISING TRANSITIONAL JUSTICE

An Analysis of the Copac Draft Constitution and its Implications on Transitional Justice in Zimbabwe

© 2013 Zimbabwe Human Rights NGO Forum
P. O. Box 9077
8th Floor, Blue Bridge North
Eastgate
Harare
Telephone: +263 4 250494
Email: tj@hrforum.co.zw
Website: www.hrforumzim.org
Facebook: www.facebook.com/ZHRNGOFORUM
CONSTITUTIONALISING TRANSITIONAL JUSTICE
An Analysis of the Copac Draft Constitution on the Provisions Dealing with Transitional Justice

Introduction
On 31 January 2013, the Parliamentary Select Committee (COPAC) published the final draft of the Zimbabwean Constitution (the Draft) with 345 sections. There are many areas in the Draft that have critical implications on transitional justice. This review is meant to highlight those areas. In doing so, the Forum looks at the bigger picture for Zimbabwe: the need for a comprehensive transitional justice mechanism, centred on the rights and needs of the survivors of the various episodes of Zimbabwe’s violent past. The Forum acknowledges that not all aspects of transitional justice can be covered in a constitution hence the need for other areas of work to fulfil the greater demands of transitional justice in Zimbabwe. The Forum remains guided by the voices of the Zimbabwean people in the Taking Transitional Justice to the People Outreach Programme¹ as well as best international practices that guarantee truth, justice and accountability for all Zimbabweans as well as the guarantees of non-recurrence.

The guiding question is: Does the Draft speak to the transitional justice needs of the Zimbabwean society? To get to the heart of this matter, we look at the Draft through the seven pillars of transitional justice under which Zimbabweans spoke clearly on their expectations.

Seven Pillars of Transitional Justice
Transitional Justice refers to a raft of measures, which a society emerging from a period of gross human rights violations may put in place to account for the past, deliver justice for the victims and achieve non-repetition. In simple terms, this complex set of mechanisms can be understood as justice in times of transition.

¹ Since January 2009, the Zimbabwe Human Rights NGO has been talking to the people of Zimbabwe
While different pillars do not necessarily mean transitional justice is a linear process or that one of them is prioritised over the other, this discussion is structured like that in order to flesh out critical areas in the Draft.

These pillars are:

a) Truth
b) Accountability
c) Reparations
d) Institutional Reforms
e) Gender
f) Rehabilitation of Victims
g) Reconciliation

There is no line of demarcation among these seven themes as various measures tend to overlap and complement each other and others fall outside the traditional transitional justice themes.

**Relevant Sections of the Draft on Truth**

The Preamble

“We the people of Zimbabwe… resolve by the tenets of this constitution to commit ourselves to build a united, just and prosperous nation, founded on values of **transparency**, equality, freedom, fairness, honesty and the dignity of hard work.” (emphasis added)

Section 3: Founding Values and Principles

“...
(2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include –

...
The preamble reflects the common values of a people and declares collectively a commitment to such values as the pillars of that society. What stands out in the preamble for transitional justice is the need for the society to look into the past, even as it seeks to design a new future. Thus while the supreme law seeks to maintain order, it also seeks to facilitate a critical transformative process. We here flash out the use of the words ‘transparency’ as it speaks to a national commitment to transparency, a value that resonates with the critical pillar of transitional justice, which is ‘truth’ for both individuals and collectively for the society. By reading this inclusion in the preamble, one is made to think that the constitution has a definitive stance on transitional justice.

What do Zimbabweans want?
The Zimbabwean people do not wish to shy away from the truth of their past. They want to confront it one-way or the other. Transparency is commitment to a culture of truth. It includes opening up the critical national processes to public participation. Zimbabweans spoke of specific transitional justice issues and said they want to deal with the past. From the survey conducted by the Forum,2 49% said the victims of past violations must be compensated for their pain, loss and suffering. This presupposes that there is a comprehensive process that establishes who is a victim and the circumstances of the violations. A total of 28% said they wanted a truth telling process, prosecution of offenders and a mechanism leading to compensation, rehabilitation of victims and forgiveness of offenders. This means about 77% of Zimbabweans look forward to a comprehensive way of confronting the past.3

What the Draft Gives
The Draft gives a list of values and national objectives.

---


3 National Survey on Transitional Justice, 2011.
Section 62: Access to Information

“(1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.

(2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the state, in so far as the information is required for the exercise or protection of a right.

...”

This section gives Zimbabweans the right to recover the truth, to push the government or any other person to make available information that is critical for public accountability and protection of human rights.

Section 69 of the draft provides for the right to a fair trial

“(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.

...”

This means any person has got the right to have their day in an open court and tell their story. It gives a mechanism for pursuing justice and accountability.

In section 210: Independent Complaints Mechanism

“An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct.”
A measure of oversight on the security services
The Draft speaks to issues of democratic transfer of power in the founding values and states that Zimbabwe is committed to a peaceful transfer of power. This commitment is commendable especially in the light of the electoral dispute resolution mechanism suggested in section 93, which gives an aggrieved candidate 7 days to lodge a complaint with the Constitutional Court, and the court 14 days to deliver judgment on the petition. This allows the judiciary to deal decisively with electoral disputes. Done effectively, this has the potential to dissuade people from resorting to extra-legal means of resolving electoral disputes.

Commissions
Several commissions are established by the Draft. We flash out the following as important to transitional justice issues.

