Constitution in Transition:

Academic Inputs for a New Constitution in Zimbabwe

Norbert Kersting (Ed.)

Mit finanzieller Unterstützung des:

Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung

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Preface

The "unforced force of the better argument" is a concept which reflects the theory of the German philosopher Jürgen Habermas. For this reason a non-hierarchical deliberate discourse is necessary. There is a lot of critique on that normative concept criticising the possibility of power-free zones and the absence of interest groups and elites. Academia may be naïve and it may be wishful thinking, but here the principle of free deliberation is prominent.

In October 2009 international experts came together in Harare to deliberate on different aspects of a future constitution for Zimbabwe. All of the participants had been included in processes of drafting constitutions in Asia, Europe, South Africa, Kenya and Ghana. The experts represented the two disciplines of law and political science. The law is key in the drafting of constitutions whereas political science plays an important role in the critique and discussion about constitutional reality. The objective of the conference was to give inputs from comparative constitutional law and comparative politics to consider the best practice of different parts of the world and especially from other African countries.

The idea of an academic conference was suggested by colleagues from the political sciences during the formation of a partnership between the University of Stellenbosch and the University of Zimbabwe in May 2009. Similar to the consultation process in South Africa's 1994 interim constitution and 1996 final constitution, external experts should be included in the consultation process. This idea was supported by different German, Zimbabwean and South African institutions and was ultimately supported by the Friedrich-Ebert-Stiftung. The conference "Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe" was held from 26 – 29 October 2009 in Harare.

Academic input is useful to show the best practices and experiences of other countries. In constitutional processes the input of civil society is very

important. The people have the final say and because their support gives legitimacy to a constitution, consequently, they have to be included in the constitutional processes. They have to bring in their own ideas and they should be allowed to discuss the recommendation provided by academia, political parties etc. However, even with a high input-legitimacy of a constitution, it is important that a constitution is justiciable and viable.

Zimbabwe in the beginning of the new millennium is characterized by a strong polarization within the society. This is partly due to a legacy of colonial rule. The process of transition is not undisputed. Within the different political parties, as well as within civil society, the support for the idea of transition and inclusive government differs. The engagement and dis-engagement brings about a fragile political situation. But, politicians and civil society groups have to think about alternatives. Are there any alternatives to negotiations, discourse and consensus?

In Zimbabwe, there has to be a cultural change towards consensual politics and real reconciliation. This change seems to be more difficult than institutional change. Two principles quoted by the participants of the conference seem to be important for Zimbabwe: “My country always, my government when it is right” and “The only way to keep power is to share power.” In a nation-building process, “national patriotism” has to focus on the will of the people and not on individual interests or clientelistic needs. Political institutions and rules help to control competing political parties and actors. A responsive benevolent government, which accepts opposition as loyal opposition has to be developed. In civil society a constructive culture of voice and protest against the government has to be developed, which produces necessary additional checks and balances. Ruling elites have to understand that democratic checks and balances are useful. For this reason a constitution can build the cornerstone for government for the people, by the people.

I would like to thank the Friedrich-Ebert-Stiftung in Zimbabwe and the German Development Cooperation for their support. I would also like to thank my assistants Renate E. Ahrens, Christian Rode and Conrad Kassier for their help in the preparation of the conference, documenting, videotaping and audio-taping the proceedings, and handling the "Metaplan". I would like to thank the representatives of the Zimbabwean civil society groups, the German Embassy, the political parties and the Honourable Minister of Constitutional and Parliamentary Affairs Eric Matinenga for their contributions. Ultimately, most welcome was the enthusiastic support by the academic participants and colleagues, who indeed made the discourse a deliberative academic input.

Norbert Kersting
Stellenbosch, November 2009

Norbert Kersting:
Constitution in Transition: Academic Inputs for a new Constitution in Zimbabwe.

Executive Summary

In February 2009, a new inclusive government was established in Zimbabwe based on the agreement signed on 15 September 2008 by ZANU (PF) and the two formations of the MDC. That agreement is now popularly referred to as the Global Political Agreement (GPA) and was brokered by SADC. The GPA contemplates a political transitional period in which the inclusive government stabilizes the economy and undertakes all the reforms necessary to transform Zimbabwe into a democracy. One of the key reforms specified in the GPA is constitutional reform. As with the South African experience, the framework of the inclusive government regards the development of a new constitution as the ultimate criterion of democratization.

It is against this background that an inclusive conference on the Zimbabwe constitution was planned by academic staff from Zimbabwean and South African universities. The conference was held in Harare in October 2009 and involved constitutional experts from Zimbabwe, South Africa, other African countries and Europe (Germany). Some of the experts had wide ranging experience in constitution-making processes, having participated in processes in South Africa, Ghana and Kenya. The conference was premised on the experience that academic inputs are valuable in constitutional development.

The conference focused on the following main aspects of a constitution: Bill of Rights; Decentralization; Electoral System, the Judiciary, Constitutional oversight Bodies; Customary Law and Transitional arrangements.

1. Brief background to constitution-making in Zimbabwe

Zimbabwe became independent on 18 April 1980. The constitution that came into force on that day was a product of negotiations between the

internal settlement government of Bishop Muzorewa and Ian Smith and the national liberation movement led by Robert Mugabe and Joshua Nkomo. The negotiations were held in 1979 and chaired by the British government. They were conducted at Lancaster House in London and accordingly the Independence and chaired by the British government. They were conducted at Lancaster House in London and accordingly the Independence Constitution is referred to as the 1979 Lancaster House Constitution. This remains the current constitution but it has been amended 19 times.

All the 19 amendments made to the Lancaster House Constitution have been piece-meal and have been effected by Parliament. There has been no comprehensive reform of the Zimbabwean Constitution since 1980. An attempt to overhaul the constitution was made in 1999-2000. In May 1999, the Robert Mugabe government appointed a 400-member Constitutional Commission to review the Constitution. This Commission was boycotted by a coalition of civil society organizations under the umbrella of the National Constitutional Assembly (NCA), an NGO which had been formed in 1997. The NCA criticized the Constitutional Commission as partisan and lacking independence. When the Constitutional Commission presented its draft constitution to a referendum in February 2000, it was rejected. The Mugabe government accepted the verdict and the draft constitution was shelved.

All elections that followed the referendum of 2000 have been violent. It is therefore not surprising that the period from the 2000 referendum to the 2008 elections was characterized by vigorous pressure for a new constitution. Inevitably, in the GPA that created the inclusive government, the making of a new constitution took centre stage.

The GPA provides for the making of a new constitution in its article 6. The process is led by a Parliamentary Select Committee with its membership

drawn from the three political parties who signed the GPA and who are represented in Parliament. The Parliamentary Select Committee is required to carry out consultations with the public and to involve civil society in the consultation process. It must produce a draft constitution which will be discussed in Parliament before being referred to a referendum.

By the time of the Academic Conference in October 2009, the Parliamentary Select Committee had convened its first Stakeholders Conference in July 2009 and was planning the second Stakeholders Conference for mid February 2010. The first Stakeholders Conference had been disturbed by opponents of the process on the first day but was able to decide on the 17 thematic committees that were supposed to be formed and chaired by a Member of Parliament. At the time of the conference, public consultations should have started already but the process had been delayed for several reasons.

One instructive feature about the proposed constitution making process in Zimbabwe is the availability of complete constitutional drafts, reflecting various political persuasions in the country. It is critical that the current process be undertaken with these drafts being given full consideration. There are four main documents that fall into this category as follows:

Current Lancaster House Constitution (1979)

This is the 1979 document agreed at Lancaster House. It came into force on 18 April 1980. It has been amended 19 times. In 1980, it provided for a parliamentary executive system of government headed by a Prime Minister. There was a bi-cameral legislature. The head of state was a non executive president. Some provisions were entrenched, such as the protection of private property which was designed to protect the minority white commercial farmers.

