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LEGAL OPINION

WHY THE SUSPENSION OF BY-ELECTIONS
IS UNCONSTITUTIONAL AND ILLEGAL



OCTOBER, 2020

LEGAL OPINION: WHY THE SUSPENSION OF BY-ELECTIONS IS UNCONSTITUTIONAL AND ILLEGAL

This is a legal opinion concerning the illegality of a government decree suspending by-elections on account of the COVID-19 pandemic.

THE COVID-19 REGULATIONS

On 30 September 2020, the government issued Statutory Instrument 225A of 2020 entitled Public Health (COVID-19 Prevention, Containment, and Treatment) (Amendment) Regulation, 2020 (No. 4) hereafter “the COVID-19 regulations”).

The regulations have two effects. The first effect is to suspend the holding of any by-election to fill a casual vacancy in Parliament and local authorities during the period that the declaration of COVID-19 as a formidable epidemic disease is in force. In other words, there will be no by-elections if the government’s declaration concerning COVID-19 is operational.

The second effect is that if a vacancy occurs during that same period the time shall not be counted for purposes of calculating the period within which a by-election should be held in terms of the law. In so doing, the regulations purport to amend section 158(3) of the Constitution of Zimbabwe which requires a by-election to be held within 90 days of the occurrence of a vacancy in Parliament.

These regulations are illegal for several reasons which are outlined below.

INVALIDITY DUE TO INCONSISTENCY WITH THE CONSTITUTION

The first point is that the regulations are invalid because they are inconsistent with the Constitution. It is trite that the Constitution is the supreme law of the country and any law that is inconsistent with it is invalid to the extent of that inconsistency. This elementary rule is affirmed in section 2 of the Constitution. When considering a piece of legislation or practice, one must assess whether it is consistent with the Constitution. This is the test that must be applied to the COVID-19 regulations.

In this regard, the COVID-19 regulations are inconsistent with section 158(3) of the Constitution which provides that by-elections “must take place within ninety days after the vacancies occurred”. Section 158(3) is a mandatory provision. It represents what “must” be done. The COVID-19 regulations are inconsistent with this requirement because they suspend by-elections and change the calculation of time within which by-elections should be held. The inconsistency is plain. For that reason, the COVID-19 regulations fall foul of section 2 of the Constitution. They are invalid to the extent of that inconsistency. The reason for the inconsistency is not a sufficient defence.

COVID-19 REGULATIONS CANNOT AMEND THE CONSTITUTION

The second point is that regulations cannot legally amend the Constitution. It is trite that subsidiary legislation cannot lawfully amend superior legislation, let alone the Constitution. This rule has constitutional authority in section 134(a) which prohibits the delegation of Parliament’s primary law-making power. It is well established that the Constitution can only be amended by Parliament through a Constitutional Bill. This is part of Parliament’s primary

law-making power that cannot be delegated to the Minister of Health and Child Welfare to change the effect of provisions on by-elections. The COVID-19 regulations represent an attempt to unlawfully amend the Constitution through the agency of the Minister of Health.

VIOLATION OF RIGHTS AND FREEDOMS

The third point is that regulations are invalid because they violate certain fundamental rights and freedoms which is contrary to section 134(b) of the Constitution. It provides that statutory instruments “must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights”. This mandatory prohibition is violated because the suspension of by-elections infringes and limits political rights under section 67 of the Constitution, which include the right to vote. It also violates freedom of expression.

To be sure, this is not to suggest that these rights and freedoms are absolute and cannot therefore be limited. They are qualified rights which may be limited, but the fundamental point is that this cannot be done through a statutory instrument because the Constitution prohibits it. The illegality is not merely that fundamental rights and freedoms have been limited, but that this has been done by subsidiary legislation which is proscribed by the Constitution.

