

Developments in the SADC region

A summary of selected electoral, legal and constitutional aspects

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2014: Election year in SADC

South Africa and Malawi were the first of five Southern Africa Development Community (SADC) countries to hold elections in the SADC region in 2014, with their elections held on 7 and 20 May 2014 respectively. The conduct of the elections was a tale of two contrasts with South Africa running a largely smooth election, whereas Malawi's election was marred by administrative challenges and allegations of rigging that had the effect of denting the credibility and integrity of the elections. In both cases, however, it was reassuring to note that the judicial and electoral institutions held their own and were able to address all electoral issues and challenges in accordance with their legal mandates.

In South Africa the Electoral Court handled a significant case relating to the suitability of the Electoral Commission (IEC) Chairperson, Advocate Pansy Tlakula, to continue holding office following allegations of impropriety in the procurement of the IEC offices in Centurion. In the same vein other electoral institutions also played their part, with the Independent Communications Authority of South Africa (ICASA) managing to deal with communication and media-related disputes that were filed by the various political parties in the country against media houses such as the South African Broadcasting Corporation.

In Malawi, despite the chaotic manner in which the elections were held, allegations of rigging by the ruling party and the pronouncement by the then State President Joyce Banda 'annulling' the elections. The electoral institutions were not deterred but proceeded with their work until the final election result was announced. The courts were able to handle election-related challenges and deliver rulings within reasonable periods of time while the Malawi Electoral Commission handled the electoral-related challenges in a way that showed its strength and impartiality as an electoral institution. Above all, the people of Malawi showed maturity and patience as they waited for the final election result without resorting to violence or other illegal acts.

Three more countries in the region will hold their elections in 2014. Mozambique will have elections on 15 October, and Botswana and Namibia will have elections in October and November respectively. It is hoped that the elections in these three SADC countries will be free and fair, and that citizens will have an opportunity to choose their leaders without fear, and in an environment that is free of violence or intimidation.

- See 2014 (July) *DR* 15.

Swaziland: Thulani Maseko and Bheki Makhubu remain in detention

In Swaziland the trial of human rights lawyer, Thulani Maseko and newspaper editor, Bheki Makhubu, for contempt of court continues. At the time of writing, the two were found guilty and remained in prison where they have been detained since March 2014. Their trial has once again put the spotlight on the independence of the judiciary in Swaziland and the role of the country's Chief Justice in undermining public confidence in the justice delivery system, as the Chief Justice was alleged to be behind the arrest and detention of the two on the alleged contempt of court charges. The charges arose from the publication of three allegedly contemptuous opinion editorials in *The Nation* magazine of which Makhubu is the editor, two of which were authored by Maseko. On 27 May 2014, the SADC Lawyers' Association (SADC LA) launched a financial appeal towards the welfare of the families of the two human rights defenders as their continued incarceration has resulted in serious financial challenges for their families. This is in addition to

other forms of support, such as attending court sessions and providing technical legal assistance that the SADC LA and other human rights and rule of law institutions throughout the world have been providing to the two. Unfortunately despite such support and the pressure that has been piled on the Swazi judiciary and government, the two human rights defenders are yet to secure their freedom. Human rights defenders, activists and lawyers in the SADC region are being urged to continue showing their support to the two so that they and other human rights defenders are not deterred from taking up human rights issues of concern in individual SADC countries and in the SADC region as a whole.

- See 2014 (May) *DR* 15.

Zimbabwe: Alignment of the country's laws with the new Constitution

In Zimbabwe, the government announced a programme to align more than 450 pieces of legislation with the country's 2013 Constitution. However, despite the public pronouncements about the programme, there is scepticism over the government's willingness to ensure that the laws are indeed aligned with the Constitution. Government has been dragging its feet with regard to the actual implementation of the programme, with civil society actors and opposition political parties arguing that the ruling ZANU PF government's interests are served better when the laws are not aligned with the Constitution. Legal experts have, however, called on civil society organisations and lawyers in the country to raise awareness about the supremacy of the Constitution and urge citizens to claim their rights as provided for in the Constitution even without the necessary alignment of the relevant laws. Section 2(1) of the Constitution of Zimbabwe provides that:

'This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'.

As such, the alignment of the laws with the Constitution is only meant to create certainty and improve administrative implementation. The fact that the laws are not aligned with the Constitution should not be used by any entity – whether State or otherwise – to deny citizens their constitutional rights. The continuous talk by the government on the need to align the laws with the Constitution while dragging its feet on the actual implementation is meant to pass a wrong message to the citizens that they cannot enjoy the rights and protection provided by the Constitution before the alignment, when in fact such rights and protection can be claimed by citizens.

Mozambique: The RENAMO threat ahead of elections

As Mozambique prepares for elections later this year, the country continues reeling under the threat of violence and instability following the decision by the Resistência Nacional Moçambicana/Mozambique National Resistance (RENAMO) to end cooperation with the ruling party Frente de Libertação de Moçambique/Mozambique Liberation Front (FRELIMO) and go back to the bush to rekindle a civil war that ran from 1975 when the country gained independence until 1992 when RENAMO and the FRELIMO-led Government signed a ceasefire agreement. RENAMO has launched a number of ambushes, attacked infrastructure and killed soldiers, police officers and civilians in a low-level insurgency since decamping to its old military base in the Gorongosa mountains in October 2012.