In 1987, this framework was changed with the introduction of the executive presidency. Entrenched clauses expired in 1990 and in their place new provisions were put for example such that diluted private ownership of land.

Constitutional Commission Draft (2000)

This is a draft constitution which was rejected in the 2000 referendum. It retained the executive presidency but with an executive Prime Minister appointed by the President. It introduced a two term limit for the Presidency. The bill of rights was not expanded but weakened further any provisions protecting private ownership of land.

National Constitutional Assembly Draft (2001)

The NCA was formed in 1997 as a civic organization campaigning for the writing of a new constitution. As a result of its opposition to the Constitutional Commission of 1999-2000, it initiated a parallel process of collecting the views of Zimbabweans on a new constitution. It produced its draft in 2001. The NCA's main objection to the 2000 draft of the Constitutional Commission was that it retained an all powerful president who was not different from the executive presidency introduced in 1987. The NCA draft provides for a parliamentary executive headed by a Prime Minister. It has a Bill of Rights covering both civil and political rights as well as social and economic rights.

Kariba Draft (2007)

This is a draft constitution that was done by ZANU (PF) and MDC before the 2008 elections. It was finalized and signed at Kariba on 30 September 2007. This is the Draft which is “acknowledged” by the GPA but there are varying interpretations as to the meaning of that acknowledgement. The Kariba draft closely follows the 2000 Draft of the Constitutional Commission.

2. Some general aspects about consultation processes in constitution making

The following points are worth noting about consultation processes in constitution- making:

- Inclusiveness of civil society: Civil society should be included to give the process broad support and legitimacy.
Inclusiveness of civil society: Civil society should be included to give the process broad support and legitimacy.
- Expert committees: It is important to have a committee of experts to analyze inputs from the public and convert them into constitutional principles. A committee of experts will also synthesize the existing drafts.
- Culture of compromise: There must be a culture of compromise and the main players in the constitution-making process must be ready for compromises. A constitution is not there merely to record the views of the majority. It must reflect a wide variety of opinions and perspectives.
- De-politicization: It is important that constitutional principles be divorced from narrow political party interests.
- Deadlock breaking mechanisms: Deadlocks are inevitable in constitution making processes. In order to prevent deadlocks, mechanisms and communication channels must be established and utilized. This requires political will and commitment from the major stakeholders. Deadlock – breaking mechanisms usually involve mediators and the spirit of reconciliation.
- Monitoring: Institutions for monitoring the outreach process are required. The monitoring process must be alive to the existence of different views and opinions and must strive to ensure that a broad range of views and opinions are taken into account.

- Interim Constitutional and Sunset Clauses: This could be a strategy not to envisage a final constitution, but to agree on an interim one, with the option of reconsidering certain aspects. It seems to be much easier to agree on a constitution that leaves room for a revision at a later stage.

3. Summary of workshop deliberations

In the following only some main points of the discussion during the conference are highlighted. It is important to note that this overview reflects the editor's perception and might be selective. Following the overview, the papers presented by the authors at the conference are printed in full and, thus, allow for a much deeper analysis of the issues.

3.1 Bill of Rights

Most constitutions utilize Bills of Rights to correct or prevent injustices and to bring a better life for all citizens. The South African Bill of Rights is viewed as a model. It accommodates social and economic rights. The South African Constitutional court has developed an admirable jurisprudence that has given meaning to social and economic rights. Zimbabwe must consider following the South African model.

In drafting the Bill of Rights in the Zimbabwean constitution, the points to be considered should include:

- Civil and political rights: There must be effective remedies of these rights. They should be fully justiciable. It is advisable that there be no specific provision for or against the death penalty. Freedom of expression must be at the heart of civil and political rights.
- Social and Economic rights: A constitution may include socio-economic rights such as labor relations, environmental rights, land reform, housing, healthcare, food, water and social security.
- Locus Standi and Access to the courts: The bill of rights is meaningless if aggrieved persons have no easy access to the courts to enforce their rights. It is important for the constitution to provide Locus Standi to aggrieved persons so as to have easy access to the courts. In addition to the Constitutional Court, the High Court must also have jurisdiction in Bill of Rights cases.

3.2 Decentralization

The idea of decentralization refers to the principle of subsidiarity and protection of (regional) minorities.

Principle of Subsidiarity: The principle of subsidiarity recognizes that as soon as local spheres of government can provide certain functions better than the national or regional levels, it should be allocated these responsibilities.

Minorities: Minority groups must be catered for, and if there are different local institutions, one may need different federal arrangements. What is more important is for local spheres of government to have their base, so as to achieve high levels of autonomy.

Service implementation: Co-operative federalism means that provincial and local levels are relevant for service delivery without having discretionary functions in all fields. In some countries more than 80% of all government activities are implemented by local government.

Devolution: It is important to consider how and to what extent to decentralize. Decentralization as devolution includes democratization. Devolution means to establish a form of representation on lower levels, such as provincial and local level. Governors and mayors must, thus, be elected.

Functions and finance: The decentralization of functions and finance are essential to avoid unfunded mandates. Constitutional core competences are very important. It is important to specify where the lower tiers of government will receive their money from. They need to be able to generate revenues and to raise taxes. Access of local government levels to specific revenues needs to be stipulated by the constitution.

Intergovernmental arrangements: Framework for intergovernmental

co-operations is needed to ensure cooperation and implementation of policies. Dispute resolution is essential if progress is to be made, so that internal administrative problems do not hinder those who are required to deliver on behalf of the government. Local control also depends on revenue sharing and agreements on the management of budgets, and thus on a fiscal/financial commission.

Step-by-step Decentralization: Positive results may be achieved by using a strategy of step-by-step decentralization.

Asymmetric Developments: They may be regional differences with a varying number of tiers and responsibilities in the different regions. This asymmetry can be considered in addition to federal arrangements and establishment of a parliament in all provinces.

Meritocracy: Civil servants should be appointed on merit. Clientelism and nepotism is a global phenomenon, but requires attention everywhere, especially in societies where the civil service has been neglected.

3.3 Elections

Global experiences should be taken into account when considering which electoral system is most preferable. Three main systems are worth considering for Zimbabwe as follows:

First past the post system: In Zimbabwe, this system is part of its colonial legacy, having been predominant in all British colonies. The system is being abandoned in many countries. Its main advantages are simplicity and accountability of the individual Member of Parliament to a given geographic constituency. Its main weakness is that it wastes votes, as the votes of the losing candidate count for nothing.

List proportional system: This involves a closed party list. It gives the highest representation. Its main weaknesses are lack of accountability and domination by the party hierarchy.

Mixed member parallel system/ mixed member proportional system: These systems seek to combine the advantages of both the first-past-the-post and the proportional representation system. The two main advantages they combine are representation and accountability. In the mixed member parallel system, half of MPs are directly elected in constituencies and the other half from a party list. In the mixed member proportional system, half of the MPs are directly elected and the rest filled by a proportional representation formula. In recent times, these systems have been introduced in Scotland, Wales, Lesotho and New Zealand.

Apart from determining the electoral system, there are other pertinent issues which must be considered in the way a constitution addresses electoral issues. The most pertinent issues are:
Gender Quota: The electoral system must ensure that there is adequate representation of women in Parliament. Given the historical under representation of women in political parties and parliament, a gender quota is recommended.

Diaspora vote: In general, all citizens must be accorded the right to vote. In Zimbabwe, it is recognized that many citizens who have left the country are still active in its economic activities, such as by sending remittances. A diaspora vote should be provided for.

Independent Electoral Commission: This must be the bedrock of the electoral process with an obligation to conduct a free and fair election. It must also have capacity to settle electoral disputes, leaving only the most serious disputes to the courts.