Therefore, the argument that the limitation of rights or freedoms is allowed under section 86 of the Constitution does not apply. This is the provision that allows for restriction of qualified rights “only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom”. This justificatory provision would only be engaged if the suspension of by-elections were being done under primary legislation. It has no application where subsidiary legislation is used because the Constitution specifically prohibits it. Section 86 of the Constitution does not and cannot save unlawful decrees such as SI225A of 2020.

COVID-19 REGULATIONS ARE ULTRA VIRES THE PUBLIC HEALTH ACT

Finally, the COVID-19 regulations are illegal because they cannot do what the primary legislation under which they are made is incapable of doing. Under section 134(c.) of the Constitution, “statutory instruments must be consistent with the Act of Parliament under which they are made”. This means the COVID-19 regulations cannot go outside the terms of the Public Health Act which is the parent legislation. Since it is ordinary legislation, the Public Health Act cannot lawfully amend the Constitution. Consequently, the COVID-19 regulations are ultra vires not only the Public Health Act, but they also infringe section 134(c.) of the Constitution.

CONFLICT WITH THE ELECTION MANAGEMENT BODY

So far, the ERC has demonstrated reasons why SI225A of 2020 is unconstitutional and illegal. The ERC is not oblivious of the reasons purportedly behind the issuance of SI225A of 2020. The government alleges that the COVID-19 pandemic as an excuse for suspending by-elections. This is even though the Zimbabwe Electoral Commission (ZEC) had already announced plans to hold by-elections before the end of the year. Indeed, ZEC had issued a statement advising stakeholders that it was lifting the suspension of by-elections “with immediate effect ... following measures taken by the government to curb the spread of the COVID-19 pandemic”.

ZEC even published the COVID-19 Policy on Electoral Activities outlining how by-elections and other electoral activities would be conducted during the COVID-19 period. The decree by the government runs contrary to the progressive position taken by ZEC, suggesting that the election management body was not even consulted. The COVID-19 regulations are illegal because they violate section 156(4) of the Constitution which requires ZEC to be consulted concerning amendments to electoral laws. The exact wording is as follows, “No amendments may be made to the Electoral Law, or to any subsidiary legislation made under that law unless the Zimbabwe Electoral Commission has been consulted and any recommendations made by the Commission have been duly considered”. The COVID19 regulations are an attempt to amend the Electoral Law via the backdoor.

WHAT THE GOVERNMENT COULD HAVE DONE

If the government wanted to change the rules concerning the holding of by-elections, it had two choices:

First, it had to amend the constitutional provisions, but this would be cumbersome, and it would take too long considering the hazard of a deadly pandemic. However, there is an alternative offered by the Constitution. It is the declaration of a State of Public Emergency in all or parts of the country. Such a declaration may be made in terms of section 113 of the Constitution. There is no doubt that the pandemic is a public health emergency.

Such a declaration would allow for reasonable limitation of certain rights and freedoms under section 87 of the Constitution. The Second Schedule to the Constitution provides for measures and safeguards that must be put in place during such a declaration. This declaration of a State of a Public Emergency involves Parliament, which is supposed to provide checks and balances to prevent abuse. It also has a role for the Constitutional Court.

However, more importantly, it is only during this period of a public emergency when lawfully declared in terms of the Constitution that certain parts of the Constitution might be suspended to the extent necessary to deal with the public emergency. Zimbabwe would not have been the only country to have declared a State of Public Health Emergency. Our neighbour Botswana and other countries made such declarations to deal with the pandemic.

Admittedly, rights would have been imperilled under a State of Public Emergency, but at least that would have been under lawful and clear conditions. It is better than a situation where emergency powers are being used without declaring a State of Public Emergency as is happening with SI225A of 2020.

The Zimbabwean government chose to use the Public Health Act rather than the Constitution. But in doing so, it took the path which has led it to illegality regarding by-elections. It has suspended by-elections using the wrong legal instrument. This illegality could have been avoided. It should be challenged in the courts of law to prevent contravention of the Constitution.

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