- Human Rights Commission – with duty to investigate human rights violations and recommend to Parliament effective measures to promote human rights
- Gender Commission – to investigate possible violations to rights related to gender and secure redress
- Media Commission – to uphold, promote and develop freedom of the media
- National Peace and Reconciliation Commission – to ensure post-conflict justice, healing and reconciliation
- Zimbabwe Anti-Corruption Commission – to investigate and expose cases of corruption in the public and private sectors
- Land Commission – to ensure accountability, fairness and transparency in the administration of agricultural land that is vested in the state

What cuts across these commissions is the need to investigate and recover the truth regarding human rights violations, to advise government and seek redress. Particularly, the Human Rights Commission and the Gender Commission seem to speak to the issues of finding redress for the victims.
The National Peace and Reconciliation Commission as suggested by the Draft is to ensure post conflict justice, healing and reconciliation. Justice and reconciliation are some of the goals of transitional justice.

*What the Draft Lacks*

While having some desirables, the Draft leaves a lot to be desired for a people committed to the process of transitional justice.

*Acknowledgment*

Transitional justice requires that the society acknowledge its past so as to make a commitment to guarantee non-repetition of gross violation of human rights. This could be situated in the preamble where some sacred values of transparency are mentioned along sacred name like Almighty God. And yet while the preamble looks at our past, it does so selectively. It looks at the violations done upon the Zimbabwean people disdainfully, but pretends that the Zimbabwean story after colonialism was all rosy. This is reflected in the entire document that seems to ignore the issues and the need for accountability.

*Institutional Reforms*

The Draft constitution hardly departs from a tradition of a powerful executive that has access to the entire security machinery without effective checks and balances. A critical sector which transitional justice processes depend upon, as well as needing address, is the security sector. The Draft creates a National Security Council (section 209), which is chaired by the President where he sits with his Vice Presidents and ministers to develop a national security policy. The Draft in section 211 creates a Defence Forces that is at the disposal of the President. Subsection (2)(b) is the most dangerous in light of our legacy. It gives the President authority to deploy the Defence Forces domestically to assist the police in maintaining public order. Only after the deployment of forces is the Parliament to be informed under section 214 and yet no power is given to the Parliament to interfere with the President’s power. This is a dangerous provision in light of the Matebeleland and Midlands Atrocities, the Food Riots of 1998 and “Operation Murambatsvina” of 2005. It is the same security that has enjoyed the impunity guaranteed by Presidential clemency.
While the Commanders and the Commissioner-General of Police are limited to a maximum of two 5-year terms, these are still to be appointed by the President who is to consult the responsible Minister but not obliged to follow the recommendations. The same applies to the Director-General of the Intelligence and the Commissioner-General of the Prisons and Correctional Service.

**National Peace and Reconciliation Commission (s251 – 253)**

Reading the functions of a peace commission set out in the Draft, it sounds noble. However, there are a few problems.

1. The Nature of the Commission – The draft proposes a National Peace and Reconciliation Commission. What is in a name? A lot. A name can tell us a lot of truths. But it can also tell us a lot of lies. The Forum has said time and again that there is need for a bottom up approach, allowing the victims/survivors to be at the centre of any transitional justice approach. The Forum’s position is in line with the core principles and assumptions outlined in the *Rule of Law Tools for Post-Conflict Societies on Truth Commissions* issued in 2006 by the Office of the United Nations High Commissioner for Human Rights. Calls for a commission in Zimbabwe date back to the period before 1998 when the Human Rights Committee of the United Nations endorsed the Forum’s recommendations for a commission of inquiry. In February 1999, the Zimbabwe Congress of Trade Unions called for ‘a Truth and Reconciliation Commission to deal with unresolved aspects of our past that hinder national integration.’

   In 2010, the people consulted by the Zimbabwe Human Rights NGO Forum in the Taking Transitional Justice to the People Outreach Programme spoke of a commission to deal with aspects of Truth, Justice and Reconciliation. In the same year, the Law Society of Zimbabwe in its model constitution proposed a ‘Truth, Justice, Reconciliation and Conflict Prevention Commission’ to investigate past abuses, provide remedies for victims, and prevent future conflicts. These different proposals...

---


5 Law Society of Zimbabwe, Model Constitution, November 2010, available on request from Veritas veritas@mango.zw
show that there are common elements in what Zimbabweans expect – Truth, Justice, Reconciliation and Conflict Prevention. This is hardly surprising taking into consideration the needs of the Zimbabwean society; the need to recover the truth of what happened in the past and establish an accurate historical record, achieve justice for victims of human rights violations, which includes accountability for perpetrators and reconciliation for both. In addition to these, other measures can be put in place to ensure non-repetition, which others identify as conflict-prevention. These key elements widely expected by the people of Zimbabwe are missing in the commission proposed in the Draft constitution.

2. The Powers and Mandate of the Commission – Part 6 of Chapter 12 which establish the commission is both ambiguous and too specific in some areas. The practice in other jurisdictions (like the South African Interim Constitution) has been for the constitution to state in broad terms that an act of parliament shall provide for the setting up of such a commission for purposes of, for example, investigating past abuses. The South African Interim Constitution specified the time to be covered by the commission. The constitutional provision does not necessarily have to go into the details of the nitty-gritties of how the commission functions. The constitution can spell out in clear and precise terms the mandate of the commission for example – recover a record of the past; investigate past abuses; make recommendations for remedy for victims, or put in place conflict prevention mechanisms. Section 252 gives what it calls functions of the commission consisting of 12 items within which one has to struggle to find out what the precise mandate is. This makes it difficult to map the work of the commission and at the same time making it rigid in terms of shaping its work in line with popular expectations. The details will then need to be carried in the enabling Act, like powers to subpoena witnesses, record evidence, compel cooperation, etc.