3.4 Executive and Parliament

The central question within the constitution is: Should there be a strong Parliament or a strong Executive? The differences between parliamentary system and (semi-) presidential system are functional ones. For example, the separation of powers and the possibilities of dissolving of Parliament are important. Because Parliament is directly elected by the people,

only the people should be able to dissolve Parliament. If the President is directly elected, only the people should be able to recall him.

3.4.1 Parliament

It is misleading to assume that all parliamentary systems have weak executives and all presidential parliamentary systems have strong ones. Despite parliamentary sovereignty in the UK, Parliament is not particularly strong and the Prime Minister is not weak. The following aspects are relevant:

Strong Parliament: A parliamentary system with a Prime Minister elected by Parliament was considered favorable during the conference deliberations. The need for a strong Parliament in the centre to ensure stability was stressed. Parliamentary systems are seen as preferable as they avoid an over-dominance of the executive and, thus, ensure a power balance. Checks and balances are easier to achieve in a parliamentary systems and succession is more easily planned.

Parliamentary Sovereignty: Parliament's main duties are representation in law and decision making, oversight and only finally recruitment of the higher political personnel. These functions will be exercised towards the executive and other institutions such as the IEC, the Public Service Commission etc. These institutions need to be independent and not under the influence of executive power. Oversight should be in the hands of Parliament.

Participation: Parliament has the ability to offer the citizenry access to the leadership, and to act as a starting point for political participation. Only Parliament should have the right to (re)assemble Parliament.

Power of the Purse: Parliaments should have the power of the purse, since budget autonomy influences the effectiveness of Parliament, and the committees within Parliament.

Loyal Opposition: In order to ensure a strong Parliament, the opposition must not be seen as an enemy, but as a loyal contributor to the pillars of democracy. Government has to be responsive, but opposition has to be loyal to the state fulfilling its role. The respectful relationship between opposition and government is crucial for democracy.

Party System: The electoral system may give incentives to multi-party systems (proportional and mixed systems). However, intra-party structures and regulations on issues such as floor crossing are important. These should allow easy coalitions. For fair party competition, party funding should be controlled and has to be transparent. The constitution should also provide regulations to strengthen inner party democracy (gender quotas).

Code of Conduct: A leadership code of conduct as well as indemnity and immunity should be considered. Party discipline as well as freedom of mandate and defection has to be discussed.

Second Chamber: The second chamber should represent local interests. It has to play a crucial role in multilevel government, decentralization and regional power sharing.

3.4.2 Executive

Regarding the head of the Executive, the following aspects are important: No Direct Election of the President and/or Premier: It is believed by many that the direct election of the President or Premier gives the elected Head of State too much power. He can only be recalled by the people. Direct elections of the head of the Executive may lead to different majorities in Parliament and in Cabinet (cohabitation) causing a deadlock. A parliamentary system where the President is elected by Parliament (see South Africa) is favorable. If the Prime Minister and President are directly elected a deadlock is possible.

President should not be able to dissolve Parliament: Since Parliament is elected by the people, the power of dissolution of Parliament should not rely on the Executive alone. Parliament should never be dissolved against its own will. Some provisions should be made to counterweigh the Executive.

Number of Terms: There should be no dissolution of Parliament if a new President/PM is elected. Presidential terms should be limited.

Veto Power: Presidents/PM should only have a limited “suspensive” veto power. Immunity and indemnity should be consistent with the regulations on members of Parliament.

State of Emergency: In terms of the declaration of war or a state of emergency, the President should consult Cabinet and a parliamentary commission before making such declarations.

Only Formal Appointment of Constitutional Court: The President/PM should only formally appoint senior positions and formally be responsible for pardoning. There should be a parliamentary commission dominating these processes. For example, the President would have to appoint police commanders on advice of Parliament. A police service commission would be required for this. These commissions must be genuinely independent.

3.4.3 Cabinet

The head of the Executive chairs the Cabinet and Ministers.

Separation of Mandate: The separation of mandates and office is useful to avoid strong interrelationships and double loyalties between Parliament and Executive.

Cabinet Size, Reshuffle, Term Limits: The size of cabinet should be kept functional. The reshuffle of Cabinet has effects on accountability and it should be avoided. Term limits for Ministers/MPs may be considered.

Ministerial Code of Conduct: Ministerial codes of conduct should address ministerial conduct as well as indemnity or immunity.

No Censure of Individual Ministers only Whole Cabinet: The censure of individual members negatively affects Cabinet's work and continuity. Only a “vote of no confidence” against the whole Cabinet seems to be adequate.

Merit System in Ministerial Bureaucracy: Except for higher political positions of the parliamentary secretary, a merit system has to be introduced. The administration should be appointed on merit and in cooperation with an independent public service commission.

3.5. Judiciary and Oversight Institutions

Judiciary Appointment: It is crucial that the appointment process and the individuals involved are clearly defined. A transparent and fair appointment process will positively impact on the legitimacy of the oversight institutions. Judges would have to be appointed by the Judicial Service Commission on a merit basis. Therefore, the appointment of an independent judicial service commission is key.

Constitutional Court: The constitution should clarify the separation of the Constitutional Court from the Supreme Court. For an interim period it might be advisable to employ foreign courts (SADC, South Africa) to decide on constitutional matters.

Oversight Institutions and Independent Commissions: To ensure independent oversight it is advisable to establish independent commissions responsible for certain issues. The conference strongly advises the establishment of an independent Electoral Commission, a Human Rights Commission, an Auditor General and a Security Forces Commission via the constitution. Further commissions that whose establishment is currently discussed should be carefully considered to avoid proliferation of commissions with possibly overlapping mandates.

3.6. Customary Law and Transitional Arrangements:

Customary law and tradition are important as they regulate different aspects of civil law for a large number of people in Zimbabwe. It should therefore not be ignored but furthered and consciously developed. However, customary law must be in accordance with the bill of rights and cannot be used as a justification for discriminatory practices. An attempt should be made to develop a viable system of legal pluralism that gives justice to the respect for human rights and respects the role that customary law plays in the social structure of the Zimbabwean society.

Sandra Liebenberg: Reflections on drafting a Bill of Rights: A South African Perspective

1. Introduction

This paper contains reflections on the drafting of a Bill of Rights in a society which is undergoing a fundamental political and social transition. It draws self-consciously on my involvement in the drafting of the South African Constitution and in being involved in constitutional law teaching and litigation since its inception. I am aware that this represents an outsider perspective on the process of constitutional change in Zimbabwe, and that not all I say will be useful or appropriate in a context with a different history and political, socio-economic and legal culture. Nevertheless I offer these perspectives with humility in the hope that they will contribute to public and academic debate on the nature of a Bill of Rights in a future new Zimbabwean Constitution.

The basic departure point is that, in the absence of an independent, courageous and vigorous judiciary and civil society, a Bill of Rights cannot fulfil its objectives. Its transformative potential will remain unrealised. This aspect is dealt with in other papers to be presented at this conference so I will not dwell on this topic further.

2. The Role of a Bill of Rights in a Transitional Constitution

A Bill of Rights in a supreme Constitution usually sets out the fundamental values and normative commitments of a country. It functions to guide the legislative, executive and administrative conduct of the institutions of State. Furthermore, it provides a potentially powerful mechanism for civil society, communities and independent commissions to hold public, and in appropriate circumstances, private actors accountable for human rights violations. It is particularly significant in enabling marginalised groups, who lack access to political and popular power and influence, to assert and protect their fundamental interests.

The value of a Bill of Rights extends beyond the ethical importance of providing effective mechanisms of redress for human rights violations. A

vibrant, effective Bill of Rights can function to deepen democracy and enhance social and economic development which is responsive to the needs and views of the populace.

Given the significance of a Bill of Rights to the future ethical, democratic and developmental character of a society, its nature and contents warrant careful reflection and widespread public participation. Meaningful public participation is also required if the Bill of Rights is to be perceived as legitimate and genuinely responsive to the aspirations of ordinary people. A Bill of Rights that is not frequently invoked and used in a young democracy is no more than a paper tiger.