Among the many demands that RENAMO has been making have been those related to electoral law reforms ahead of the 15 October 2014 elections. In February 2014, the Parliament of Mozambique, made up of parliamentarians from both FRELIMO and RENAMO, adopted changes to the country's electoral laws with the hope of ending the RENAMO-led violence. The focus of the changes were on reforming the body that is tasked with running elections in the country, the Comissão Nacional de Eleições/National Elections Commission (CNE).

In line with these changes in March 2014, RENAMO representatives in the new 17-member CNE were increased from two to four. Other members of the commission are from FRELIMO (five members), civil society (seven members) and another political party, the Movimento Democrático de Moçambique/Mozambique Democratic Movement (one member). However, despite these reforms, RENAMO has not ended the violence particularly along the main North-South highway in the Sofala Province. In June 2014, the chairperson of the Mozambique Human Rights Commission, Custodio Duma, met with members of RENAMO to urge them to stop the attacks, but no undertakings were made. A spokesperson for RENAMO, Antonio Muchanga, after the meeting with the Human Rights Commission said: 'I cannot lie to the people and say that because the National Human Rights Commission has met with us there will be a ceasefire. What we are telling Mozambicans is that there is still danger.' (AIM 'Human, Rights Commission urges RENAMO to renew truce' www.clubofmozambique.com/solutions1/sectionnews.php?secao=mozambique&id=32808&tipo=one, accessed 10-7-2014) (see statement by the SADC Lawyers' Association on 9 January 2014 titled 'SADC Lawyers Concerned with Undue Delays to the Constitution Making Process in Zambia' (www.sadcla.org/?q=node/144, accessed 10-7-2014)).

Mozambicans from different walks of life have urged RENAMO to renounce violence and commit itself to negotiations while also urging the ruling party to commit to the talks in an effort to end the unnecessary loss of life and damage to property that is being caused by the insurgency. As the elections in Mozambique grow closer, it is hoped that both RENAMO and the ruling FRELIMO Government will agree to inclusive reforms that do not only address the concerns of these two main political parties but the wishes of the smaller political parties and the people of Mozambique as a whole.

Zambia: The Constitution-making process has stalled

The constitution-making process in Zambia has stalled despite significant investments in terms of finances, time and human resources by the country in its efforts to create a new people-driven supreme law for the country. This followed pronouncements by the State President, Michael Chilufya Sata, to the effect that the country does not need a new constitution but mere amendments to the existing one. This is a clear departure from the government's earlier position, which led to the appointment of a twenty-person technical committee to draft a new republican constitution on 16 November 2011. It must also be recalled that when Mr Sata assumed power in September 2011, he rode on the promise of a new constitution for Zambians as one of his campaign points.

The constitution-making process required the Constitutional Technical Committee to release the final draft to the President and to the public concurrently but this was stopped by the President, who wanted the draft to be scrutinised by his cabinet first before it could be released publicly. The result is that several months after the Technical Committee delivered on its mandate, the people of Zambia are still waiting to see the final draft Constitution.

Tanzania: Constitution-making process in progress

The process of developing a new constitution in Tanzania started off on a high note with the State President at one point indicating that the new supreme law would be passed in 2014 (S Mtweue 'Tanzania will have new Katiba in 2014: Kikwete' www.thecitizen.co.tz/News/Tanzania-will-have-new-Katiba-in-2014--Kikwete/-/1840392/2142974/-/11m0qaaz/-/index.html, accessed 10-7-2014). The country's Constitutional Review Commission's term ended in March 2014 in terms of the provisions of s 31 of the Constitutional Review Act, chapter 3, after the commission had handed over the constitutional draft to the Constituent Assembly (CA) and to the State President. The CA has been debating the Constitutional Bill, although there are now concerns with delays in finalising the new supreme law. The CA went on recess in April and was only expected to resume its sitting in August after Parliament concludes debating on and approving the national budget. This is

because all members of the National Parliament, which is supposed to be debating the national budget are also members of the CA.

As part of the development of the new Constitution, Tanzanians are expected to participate in a referendum that may end up focussing more on deciding the issue of the union – which currently comprises of the Island of Zanzibar and mainland Tanganyika which came together to form the United Republic of Tanzania in 1964. The referendum will, among other things, seek citizens' views on whether the union should be maintained in its current form or whether there should be three levels of government (one for Tanganyika, one for Zanzibar and a federal one). This has been an issue of serious contention both within the CA and among ordinary Tanzanians as debates on the draft constitution continue.

Hopefully the new constitution will be finalised in time for the citizens of Tanzania to familiarise themselves with the constitution ahead of national elections expected to be held in 2015.

SADC Bar leaders meet in Johannesburg

The SADC Lawyers Association (SADC LA) brought together 15 Bar and law society leaders – including SADC LA President Kondwa Sakala-Chibiya – representing 13 SADC countries at the first-ever SADC Bar Leaders' Conference in Johannesburg in July 2014. Various issues of common interest and concern were discussed including the drafting of a *pro bono* and legal aid framework in the SADC region. The Law Society of South Africa (LSSA) was represented by its Co-chairpersons, Ettienne Barnard and Max Boqwana, and by its Chief Executive Officer, Nic Swart.