



CONSTITUTIONAL AND LEGAL ISSUES

Presentation and Group Discussion

PRESENTATION

Dr Lovemore Madhuku submitted a brief and technical paper addressing the legal and constitutional issues surrounding transition¹⁷. This submission suggested that issues of dialogue and transition are not legal but political. The current constitution is silent about transitional possibilities, but regardless of this fact, processes can be initiated between interested parties. Thus, with political will regarding what a transitional phase should look like or what was required to move Zimbabwe forward, the law could be changed to reflect this agreement. This also means that the legal process itself can change to adapt to any political settlement.s

Two or more parties may agree to dialogue but this does not automatically imply what form this dialogue will take. Similarly, the form of transition of any society will be unique to the requirements of that particular country. Therefore, developing a legal framework for dialogue and transition implies some basic assumptions about the focus of the dialogue and the form of the transition.

The paper thus developed two possible routes to transition, stating that the specifics of these routes would be contingent upon the broader concerns as defined by the dialogue or transition period.

One route was described as the “extra-legal” route, wherein the existing constitution would be overthrown, and a new constitutional order would be imposed, provided the new order could work itself into the existing situation and take hold.

The other option was described as the “legal” route, which operates within the existing constitution and laws of a country. This method does not challenge, the legitimacy or justice of the very laws themselves.

Under the legal route, the process of dialogue itself does not need to be legislated. It can instead operate based on agreements between the parties which might be morally, rather than legally binding. If, however, the parties chose to create a legally-binding environment for dialogue, they could do so either through an Act of Parliament, specifying the nature, mandate and scope of the dialogue body, or through the Presidential appointment of a Commission (similar to the way in which the Constitutional Commission was defined. This legal construction of a dialogue body was described as the exception rather than the norm.

In contrast to this, the transition process itself would be regulated by law, although the specifics of this legislation would depend on the form of the transition. In particular, the starting point for a transitional phase would be the amendment of certain sections of the constitution, in order to address the issues of elections and office bearers in particular.

“With political will, the law can be changed.”



17 See Appendix 11 for a copy of this submission.

GROUP DISCUSSION

The group discussion focussed around the following questions:

1. Can the current Constitution facilitate transition? If so, how?
2. If not, what should be done to ensure that there is an appropriate legal framework for transition?
3. What are the challenges for such a course of action?
4. What time frames will be necessary and appropriate for Constitutional or legal changes that will facilitate a return to legitimacy?
5. What laws need to be repealed and amended to achieve the objectives set above?

“Transition” was defined as a bridge or linkage between two phases. The transition phase would be an acting or caretaker government, to serve as the temporary authority or provisional government. The transitional government should be all inclusive, incorporating faith based organisations and broader civil society, not just political parties.

“Transition is a bridge or link between two phases.”

Political parties and civil society organisations, including organised formations that have a stake in the nation should both be involved in the transitional government.

It was suggested that a National Assembly could be established, either by an Act of Parliament or a Constitutional amendment. The mandate of the National Assembly would include setting up a time-frame for the elections, supervising democratic elections, creating an enabling environment, the depoliticisation and demilitarisation of the police, facilitating a new Constitution process and ensuring full participation of all Zimbabweans in the transition process.

A Referendum Act could be written, as a precedent for participation by citizens on a referendum on the way forward. It was suggested that Section 31 of the

Constitution, which pertains to the operation of Parliament and the Cabinet could be suspended, thus opening the way for transitional arrangements. Others however doubted the effectiveness of suspending Parliament, and believed that it was necessary instead to gain participation of Members of Parliament, to help mobilise the political will necessary for such legislation to be passed.

“There should be broad participation in the dialogue and negotiation process.”

The South African model recommended a Government of National Unity, an interim constitution and the establishment of interim structures. The interim Constitution would lead to a new substantive Constitution.

Political will for transition would be one of the major stumbling blocks. There is a need to define objectives and articulate the purpose of the dialogue in order to increase political will. There is also a need to put pressure on major political parties, particularly once these objectives are clearly defined. One objective of engaging the political parties should be to ensure broader participation in the dialogue and negotiation process.

Through an Act of Parliament a transitional government could be established. This would provide for an interim constitution and could work with an Eminent Persons Group to develop a brokered transition.

Challenges of these suggestions and other proposals for transition would include:

- resistance from Zanu PF,
- lack of political will,
- repressive legislation such as POSA and AIPPA,
- unconstitutional groupings of intimidation such as war veterans and militias,
- the current executive powers of the Constitution,
- apathy,
- donor conditionalities,
- limited resources and
- the lack of a clearly defined mandate and time-frame for the transitional government.

In addition, the environment must become conducive for a stable transition, in order to limit the scramble for positions and leverage in the face of a leadership vacuum.

Recommendations

Based on its discussion, the group developed the following recommendations for the conference:

- The transitional government would be a temporary provision. This could operate under a transitional constitution.
- Such a temporary provision would come about through an Act of Parliament
- The need for an interim constitution with an Interim Assembly
- Need for an Eminent Person to act as broker during the Transitional period
- There was need for civil society to create an environment that would encourage and ensure meaningful participation of the people
- There was need for the repealing of POSA and AIPPA
- The mandate of the Interim Assembly should be overseeing the process of coming up with a new Constitution, depoliticisation of state institutions, Human rights watchdog and to ensure that Gender was a cross cutting issue
- Need to develop a timeframe for the transition period with clear monitoring mechanism