Like other constitutions drafting in periods of profound political contestation and change, one can anticipate that a future Zimbabwean Constitution will be 'simultaneously backward- and forward-looking[1]

In other words it will contain provisions which seek to respond, and possibly provide redress, for the injustices of the past. It will hopefully also contain provisions which lay the basis for the kind of future society that is envisaged. In this respect, the Bill of Rights reflects the fundamental normative commitments of the new society which is being constructed.[2] The 'backward looking' features of the Bill of Rights will be referred to in this paper as its 'restitutionary' features, and the 'forward looking' features as its 'transformative' features.[3]

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[1]Ruti Teitel *Transitional Justice* (2000) 191. Teitel's study shows that:
While the rule of law in established democracies is forward-looking and continuous in its directionality, law in transitional periods is backward looking and forward looking, retrospective and prospective, continuous and discontinuous (215).
See also R Teitel 'Transitional jurisprudence: The role of law in political transformation' (1997) 106 *Yale LJ* 2009-2080.

[2]Teitel (2000) ibid describes this 'constructivist' role of constitutions in transitional societies. A constitution of this nature, 'explicity reconstructs the political order associated with injustice' (197). She describes such constitutions as 'agents in the construction of transformation' (200). See also R Teitel (1999) ibid 2075-2080.

[3]The description of South Africa's constitution as 'transformative' derives from a seminal article by Karl Klare: K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146–188. The notion of 'transformative constitutionalism' has found a deep resonance in academic literature, the jurisprudence of the courts, and civil society campaigns for social justice. For jurisprudence pertaining endorsing the concept of 'transformative constitutionalism', see *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 157; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 73–74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) paras 51–52; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) para 100.

Having said this though, I should immediately note that there is no watertight distinction between these two dimensions of a Bill of Rights in a transitional society and often a considerable measure of overlap and interrelatedness. Thus the same provision in the Bill of Rights can have both restitutionary and transformative dimensions. Nevertheless I believe it is useful to distinguish between these two dimensions as make clear that the Bill of Rights should not only be about looking backwards, but also about envisaging and engaging in public deliberation on a future society. It requires openness and a commitment to responding to the emergence of new forms of injustice and systemic marginalisation in the future.[4]

3. Restitutionary Features of a Transitional Bill of Rights

In its backward looking aspect, the Constitution aims to facilitate the transformation of society by setting right the wrongs of the past. Again how these wrongs are perceived and responded to in a Bill of Rights is a matter for widespread consultation and public participation.

In the South African context, the 'wrongs' of the past arise from the complex, interaction of colonialism, apartheid and capitalism over a period of four centuries. There are many provisions in the Bill of Rights of South Africa's 1996 Constitution[5] that seek to redress these past injustices. Thus the equality clause in the Bill of Rights (s 9) contains an express provisions relating to 'restitutionary equality', permitting legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' in order to promote substantive equality.[6] As Moseneke J (as he then was)[7] stated in the leading case on restitutionary equality, positive measures are required to progressively 'eradicate socially constructed barriers to equality and to root out systematic or institutionalised under privilege.'[8]

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[5]The Constitution of the Republic of South Africa, 1996 (hereafter 'the 1996 Constitution'). The Bill of Rights is contained in chapter 2 of the Constitution.
[6]Section 9(2). Equality is defined in this provision to include 'the full and equal enjoyment of all rights and freedoms.'
[7]He is now the Deputy Chief Justice.
[8]Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) para 31.

This restitutionary dimension can be seen most clearly in the property clause (s 25) which incorporates both a protective and a reform dimension.

The protective purpose seeks to protect existing property rights against unconstitutional state interference in the form of either arbitrary deprivation of property,[9] or expropriation which does not comply with the purpose and compensation requirements of sections 25(2) and (3).[10] But even in this protective dimension the restitutionary elements are evident. Thus property can only be expropriated for 'a public purpose or in the public interest.' [11]Section 24(4) defines the public interest to include 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.' Moreover, a number of factors are listed to guide the parties or a court to determining what would constitute 'just and equitable' compensation for the expropriation of property. [12]These factors include 'the history of the acquisition and use of the property'.[13] In the mix of factors, the market value of the property is only one consideration in the determination of just and equitable compensation.[14]

The reform purpose of the property clause is reflected in the provisions which mandate land and related reforms in property holdings and law. They are contained in sections 25(5) to 25(9) of the property clause. Section 25(5) places a positive obligation on the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions

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[9] The leading case concerning the meaning of 'arbitrary' deprivations of property in s 25(1) is First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC). On the distinction between deprivation and expropriation of property, see Van der Walt ibid 209-237.

[10] The deprivation provision is contained in s 25(1), stating that: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[11]Section 25(2)(a).

[12]Section 25(3).

[13]Section 25(3)(b).

[14]Section 25(3)(c).

which enable citizens to gain access to land on an equitable basis.' Section 26(6) entitles person or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices to either tenure which is legally secure or to comparable redress. Tenure security in terms of this provision must be provided by an Act of Parliament.[15] Section 26(7) deals with land restitution. It provides that 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'[16] Finally, section 28(8) provides that no provision of the property clause should 'impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination. However such measures must conform to the requirements of the general limitations clause (s 36(1)). This means that they must be (a) in terms of a law of general application and (b) reasonable and justifiable in terms of an open and democratic society based on human dignity, equality and freedom. In essence they must have a purpose which is consistent with these values and the measures must be proportionate to the achievement of these goals.[17]

These represent two important examples in the Bill of Rights of measures aimed specifically to redress the injustices of the past.

[15]Key legislation which has been enacted to provide for tenure security is the Interim Protection of Informal Land Rights Act 31 of 1996, the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998, the Communal Land Rights Act 11 of 2004.

[16]The relevant legislation is the Restitution of Land Rights Act 22 of 1994 as amended by the Restitution of Land Rights Amendment Act 48 of 2003. See also the leading decision in *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC).

[17]See the factors listed in s 36(a) – (e) which must be taken into account in considering the proportionality of relevant measures.

4. Transformative features of a transitional Bill of Rights

As discussed above, the transformative dimensions of a Bill of Rights reflect the kind of future society which the Bill seeks to facilitate. In his significant article on the transformative nature of the South African Constitution, Karl Klare describes it as a 'post-liberal' constitution. As described by Klare:[18]

In support of a postliberal reading, one would highlight that the South African Constitution, in sharp contrast to classical liberal documents is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission. To put it another way, the Constitution embraces a vision of collective self-determination parallel to (not in place of) its strong vision of individual self-determination. (footnotes omitted)

In other words, the South African Bill of Rights represents a departure from many of the dichotomies and divisions of classic liberal constitutionalism. These include a blurring of the sharp distinction which the latter seeks to draw between negative and positive rights, public and private law, rights versus democracy, and individual versus communal redress for human rights violations. It is concerned with guaranteeing the substantive (real and effective) enjoyment of rights and freedoms as opposed to simply formal protects in laws or judicial pronouncements. Thus, in terms of section 7(2) of the Constitution, the State is required not only 'to respect' and 'protect' the rights in the Bill of Rights, but 'to promote' and 'fulfil' them. This formulation derives from the works of Henry Shue who argued that the effective guarantee of all human rights – whether classified as civil and political, or economic, social or cultural –

[18] Klare (note 4 above) 152-153.

requires a combination of negative duties of restraint on the State, and positive duties to protect and ensure rights.[19] It has also been incorporated in a number of international human rights instruments, and jurisprudence.[20]

The Bill of Rights is described as 'a cornerstone of democracy in South Africa,' enshrining 'the democratic values of human dignity, equality and freedom.' (emphasis added). Thus instead of highlighting the counter-majoritarian dilemma traditionally associated with justiciable Bills of Rights, the Bill of Rights is viewed as an integral part of democracy. It enhances and deepens participatory and deliberative democracy alongside the institutions of representative democracy which are protected through the political rights in section 19 of the Constitution.

