Zimbabwe: Transitional Justice without Transition?

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18 December 2008

The July 2008 Memorandum of Understanding (MoU) between the Zimbabwe African Nationalist Union Patriotic Front (ZANU-PF) and the two factions of the Movement for Democratic Change (MDC) offered the first glimmer of hope in resolving the long-standing crisis in Zimbabwe. With the signing of the MoU, the parties began to negotiate a settlement to the crisis under the mediation of Thabo Mbeki, the then South African President. However, it is still unlikely that the current negotiations will lead to a political transition in Zimbabwe. The current regime will remain in power and block meaningful efforts at accountability for past violations. Though a political transition remains highly unlikely any time soon, it is important to consider the form that transitional justice could take in Zimbabwe if ZANU-PF were to lose political power. This essay discusses what shape transitional justice could take if some form of transition were to occur, while recognising the immense challenges to this becoming a reality.

Limitations of Negotiated Transitional Justice

Transitional justice processes generally depend on the nature of the political transition. In the case of a negotiated transition, there are usually limits to prosecutions and therefore alternative mechanisms are often considered, including various forms of restorative justice, truth commissions or even deliberately ignoring the past. Where there is a complete political break with the past, it is much easier for new leaders to opt for prosecutions of violations committed under the former regime. In Zimbabwe, a debate is already taking place regarding the possibilities for prosecutions and the relative advantages of a truth commission.

There are several factors to consider when evaluating the transitional justice mechanisms that are appropriate for, on the one hand, dealing with the past while, on the other, safeguarding the democratic future. First, it is important to consider the time frame that the transitional justice mechanism should cover. In Zimbabwe, gross human rights violations were committed during the colonial era, against the Ndebele in the early 1980s during the first years of independence, directly after the 1998 food riots, and during the fast track land resettlement and the election violence including Operation Murambatsvina in 2005. The colonial era violations cannot be ignored since they have created problems regarding distributive justice and ensuing efforts to address these

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3 See UN report of the fact-finding mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina by Anna Tibaijuka http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf
economic imbalances in the post-independence period. The fast track land resettlement, moreover, could be traced back to the colonial period. The early 1980s also left unhealed wounds among large sectors of the Zimbabwean population.

What is likely in Zimbabwe is reform short of transition and this will shape how past violations are handled and how the future is mapped. Reform short of transition is likely because negotiated settlements rarely bring about complete transition. Complete transition would mean dismantling the ZANU-PF edifice, which appears highly unlikely, given the negotiations and agreements to date. ZANU-PF still holds substantial power and will stop any forms of transitional justice that would mean the punishment of their own. This will mean that to have a semblance of accountability, some form of commissions of inquiry could be instituted, but they will not bring tangible results in terms of establishing the truth or getting some form of justice for victims through reparations.

It would seem expedient to deal with past violations using a truth commission as well as offering victims economic compensation rather than pursuing prosecutions of perpetrators. In many ways, prosecutions may not be the ideal mechanism in addressing the long history of violations in Zimbabwe. It can be onerous to gather convincing criminal evidence from events that occurred more than 30 years ago and when most perpetrators are either too old or dead. Prosecutions will only be symbolic in this instance. If one is to prosecute Mugabe, he is likely to be released due to his age. Instead, a truth commission is more likely to establish the truth about what happened during Zimbabwe’s dark years, as well as to recommend steps toward victim reparations. Indeed, most post-independence perpetrators are themselves victims of the colonial past and will also be subjects of redress, including Mugabe and most senior security personnel in the current government who are accused of perpetrating violations. This past has not been properly redressed for them or the black population in Zimbabwe. A truth commission would provide the possibility at least of dealing with these complicated dual victim/perpetrator identities.

Furthermore, if prosecutions are pursued, they should not target only a limited number of individuals. Advocates of prosecutions argue for the indictment of Mugabe and the security personnel implicated in the violations. While this may be noble, crimes were also committed during colonialism, including the economic marginalisation of the black majority; admittedly a situation that Mugabe has abused, in particular since the 2000 elections. The approach to redressing the violations in Zimbabwe must therefore be holistic and not only an attempt to punish Mugabe or to seek revenge; otherwise, the chosen transitional justice mechanism will alienate other victims. In short, concentrating only on Mugabe and his regime represents an insufficient response to the plethora of perpetrators and deep divisions in Zimbabwean society. Instead, a comprehensive truth commission is necessary to address all past violations, as well as to recommend the reparation policies necessary to address broader issues of economic justice.
Negotiations without Transition

