

## Land and the new Zimbabwe Constitution - Lloyd Msipa

Thursday

ZIMBABWEANS are on the verge of writing a new Constitution. The last substantive Constitution of Zimbabwe was the Lancaster House Constitution. It was foisted on the country through a rigorous process of negotiations and compromises between our former colonisers and our then new crop of leaders that led the war of liberation for Zimbabwe.

The residual document, the Lancaster house Constitution, has been our supreme law for the last thirty years with nineteen amendments to date. Zimbabweans are in agreement that this document has outlived its usefulness. Zimbabweans are currently consulting on the possible contents of a new constitution.

What is significant with this new constitutional consultative processes currently taking place in Zimbabwe and indeed abroad is that Zimbabweans have this tremendous opportunity to craft their own supreme law taking into consideration our tumultuous history over the last thirty years. No peoples in Africa have thus far had the opportunity to redress post-colonial land imbalance by way of a constitution, which is the unique situation Zimbabweans find themselves in.

Our history as Africans and indeed the history of Zimbabwe is rich with lessons of which this new constitutional consultative process must take cognisance of. The protracted war of liberation in Zimbabwe was a war brought about by the uneven distribution of land and other resources amongst the indigenous citizenry. Most of the injustices we are currently wrestling with emanate from this legacy.

Following the colonisation of Zimbabwe, the indigenous citizenry were removed from the most arable land in Zimbabwe and relegated to the so-called Tribal Trust Lands. These were sandy small plots of land that were not suitable for any form of commercial farming. This scenario of colonial subjugation became the epicentre of the fight for land and for Zimbabwe's resources in general.

The Constitutional consultative processes currently taking place must prioritise and clarify the legal position regarding the ownership of land in Zimbabwe. There are many reasons why I think this is the most important issue the new constitution needs to address.

In the first instance, by taking into account that the identity of any country is grounded on its land, it naturally follows that the identity of Zimbabwe, and indeed that of other African countries, cannot be divorced from its land. The war of liberation in Zimbabwe was itself premised on the imbalance in the ownership of land.

Post-independence, where it was clear that the economy of Zimbabwe was largely agricultural based, 70% of all the arable land continued to be owned and controlled by a mere five thousand white commercial farmers. Now the prevailing situation of a legal tug of war between Zimbabwe's former white farmers and the Zimbabwe government, in relation to the legality of the SADC Tribunal, is a result of this ongoing conflict over the land issue.

It is in this respect that the methodology used to determine ownership of land in Zimbabwe needs to be inputted into our supreme law -- the Constitution of Zimbabwe. The challenge and question that comes to mind is how we will write this into the constitution equitably without further alienating other citizens who are "citizens by colonisation".

In all fairness, the indigenous black Zimbabwean population represents at least eighty percent of the population of Zimbabwe. In this regard, a constitutional provision on land ownership reflecting this demographic reality needs to be put in place, and has to ensure that land is continually and fairly accessible to all indigenous Zimbabweans and held in trust for future generations.

What are the advantages of having such a provision in the Constitution?

We have a generation insisting on completing the liberation struggle by seeing through

land redistribution, but it is unfortunately slowly reaching its natural life-cycle and a new generation that wants to embrace globalisation and is unwilling to endure the discomfort such a position inflicts on the country by way of the sad reality that as the land changes hands, pre-existing partnerships with international players also dissolve.

The above has been obvious with the retreat of international investors from the country, organised bad publicity in defence of the status quo, an unwillingness to help the nation find its way through this necessary and new situation. Hence this generation seems unwilling to protect this legacy. In the long term will it pay off?

The land re-distribution exercise embarked upon by the Zimbabwe government post 2000 has had its takers and also at the same time there are those hell-bent on reversing it to the detriment of the indigenous populace. Some of those bent on reversing the gains of land reform are unfortunately sons and daughters of the soil.

The current land ownership is currently held in place by sheer political will and this will in the long run prove not to be sustainable. The Land Reform Act, in particular under 16B of the Constitution of Zimbabwe (Amendment No 17, 2005), has been the subject of legal challenges at international institutions like the SADC Tribunal.

Of late, the same institutions have pronounced decisions that are not tallying with the national psyche. This is potentially fresh ground for future conflict amongst Zimbabweans themselves. In this instance between Zimbabweans who stake their claim on the land by virtue of being indigenous to the land, and those that have acquired their citizenship through "colonisation".

It is, therefore, important that the constitutional consultative processes currently underway factor in this reality. It represents a clear and future danger if it is not adequately clarified in the new constitution.

My proposal would be to have a provision in the constitution that limits ownership of land percentage-wise between indigenous Zimbabweans and those who came to be Zimbabweans by other means.

For example, land ownership in Zimbabwe for non-indigenous Zimbabweans should be limited to plus or minus twenty percent. This inputted into the Zimbabwe constitution will go a long way in making sure that we have put paid to this emotive issue. After all, no minority anywhere in the world has ever owned 70 percent of the arable land.

Secondly, the new Constitution needs to clarify the position of land ownership under national law, as it relates to international law. The Zimbabwe constitution (current amended version) leaves a lot to be desired as it does not clarify Zimbabwe's obligations under international law. This has provided numerous loopholes in land litigation cases.

The United Kingdom became a member of the European Union in 1973. This did not mean that European law was to automatically take precedence over British national law. The British parliament needs to sit and come up with an enabling legislation allowing whatever provision signed for to take effect. What this means is that the British parliament is superior to Brussels. Zimbabwe needs to adopt its own ways to which our constitution, the national law, relates to international law and our treaty obligations.

Lastly, the new Constitution of Zimbabwe needs to make more use of entrenchment clauses to guard against arbitrary amendments. This is particularly important when it comes to the provision on land ownership in the new constitution.

An entrenchment clause will make it difficult or next to impossible to make certain amendments on the constitution once it has been written. The entrenchment clause may be made to require consent from various parties that may include a two thirds majority in both houses (Senate and Legislature) and the consent of the people of Zimbabwe by way of a referendum.

For example, if as Zimbabweans we are in agreement that non-indigenous Zimbabweans' ownership of land be limited to twenty percent, then an entrenchment clause should be

used to protect this constitutional reality.

Any attempt to amend the constitution that goes against the spirit of a valid entrenchment clause would render it unconstitutional. Given the history of Zimbabwe and the general resistance by minority Zimbabweans against the land reform exercise, it is justified to protect the rights of the majority of Zimbabweans, especially when it comes to land ownership by way of a constitutional provision.

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