A postliberal constitution typically exhibits a contextual, dialogic conception of the separation of powers doctrine as compared with the rigid, bounded conceptions associated with classic liberal constitutionalism.[21] Thus the Constitutional Court has generally emphasised that the Constitution does not envisage bright-line boundaries or a competitive model of relations between the three spheres of government (national, provincial and local). Instead it emphasis a flexible and co-operative relationship between the different branches and spheres of government.[22]

The choices that have been on the substantive rights (and the method of

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[19]H Shue Basic Rights, Affluence and US Foreign Policy (1980).

[20]See, for example, the decision of the African Commission on Human and Peoples' Rights in *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic, Social and Cultural Rights v Nigeria* Communication no. 155/96 (2001) AHRLR 51 (ACHPR 2001) paras 44-48.

[21]These features of the South African Constitution are elaborated upon in detail in my forthcoming book: S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative* Constitution (forthcoming 2010, Juta & Co), chapter 2, 2.4.

[22]See generally Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa 1996 1996 (4) SA 744 (CC), para 11; De Langa v Smuts NO 1998 (3) SA 785 (CC), para 60.

their formulation) in the Constitution, as well as the operational provisions of the Bill of Rights illustrate the break that has been made with classic liberal constitutionalism. I consider some examples of each of these in turn.

4.1 Substantive Rights

Equality and non-discrimination

The Constitutional Court has endorsed a substantive as opposed to a formal interpretation of the right to equality and guarantee against direct or indirect unfair discrimination in section 9 of the Constitution. A substantive approach to equality is one which is concerned with remedying systemic and entrenched forms of inequalities with a view to furthering the goal of equal participation in all social institutions. Cathi Albertyn observes that a substantive approach to equality 'requires that judges and lawyers understand the context in which inequality occurs, and identify the social and economic conditions that structure action and create unequal and exclusionary consequences for groups and individuals.'[23] In other words, it is not concerned to examine only the form of the law or practice with a view to ascertaining whether it accords identical treatment to similarly situated groups.

The ground of prohibited unfair discrimination are broad and generous including sex, gender, race, sexual orientation, disability, ethnic or social origin, religion, language or culture.[24] The list of prohibited grounds is an open one leaving room for the emergence of new grounds of potential unfair discrimination. Thus, for example, the Constitutional Court has recognised HIV-status[25] and citizenship (in the form of discrimination against permanent residents)[26] in terms of s 9(3).

[23] C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253-276 at 259.
[24] Section 9(3).
[25] Hoffman v South African Airways 2001 (1) SA 1 (CC).
[26] Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 (1) SA 745 (CC); Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC).

The test for 'unfair' discrimination places disadvantage and impact at the centre of the inquiry regarding whether discrimination is unfair or not.[27] As mentioned above, section 9(2) expressly mandates the adoption of restitutionary equality (affirmative action) measures.

Civil and Political Rights

The Bill of Rights contains a broad and generous suite of traditional civil and political rights such as the right to life,[28] freedom and security of the person,[29] the prohibition of slavery, servitude and forced labour,[30] privacy,[31] freedom of religion, belief and opinion,[32] freedom of expression,[33] the right of assembly, demonstration, picket and petition,[34] freedom of association,[35] political rights,[36] citizenship rights,[37] freedom of movement and residence,[38] and fair trial rights.[39] In addition, it contains rights which protect and facilitate access to information,[40] just administrative action,[41] and access to courts.[42] All this rights can be viewed as essential to the protection and promotion of a humane, vibrant participatory democracy in which ordinary people are able to hold public and private actors accountable and responsive.

In contrast to most of the Zimbabwean proposals for a new Bill of Rights,

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[27]The leading case which established the general approach of the courts to the determination of 'unfair' discrimination is *Harksen v Lane NO* 1998 (1) SA 300 (CC) (see particularly para 51). See also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 enacted to give effect to s 9 of the Constitution.
[28]Section 11.
[29]Section 12.
[30]Section 13.
[31]Section 14.
[32]Section 15.
[33]Section 16. Certain forms of expression are expressly excluded from the ambit of the right. These are 'propaganda for war', 'incitement of imminent violence', or 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' (art 16(2)).
[34]Section 17.
[35]Section 18.
[36]Section 19.
[37]Section 20.
[38]Section 21.
[39]Section 35.
[40]Section 32.
[41]Section 33.
[42]Section 34.

nothing is expressly said in either the interim[43] or 1996 South African Constitution regarding the death penalty.[44] In S v Makwanyane 1995 (3) SA 391 (CC), the Constitutional Court found the death penalty to be in conflict with the right to life and the guarantee against cruel, inhuman or degrading punishment. Langa J (as he then was) held that the State should be a role model for society and demonstrate its own respect for human life and dignity by refusing to destroy the life and dignity of criminals. He linked respect for life and dignity and a de-emphasis on retributive justice with the African philosophical concept of ubuntu.[45] In this regard I would urge the participants in a new Zimbabwean Constitution to give careful consideration to the desirability of expressly allowing for the death penalty, even if its use is expressly circumscribed. Apart from its fundamental incompatibility with the founding constitutional value of human dignity, it swims against the tide of international human rights law and contemporary societies towards the abolition of the death penalty. On a more pragmatic level, it is bound to give rise to considerable amounts of litigation and administrative resources as the limits of this penalty are inevitably and continuously tested.[46]

Socio-economic Rights

The South African Constitution is renowned for its inclusion of a comprehensive range of justiciable economic, social, cultural and

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[43]Constitution of the Republic of South Africa Act 200 of 1993.

[44]Both s 9 of the interim Constitution ibid and s 11 of the 1996 Constitution state simply that every person (or 'everyone' in the case of the 1996 Constitution) has the right to life.

[45]*S v Makwanyane* paras 217 and 225. See also the judgment of Mokgoro J at para 308.

[46]See, for example, recent developments in the United States regarding the use of the lethal injection as a method of administering the death penalty.

[47]See, for example, ss 23 (labour relations), 24 (environmental rights), 25(5)-(7) (land reform), 26 (housing), 27 (health care, food, water and social security), 28(1)(c) (right of every child to basic nutrition, shelter, basic health care services and social services), 29 (education), 30 (language and cultural rights) 31 (the rights of cultural, religious and linguistic communities), 35(2)(e) (the rights of prisoners and persons deprived of their liberty to conditions of detention that are consistent with human dignity). The drafting of the core socio-economic rights provisions in sections 26 and 27 of the Constitution were influence by the International Covenant on Economic, Social and Cultural Rights (1966), particularly the concepts of 'progressive realisation' and 'within available resources' (compare art 2 of the Covenant with sections 26(2) and 27(2) of the South African Bill of Rights).

environmental rights in its Bill of Rights.[47] The motivation for including socio-economic rights on an equal basis to civil and political rights in the Bill of Rights had both restitutionary and transformative dimensions.

The restitutionary dimension arose from the insight that colonial exploitation and apartheid consisted not only of the denial of political rights and repression against the black majority, but was fundamentally constituted by systemic discrimination and lack of development in all spheres of economic, social and cultural life. The redress of the apartheid legacy of poverty and inequality required far-reaching positive and redistributive measures in areas such as education, housing, health care, water reform and social security. Without such measures the socio-economic legacy of the past would be perpetuated and continue to generate classes of people marginalised from full participation in our young democracy. Many groupings in civil society and most of the political parties supported the inclusion of socio-economic rights in the highest law of the land.

