A Law Unto Themselves (Part 1) : Making and Breaking the Laws of the Land

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Observance of the law is the eternal safeguard of liberty; and defiance of the law is the surest road to tyranny. For in a government of laws and not of men, no man, however prominent or powerful, and no mob however unruly or boisterous, is entitled to defy a court of law."

~ US President John F. Kennedy, 30 September 1962

Executive Summary

The story of Zimbabwe's land crisis can be told as much by the executive's prerogative to make laws as to wilfully break them. This paper recounts how the executive was granted wide discretionary powers to make laws and how Presidential abuse of these powers compromised the independence of the judiciary and undermined the duty of law enforcement agencies to uphold the constitutional rights of the people. Presidential pardons and the enactment of laws that ran counter to natural justice and international law were the executive's weapons of choice. If and when these laws were challenged, they were simply changed or ignored by presidential fiat. The President's self-proclaimed moral and political imperatives – based on his resurrected nationalist narrative on land – were enforced by suborned institutions of the state. Neither the country's laws nor its courts could hold the executive or members of the ruling party to account. In their place a culture of impunity festers. Here, and in Part II of this paper (to follow), I argue for an alternative imperative: that fundamental human rights and the principles of international law be enshrined in Zimbabwe's constitution, become the cornerstone of our transition to democracy, and etched into our future land policy.

The Rule of Law

What *is* the rule of law? Anthony Gubbay, Zimbabwe's former Chief Justice (1990 – 2001), sees it as a celebration of individual rights and liberties.[1] It recognises the supremacy of the law, equality before the law, accountability to the law, and fairness in the application of the law. A fundamental tenet of the rule of law is the separation of powers. Because an independent judiciary constrains and regulates executive power, it is the bedrock of a constitutional democracy.

It means that rulers cannot pick and choose which laws or courts they wish to obey. They cannot set one standard for themselves and another for the people they govern. Another key principle of the rule of law, according to Bingham, the former Lord Chief Justice of England and Wales, is the protection of fundamental human rights and a state's obligations in international law.[2]

Making Laws

A number of laws made in Zimbabwe, especially regarding land, are at variance with the internationally accepted principles of law-making. The first relates to discretionary powers. Bingham states that: "Questions of legal right and liability should ordinary be resolved by application of the law and not the exercise of discretion." Yet, under Zimbabwean law the President has been granted wide discretionary legal powers. Consider for example, the discretionary power vested in the President in terms of section 12(1) of the Agricultural Land Resettlement Act:

The President may, at any time and in such manner and under such conditions as he may deem fit, retake possession of land alienated.

The President also has his own law, the Presidential Powers (Temporary Measures) Act, for dealing with urgent situations. Although such discretionary executive powers are often necessary in times of an emergency, they are usually subject to stringent legislative constraints. In Zimbabwe, however, the law has been used more to press the executive's legislative agenda on land and by-pass Parliament than to deal with emergencies.

There are three other principles of law-making which the government has consistently broken.

- The first is that laws should not be made retroactively because it legalises an action that was unlawful when it was committed. It is rather like a blanket pardon; condoning wrong-doing.

- The second is that laws should uphold the principle of natural justice. This simply means that every person has the right to a fair hearing in a court of law if it affects their rights or legitimate expectations. And, to avoid any impression of bias, a judge must recuse himself from hearing any matter in which he has an interest, such as seized land.[3]

- The third is that domestic law should reflect international customary law, such as respecting human rights, paying fair compensation for property compulsorily acquired, and honouring treaties.

There is one final method of law-making that offends justice: to make laws that coerce a person from exercising their fundamental rights. Under the Land Acquisition Amendment Act of 2001, for example, the government's preliminary notice to acquire land was valid for 2 years. But this time was extended for any period that a farmer had lodged an appeal with the Administrative Court. Its intent was to coerce farmers from exercising their right to be heard in a court of law.

Compensation

The first occasion of making land laws that ran counter to international law and natural justice came with the enactment of Constitution Amendment No. 11 in 1990. When the provisions protecting land rights in the Lancaster House constitution expired, the government was adamant that it would 'not buy land by market force'.[4] Rather than paying 'prompt and adequate compensation', the state would now only pay compensation 'within a reasonable time' and an amount – by its own reckoning – that was 'fair'. The British Foreign Secretary expressed his government's dismay, saying:

We are not happy. Zimbabwe, of course, has the right to amend its Constitution—but the principle of prompt and adequate compensation is a principle of international law and to remove it from the Constitution, therefore, has rather deep implications.'[5]

Equally controversially, Section 6 of Constitutional Amendment denied landowners the right to challenge the fairness of any compensation awarded in a court of law. As this provision was inimical to natural justice – because it extinguished the fundamental right to a fair hearing[6] – former Chief Justice Dumbutshena (1984-1990) protested that the amendment went against "all accepted norms of modern society and the rule of law".[7]

Breaking the law

The tipping point, however, came when the government sponsored draft constitution was rejected in a referendum in February 2000. Sensing defeat at parliamentary elections scheduled for June, the government wilfully broke its own laws by covertly aiding and abetting thousands of ruling party supporters to unlawfully occupy white owned commercial farms. In March 2000 the High Court declared the occupations unlawful and gave the occupiers just a day to leave the farms. The court order specifically directed the police to assist with the evictions and ignore any countermanding directives from the executive. But within days the Commissioner of Police applied to have the order amended on the lame excuse that he had insufficient manpower to carry out the order and, paraphrasing the President, that the right of occupation merited a 'political' and not a 'legal' solution. Despite another order affirming the High Court ruling the following month, it was defied by the Commissioner of Police. The fact of the matter was that the Commissioner's bounden duty no longer lay with the state, its constitution, or the sanctity of judicial orders. His loyalty was to the Executive President, who said, "This is not a problem that can be corrected by the courts; it is a problem that must be corrected by the government and people of Zimbabwe."[8] The edifice of the rule of law was crumbling. Gripped with revolutionary fervour, the President declared the Third Chimurenga: a war in which unconstrained executive power would dispense with diplomatic niceties and brush aside the law to rid the land of white farmers.