It is highly unlikely that the current agreement between ZANU-PF and the MDC will bring about a political transition in Zimbabwe. The early negotiations broke down because ZANU-PF considered the position of President Mugabe to be non-negotiable. There are indeed echoes from the 1987 negotiations with the Zimbabwe African People’s Union (ZAPU) under Joshua Nkomo⁴, but there are obvious differences between 2008 and 1987. Today, the parties are negotiating roughly from a position of equal strength: while Mugabe can count on the force of the coercive state apparatus and, if the March 2008 presidential elections are anything to go by, almost 50% of the electorate, MDC leader Morgan Tsvangirai has the support of the international community as well as half of the votes in Zimbabwe. It now leaves the situation open to shrewd negotiating tactics; and on that score Mugabe has extensive experience.

In the current negotiations, ZANU-PF seeks to incorporate the MDC into government rather than a transition to democracy since ZANU-PF argues that democracy already exists. The MDC, at least the Tsvangirai faction, seeks to take the reins of power rather than be incorporated into a coalition government, since it believes it won the March 2008 presidential election. For all its promise, these negotiations are not explicitly about democratisation but about power-sharing, hence the continued reference to a power-sharing arrangement. Whether this arrangement will be transitional or permanent, as was the case with the 1987 Unity Accord, is currently unclear. ZANU-PF is negotiating only because it needs international legitimacy and has failed to rescue the economy. If ZANU-PF could achieve all of this without the MDC, then there would be no negotiations. The MDC factions are negotiating because there seems to be no other means of attaining power. The agreement reached in September this year is confusing as it creates two opposing centres of power, the executive Presidency and the executive Premiership. How these two executives should operate is not defined. However, already it seems the experiment is having negative effects, since Mugabe and Tsvangirai are both exaggerating the reach of their powers; Mugabe more so. This tragic scenario has played itself out in the appointments of Cabinet members.

The current negotiations are not explicitly about transition to democracy – in fact ZANU-PF insists that Zimbabwe already has a democratic government. Any transitional arrangement should ensure the depoliticisation of the police, army, prisons, air force and intelligence services specifically and reform of government structures in general. Institutional reform should not only be about changing the constitution as the parties seek to do for different reasons, but also depoliticising the security apparatus and government structures to ensure they do not service a particular leader but the people of Zimbabwe.

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⁴ The late Joshua Nkomo was the ZAPU leader who negotiated the Unity Accord in 1987 to end the Matabeleland atrocities; an era that saw the murder, torture and violations of a large majority of the Ndebele ethnic group in Zimbabwe. Nkomo became one of the two Vice Presidents and Zimbabwe has had two Vice Presidents since.
Future of Agreed Transitional Justice Mechanisms

The agreement reached in September does not cover transitional justice mechanisms in detail, but Article vii (c) of the agreement states that the new government shall “give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of pre and post independence political conflicts.” The agreement therefore does not mention justice as a goal but cohesion, healing and national unity, which points towards a truth commission of sorts rather than prosecutions. In time we may see the structure and mandate of this commission. However, such eventualities are doubtful, given the agreement’s emphasis on consideration of a truth commission rather than a dedication to establishing one.

In terms of mechanisms to deal with the past, the most likely would be some form of commissions of inquiry short of truth commissions and civil procedures short of criminal prosecutions. These have been employed previously in Zimbabwe with little or no success. The civil procedures, which refer to civil suits against violators of human rights, including the police, the army, war veterans and militias, may lead to compensation but without establishing criminal liability. As in the past, civil procedures are likely to continue informally through NGOs such as Zimbabwe Lawyers for Human Rights (ZLHR) and the Zimbabwe Human Rights NGO Forum. Any compensation, however, will be paltry since the payments are usually delayed and thus eroded by inflation rendering them symbolic and a form of false victory for the victims. Commissions of inquiry would be set up to foster legitimacy and improve the government’s public image. It would be highly unlikely that any reports by such commissions be made public and they would not facilitate meaningful redress for victims and positive change nationwide. Whether the MDC will resist this turn of events remains to be seen. It is unlikely that the MDC will succeed in opposing every decision by ZANU-PF without a total breakdown in the fragile arrangement. Until Mugabe and ZANU-PF leave power, there will be no real transition and no real transitional justice in Zimbabwe.

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5 See “The agreement between the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations on resolving the challenges facing Zimbabwe”, signed on 15 September 2008.