The transformative or forward-looking dimension arises from the insight that rights are interrelated and interdependent. One cannot effectively protect one set of rights without also protecting the other. This insight is powerfully expressed by former President Nelson Mandela in a conference in 1991 on the constitution-drafting process:[48]

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[47]See, for example, ss 23 (labour relations), 24 (environmental rights), 25(5)-(7) (land reform), 26 (housing), 27 (health care, food, water and social security), 28(1)(c) (right of every child to basic nutrition, shelter, basic health care services and social services), 29 (education), 30 (language and cultural rights) 31 (the rights of cultural, religious and linguistic communities), 35(2)(e) (the rights of prisoners and persons deprived of their liberty to conditions of detention that are consistent with human dignity). The drafting of the core socio-economic rights provisions in sections 26 and 27 of the Constitution were influence by the International Covenant on Economic, Social and Cultural Rights (1966), particularly the concepts of 'progressive realisation' and 'within available resources' (compare art 2 of the Covenant with sections 26(2) and 27(2) of the South African Bill of Rights).

[48]N R Mandela 'Address: On the occasion of the ANC's Bill of Rights conference' in A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee, May 1991 (1991) 9-14 at 12.

A simple vote, without food shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.

In the landmark decision on socio-economic rights by the Constitutional Court, Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC), Yacoob J explains the implications of this interrelationship between civil and political rights and social and economic rights as follows:[49]

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing and shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights in chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

To date the Constitutional Court has decided about 13 major cases concerning the interpretation of the socio-economic rights in the Bill of Rights. However, there is an wide array of High Court and Supreme of Appeal jurisprudence also dealing with these rights.

The negative duties imposed by socio-economic rights are breached when

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[49]Ibid para 23.

legislative or other measures have the effect of depriving or impeding people's access to socio-economic rights. The State can only justify such measures if it complies with the stringent requirements of the general limitations clause (s 36).[50] The Constitutional Court has developed a sophisticated (but not unproblematic) model of reasonableness review for assessing whether the State has complied with the positive duties imposed on it by the various socio-economic rights included in the Constitution.[51] Reasonableness review seeks to strike a balance between, on the one hand, a court dictating the content of social and economic policies to government and, on the other, abdicating its responsibility to enforce these rights. As explained by the Court in Grootboom:[52]

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that themeasures do so, this requirement is met.

However, as cases such as Treatment Action Campaign and Khosa illustrate, reasonableness review can result in mandatory orders for the provision of tangible benefits to particular groups.

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[50]See Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC).

[51]The foundations of reasonableness review were laid in the cases of Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC), Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC); Khosa v Minister of Social Development; Mahlaule v Minister of Social Development (note…above). For a recent application of this approach in the context of water rights, see Mazibuko v City of Johannesburg (Case CCT 39/09) 2009 ZACC 28. For a description and critique of the reasonableness model of review, see Liebenberg (note 22 above), chapter 4.

[52]*Grootboom* ibid para 41.

In considering the manner and form of the recognition of socio-economic rights in a future new Zimbabwean Constitution, careful consideration must be given to the consequences of either excluding this group of rights altogether, or entrenching them in the weak form of judicially unenforceable directive principles of state policy.[53] The effect would be that persons who experience socio-economic disadvantage and vulnerability have much weaker mechanisms at their disposal to defend their interests and to hold the State accountable for meeting their basic needs. This can result in an undermining of the legitimacy of the Constitution among large sections of the populace. As argued by the civil society campaign for the inclusion of socio-economic rights in the South African Constitution:[54]

It is useful to see the constitution as a mirror…If this mirror does not show protection from shelters being demolished, does not show protection from being chased out of school or hospital queues, then it does not reflect the lives to which we aspire for all South Africans. If it is only a mirror that reflects the image of a more privileged sector of society then it is a constitution for only those people and not all the people.

If the decision is ultimately made to incorporate socio-economic rights in the form of directive principles of state policy which cannot be directly invoked before the courts, then I would urge the inclusion of provisions which enable the directives to be more than simply window-dressing. Thus a provision could be included, requiring organs of State to give effect to these directives in the adoption, formulation and implementation of policies, programmes and legislation. In addition, the judiciary should be

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[53]See, for example, the 'national objectives' in part II of the Kariba draft Constitution.

[54]Petition to the Constitutional Assembly by the Ad Hoc Campaign for Social and Economic Rights (19 July 1995) at 3-4. Extracts published in S Liebenberg and K Pillay (eds) Socio-Economic Rights in South Africa: A Resource Book (2000) 19-20.

required to promote the values and purport underlying these directives in their interpretation of all other provisions in the Bill of Rights. In so doing it is at least possible to facilitate an interpretation of the Bill of Rights which supports the realisation of social and economic rights.

Cultural and Religious Diversity and Legal Pluralism

A final issue that I wish to highlight in this context is the Constitution's approach to cultural and religious diversity and legal pluralism. As noted previously, the South African Constitution contains a number of provisions guaranteeing religious and cultural rights. The Constitutional Court has emphasised that religious and cultural diversity is not simply a fact that must be tolerated, but should be actively promoted and celebrated.[55] In addition, the institution, status and role of traditional leadership according to customary law is recognised, and courts are obliged to apply customary law when that law is applicable. [56]

However, the Constitution makes it clear that the recognition and application of religious, person or family law must be consistent with the Constitution.[57] Similarly the exercise of the rights of cultural, religious and linguistic groups 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'[58] Customary law must be applied by the courts 'subject to the Constitution and any legislation that specifically deals with customary law.'[59] The Constitution goes further and requires

[55]MEC for Education: KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC), para 65.

[56]Section 211.

[57]Section 15(3).

[58]Sections 30-31.

[59]Section 211.

every court, tribunal or forum when developing the common law or customary law to 'promote the spirit, purport and objects of the Bill of Rights.'[60] These provisions have resulted in the primogeniture rule as applied to the customary law of succession being declared inconsistent with the constitutional rights to equality and human dignity.[61] In the Shilubana case, the Constitutional Court recognised the right of traditional authoritiesto develop the living customary law so as to recognise a woman as Hosi (chief) of the community.[62] In this way, the Court reinforced the rights of communities governed by customary law to develop customary law to give effect to 'the spirit, purport and objects' of the Constitution.

South African constitutional law can be contrasted to the provisions in the current Constitution of Zimbabwe which effectively immunise personal and African customary law from challenge in terms of the non-discrimination clause in the Declaration of Rights.[63]

The status of customary law under a future new Zimbabwean Constitution clearly requires careful consideration. This important component of the Zimbabwean legal system should be recognised and affirmed in a future constitutional dispensation. However, customary law should be allowed to develop and flourish in accordance with the normative commitments and values of the new Bill of Rights. If it is excluded from constitutional influence, it will ossify large parts of the population will not enjoy equal protection under the Constitution. Both pre- and post-colonial history has

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[61]Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Com v President of the RSA 2005 (1) BCLR 1 (CC). The

[62]Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC).

[63]Section 23(3)(a) and (b).

shown that women are particularly disadvantaged when customary law is frozen in time through codification or when it is shielded from the influence of human rights law. The Constitution Court noted in the Shilubana case:[64]

As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.
And in the Gumede case, Moseneke DCJ held that:[65]

Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.

4.2 Operational Provisions

The transformative dimension of the Constitution is also reflected in its operational provisions. These concern the provisions in the Bill of Rights governing its application, standing to approach the court in respect of human rights violations, the limitation of rights, the interpretation of rights, and remedies for human rights violations. Each of these will be briefly considered in turn.

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[64] *Shilubana* (note 63 above) para 45.

[65] Gumede v President of the RSA and Others 2009 (3) SA 152 (CC) para 17.

Application

The Bill of Rights contains broad application provisions. It 'applies to all law, and binds the legislature, the judiciary and all organs of state.'[66] Provision is also made for the application of the Bill of Rights in relations between private parties, depending on 'the nature of the right and the nature of any duty imposed by the right.' [67]

In addition, when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum 'must promote the spirit, purport and objects of the Bill of Rights.'[68] Thus all forms of law are subject to the transformative influence of the Constitution. The Constitutional Court described the relationship between constitutional law and the common law as follows:[69]

[T]here are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

This is underscored by the Constitutional Court's interpretation of section 39(2) which places a general duty on the courts to interpret and develop all law – statutory, common law or customary law – in accordance with the 'objective normative value system' created by the Constitution.[70]

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[66] Section 8(1).