Earlier, in February 2000, the President had unilaterally inserted a clause into Zimbabwe's draft constitution stating that compensation would be paid for farm improvements only – not for the land itself.[9] This responsibility would now rest with the 'former colonial power': Britain. Undeterred by the people's rejection of the draft constitution, the President presented this clause as Constitutional Amendment No.16 to Parliament where he still commanded a two-thirds majority. Needless to say, the enactment of the amendment in April 2000 was *ultra vires* because it is beyond the powers of one state to unilaterally impose an obligation on another in its constitution. It therefore has no basis in international law. It was also coercive. It made an established right to compensation under international law conditional upon the unenforceable performance of another party.

Rather than defer to Parliament, the President moved quickly to give legislative substance to the constitutional amendment by invoking his statutory powers. In May 2000 the Presidential Power (Temporary Measures) (Land Acquisition) Regulations 2000 came into force, amending the Land Acquisition Act of 1992. Although its main purpose was to disavow any compensation payable for land, its various clauses chipped away at commercial farmers' rights. Owners could no longer appeal to the Administrative Court to rule on whether the acquisition of their farms for resettlement was 'reasonably necessary'. The mere identification of their farms for resettlement was deemed to be *prima facie* evidence that they *were* suitable for resettlement. This clause was also retroactive. If the Administrative Court had ruled that the farm was unsuitable for resettlement, the government could issue another acquisition order, which could not be brought before the Court. The President's regulations also offended the principle of natural justice. Farmers were denied a fair hearing in any court to appeal against the government's assessment of compensation.

When the President's land acquisition regulations were ratified by Parliament in November 2001,[10] only the last constitutional safeguard – an independent judiciary – stood in his way.

A clear message was soon sent to the judges. When the Supreme Court was about to hear an application brought by the Commercial Farmers Union, a riotous mob invaded the sanctity of the Supreme Court, shouting death threats at judges. The Court, however, stood firm. It again ordered ministers and the Commission of Police to prevent further unlawful farm invasions. It also required land resettlement to be carried out constitutionally and in compliance with the law. When the Supreme Court sat again in December 2000, it found that:

Laws made by parliament have been flouted by the government. … The settling of people on farms has been entirely haphazard and unlawful. … They have been supported, encouraged, transported and financed, by party officials, public servants, the CIO and the army. … The rule of law has been overthrown in the commercial farming areas, and farmers and farm workers on occupied farms have been denied the protection of the law.

But the President had already signalled his intent. 'The courts can do what they want,' he said at his party congress, 'They are not courts for our people and we shall not even be defending ourselves in these courts.' The Supreme Court order was again disobeyed and the law broken.

The rest is history

In early March 2001, Chief Justice Gubbay and other independent-minded judges were forced to step down. In their stead the President appointed a new Chief Justice and reconstituted the Supreme Court bench with judges more amenable to his executive directives on land policies. Predictably, in December 2001, the Supreme Court set aside the Court's earlier judgement. It held that the Rural Land Occupier (Protection from Eviction) Act, which legalised the unlawful invasions, was constitutional. It exonerated the Commissioner of Police when failing to obey previous High and Supreme Court orders. It also delivered for the executive its *coup de grace*: a constitutional and lawful land reform programme founded on the rule of law.

The words of John F. Kennedy's still resonate today across our benighted land.

This paper is part of the Zimbabwe Land Series

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[1] Anthony R. Gubbay (2009) *The Progressive Erosion of the Rule of Law in Independent Zimbabwe*. Third International Rule of Law Lecture, Bar of England and Wales: London
[2] Tom Bingham (2010) *The Rule of Law*. Allen Lane: London
[3] According to the CFU, 16 Supreme and High Court Judges occupy contested farms (*ZimOnline*, 16 February 2010). Neither they nor the Chief Justice, who owns 2 farms, have recused themselves when hearing cases involving contested land or farmers' assets.
[4] *The Financial Gazette*, 22 February 1991.
[5] *The Herald*: 10 January 1991.
[6] Article 7 of the African Charter of Human and Peoples' Rights, to which Zimbabwe is a signatory.
[7] *The Guardian* (London), 13 December 1990.
[8] *The New York Times*, 17 April 2000 (International Crisis Group, *Soil and Blood*, 2004).
[9] Anne Hellum and Bill Derman (2000)*Land Reform and Human Rights in Contemporary Zimbabwe.* Meeting of the African Studies Association: Nashville (November)
[10] The exercise of the President's prerogative to issue regulations in terms of the Presidential Powers Act is circumscribed by the requirement that such edicts be ratified by Parliament within 6 months.