[67] Section 8(2) read with 8(3) (so-called 'horizontal application of the Bill of Rights').

[68] Section 39(2).

[69] Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC), para 44.

[70] Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) para 54.

One of the areas in which there has been substantial development of common law rules under constitutional influence has been in relation to changed statutory law and jurisprudence relation to the eviction of persons from their homes. A key constitutional provision in this context is section 26(3) which reads:

No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 ('PIE') has been enacted to give effect to this constitutional guarantee. In the leading case on the interpretation of PIE, Port-Elizabeth Municipality v Various Occupiers[71] Justice Sachs underscores the fundamental changes it brings about in the judicial approach to eviction applications:[72]

In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-one with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and

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[71] 2005 (1) SA 217 (CC).

[72] Ibid para 23.

reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

This case along with a plethora of other eviction cases illustrates how the common law can be developed to accommodate the new rights and 'objective normative value system' introduced by the Constitution.

Standing

Section 38 of the Constitution makes broad and generous provision for persons who allege that a right in the Bill of Rights has been infringed or threatened to approach a court for appropriate relief. This includes –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;[73]
(d) anyone acting in the public interest;[74] and
(e) an association acting in the interest of its members.

The Constitutional Court has adopted an objective approach to standing in Bill of Rights litigation. It is not required that an applicant be personally adversely affected by the alleged human rights violation. It is enough that objectively a right in the Bill of Rights has been infringed or threatened, and the applicant can demonstrate, with reference to the categories in (a)–(e) above, that he or she has 'a sufficient interest' in obtaining the remedy sought.[75]

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[73] The leading case on class/representative actions is Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government 2001 (2) SA 609 (E); Permanent Secretary, Department Welfare, E Cape Provincial Government v Ngxuza 2001 (4) SA 1184 (SCA).

[74] On the criteria for granting public interest standing by the courts, see *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 18.

[75] This approach to standing was established by the Court in *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

Limitations

All the rights in the Bill of Rights are subject to limitation in terms of the general limitations clause (s 36). As noted above, s 36 requires a law of general application and all limitations of rights must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve its purpose.

The general limitations clause creates a relational approach to rights adjudication which is not premised on rigid boundaries between individual rights and collective interests. As Henk Botha argues, the general limitation clause is also dialogic to the extent that it institute a debate about the cogency of the justifications offered for the limitation of a fundamental right, and requires judges to articulate substantive reasons for their decisions, rather than simply declare the case to fall within a particular category.[76]

Interpretation

Another signification operational provision in the Bill of Rights is section 39 of the Constitution which sets out the general approach to be followed when interpreting the Bill of Rights. Thus a court, tribunal or forum -

(a) must promote the values that underlie and open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

[76] H Botha 'Metaphoric reasoning and transformative constitutionalism (part 2)' (2003) 1 *TSAR* 20-36 at 26.

Section 39 endorses a value-based approach to the interpretation of the Bill of Rights. The role of constitutional values in the interpretation of the Bill of Rights is described as follows by by Sachs J in Sidumo v Rustenburg Platinum Mines Ltd ('Sidumo')[77]

The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution.[78]

Section 39(1)(a) also requires the court to actively promote these values in interpreting the rights. This underscores the important role which the Constitution gives the courts of safeguarding and promoting the founding values of our society. It also indicates that the primary orientation of the South African Constitution is towards positive as opposed to negative constitutionalism. Herein lies the major distinction between transformative as opposed to preservative constitutionalism.

Sections 39(1)(b) and (c) indicate the openness of the Constitution to international and comparative law sources in the interpretation of the Bill of Rights. The process of interpreting and giving meaning to human rights

[77] 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC).

[78] Ibid para 149 (footnotes omitted).

norms can be understood as a dialogic process which includes a range of national and international actors. This may be one of the more positive features of globalisation, where the meaning accorded to fundamental human rights norms can be influenced by a cross-cultural dialogue extending across national boundaries. As Kent Roach observes:

A globalized world is one where people, including judges, engage in multiple and ongoing conversations that cross borders. It is hopefully a world characterized by a sense of openness, modesty, and willingness to learn from others.[79]

A willingness to consider alternative interpretations generated by other legal cultures and traditions destabilises the sense of naturalness and inevitability of the interpretations generated by our own legal culture and tradition. A constitutional culture that is relatively closed to learning from other cultures and experiences is inevitably an insular and limited one.

Remedies

A final and crucial aspect to be considered is the kinds of remedies which the Constitution mandates the courts to provide for violations of the Bill of Rights. The South African courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'[80] In addition, they enjoy broad powers to 'make any order that is just and equitable.'[81] Such orders include a suspended declaration of invalidity for a period and on any conditions to allow the competent

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[79] K Roach 'Constitutional, remedial, and international dialogues about rights: The Canadian experience' (2004–2005) 40 *Texas International LJ* 537–576 at 538.

[80] Section 172(1)(a).

[81] Section 172(1)(b).

authority to correct the defect,[82] a declaration of rights,[83] prohibitory or mandatory orders, exercising a supervisory jurisdiction, and compensation (or 'constitutional damages'). All have the aforementioned orders have been utilised by the courts in various cases. The Constitutional Court has emphasised the broader significance of developing effective, and, if need be, innovative remedies to vindicate constitutional rights: Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal.[84]The role of constitutional remedies should represent, in the words of former Constitutional Court judge, Kriegler J an 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause].' [85]In the absence of a broad array of remedial tools in its impossible to achieve this fundamental objective. It is therefore recommended that careful attention be paid to the question of constitutional remedies in drafting a new Constitution for Zimbabwe.

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[82]Section 172(b)(ii).

[83]Section 38(1).

[83]Section 38(1).

[84]*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69 (footnotes omitted).

[85] Ibid para 94.

5. Conclusion

Ultimately the Bill of Rights in a new Zimbabwean Constitution should be responsive both to the historical justices of the past, and reflect the kind of future society aspired to by the people of Zimbabwe. To achieve these dual goals will require widespread public participation as I have continually emphasised throughout this paper. Inspiration can be drawn from 'best practices' in other constitutional jurisdictions as well as the rich sources of international and regional human rights law, paying particular attention to the African regional human rights system of which Zimbabwe is part. It is in the spirit of contributing to an academic and public dialogue on the Bill of Rights for a future Zimbabwe that the reflections contained in this paper are offered.

Greg Linington:
Developing a New Bill of Rights for Zimbabwe:Some Issues to Consider

1. Introduction

If Zimbabwe is to have a meaningful future it must have a credible Bill of Rights. Of course, ensuring that human rights are upheld is something that ought to concern all Zimbabweans. But it is also about brushing up the (very bad) image the country has in the world. What follows below is a review of issues and problems that must be addressed if a new Bill of Rights is going to be effective. However, no matter how carefully a Bill of Rights is crafted, it can never be more than a document full of words. Its operation will require the existence of a culture of constitutionalism. This means (at least) that there must be an independent judiciary and an executive prepared to uphold and enforce court decisions. The absence of these things in today's Zimbabwe largely accounts for the crisis the country is in.

What is a 'Bill of Rights'?

Many constitutions today contain Bills (or Declarations) of Rights. These rights are 'justiciable.' That is, they are rights which can be enforced in a court of law. Such rights vest in 'persons.'[86] Section 113 (1) of Zimbabwe's current Constitution defines a 'person' as 'any individual or any body of persons, whether corporate or unincorporated.' Many constitutional rights may be enjoyed by both biological and corporate persons. For example, in Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General of Zimbabwe intervening)[87] Gubbay CJ said: 'Under section 20 (1) of the [Zimbabwean] Constitution the enjoyment of freedom of expression is conferred universally, on everyone, individual and corporate personality alike.'[88] The Supreme Court has ruled, however, that '… certain rights …

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[86]Greg Linington, *Constitutional Law of Zimbabwe* (2001), at 219.

[87]1996 (1) SA 847 (ZS).

[88]Ibid, at 854.

provided by the Constitution do not, by their very nature, apply to juristic persons (artificial legal persons).'[89] The right to life is an obvious example.[90] Property rights, on the other hand, may vest in both biological and corporate 'persons.' Obviously, it is important to ensure that a similarly broad definition of 'person' is contained in the new Constitution.

Application of the Bill of Rights

In the past, Bills of Rights always operated in an exclusively vertical manner. The rights concerned imposed a corresponding obligation on the state and its officials, but not on private persons. Thus, only legislation and state action was bound by the Bill of Rights. More recently, Bills of Rights in some countries have been designed to apply horizontally as well – at least in some circumstances. This means that constitutional rights may bind private persons and bodies. Horizontal application is provided for in section 8 (2) of the South African Constitution. That provision says: 'A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right' (emphasis added).

Anthea Jefferey has argued[91] that direct horizontal application may threaten the maintenance of the separation of powers between the legislature and the judiciary. She refers with approval to the decision of the South African Constitutional Court in Du Plessis and Others v De Klerk and Another.[92] The court held that horizontal application would require the judiciary to strike down common law rules regulating private

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[89] Lees Import and Export (Pvt) Ltd v Zimbank 1999 (2) ZLR 36 (S), at 45.

[90] Although one could perhaps argue that, unless and until it is wound up, a corporate entity has 'life.'

[91] Anthea Jefferey, 'The Dangers of Direct Horizontal Application,' *HRCLISA* (1997) 1, at 10.

[92] 1996 (15) BCLR 658 (CC).

relationships. Judges would then have to reformulate the common law concerned – a legislative function. Du Plessis was decided before the coming into force of the final 1996 South African Constitution. (The Interim Constitution did not provide for direct horizontal application.) The qualifying language used in section 8 (2) addresses the concerns raised by Jefferey and the Du Plessis court by recognising that horizontal application will not always be appropriate.

The 1996 Constitution also provides (in section 39 (2)) for indirect horizontal application. That provision says: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights' (emphasis added). Horizontal application, whether direct[93] or indirect, is mainly concerned with the constitutionality of the common law. Challenging the constitutionality of legislation will of course not engage horizontal application.

In Zimbabwe the courts have always applied the Declaration of Rights in a purely vertical way. Some provisions (for example, section 23, 'Protection from Discrimination') are set out in language that does not permit anything other than vertical application. But other provisions could be interpreted as imposing obligations on private persons. A new Constitution ought to expressly state that horizontal application – both direct and indirect – will be permissible in appropriate circumstances. Section 34 (2) of the Kariba Draft is very similar to section 8 (2) of the South African Constitution, although the former does not refer to the nature of the right. This is a pity, although 'nature' is probably implicitly contained in section 34 (2). It is the nature of a right that will of course determine whether horizontal application is appropriate or not.

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[93] Constitutional litigation on the basis of direct horizontal application is comparatively rare. See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) and Ian Currie and Johan de Waal, *Bill of Rights Handbook* (5th ed., 2005), at 51.

While on the subject of the Kariba Draft it is worth noting that section 34 (1) of the Draft, like section 8 (1) of the South African Constitution, binds the executive, Parliament, the judiciary and all state organs. Unlike the South African provision, however, section 34 (1) does not refer to 'all law.' This is unfortunate and ought to be changed. Arguably, legislation is covered by 'Parliament.' But what happens if someone wants to argue that a human right is being infringed by a rule of the common law relied on by the state? It may well be that the words 'all state organs' cover not only conduct by those organs, but also reliance by them on common law rules. However, since it is better to be safe than sorry, it would be wise to insert a reference to 'all law' into section 34 (1).

2. The Locus Standi Problem

In recent years human rights litigation in Zimbabwe has been adversely affected by the language used in section 24 of the Constitution (the enforcement provision) and by the judiciary's understanding (or lack of understanding) of that provision. What follows below is an analysis of section 24 and some of the cases that have interpreted and applied the section.

Direct Applications to the Supreme Court under Section 24 (1)

Section 24 sets out a number of options for enforcing constitutional rights. In the first place, subsection (1) provides for direct access to the Supreme Court. A person will only be able to utilise this procedure, however, if he or she is able to allege '… that the Declaration of Rights has been, is being or is likely to be contravened in relation to him'[94] (emphasis added).

In Mandirwhe v Minister of State[95] Baron JA said that the purpose of section

[94] Section 24 (1) of the Constitution.

[95] 1986 (1) *ZLR* 1 (S).

24 (1) is to provide '… speedy access to the final court in the land.' He added: 'The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual: constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the [Supreme Court] without protracted litigation.' [96]

But although direct access will sometimes be necessary in the interests of justice, it may retard the development of Zimbabwe's constitutional jurisprudence. On this view, a constitutional issue is more likely to be resolved correctly by the Supreme Court if it has previously been considered by a lower court. In Bruce and Another v Fleecytex Johannesburg CC and Others,[97] a decision of the South African Constitutional Court, Chaskalson P said:

'It is … not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without their being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.'[98]

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[96] Ibid.

[97] 1998 (4) *BCLR* 415 (CC).

[98] Ibid, at 419, paragraph 8.

The drafters of Zimbabwe's new Constitution will need to consider whether there ought to be an automatic right of direct access to the Supreme Court or whether – following the South African example – such direct access should be at the discretion of that court. If the second scenario is adopted, it might be advisable to ensure that the relevant constitutional provisions contain criteria to assist the Supreme Court in determining when direct access will (and will not) be appropriate. Obviously, urgency ought to be a factor. Section 167 (6) (a) of the South African Constitution says that the question of direct access to the Constitutional Court must be dealt with by 'national legislation or the rules of the Constitutional Court.'[99] Such access will be possible 'when it is in the interests of justice and with the leave of the Constitutional Court.' The relevant constitutional application for direct access must set out 'the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted.'

According to Kate Hofmeyr, an application for direct access to the South African Constitutional Court must address three issues: 'First … whether the applicant has exhausted all other remedies or procedures that may have been available. Secondly [whether] … the application is of sufficient urgency or public importance to warrant direct access. [Finally] … the prospects of success.'[100] But even if all of these questions are answered in the affirmative the Constitutional Court may still exercise its discretion against a direct access application. This has meant that it is impossible to predict with certainty when the Constitutional Court will allow direct access. In practice it very rarely does.

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[99]Section 167 (6) (a) of the Constitution.

[100]Kate Hofmeyr, 'Rules and Procedure in Constitutional Matters,' in Woolman et al (eds), *Constitutional Law of South Africa*, 2nd ed., vol. 1 (2007) at 5-19 to 5-20.

Even if an automatic right of direct access exists, as is the case in Zimbabwe, the requisite locus standi test must still be satisfied. As has been seen already, in Zimbabwe it is not enough that one has an interest in the matter when seeking to approach the Supreme Court directly in terms of section 24 (1) of the Constitution. The applicant's own rights must have been affected. Thus, in United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others[101] the applicant, a political party, wanted to challenge the constitutionality of provisions in the Electoral Act giving constituency registrators the right to object to the registration of voters, as well as the right to desist from having to take any action in respect of objections lodged by voters regarding the retention of their names on the voters roll. The Supreme Court held that the impugned provisions affected the rights of voters. Since political parties are not voters, the applicant was denied locus standi. Although issues concerning voters and voters rolls may have serious consequences for a political party, that does not mean – according to the court – that the rights of the party have been violated.

Perhaps the equivalent of section 24 (1) in a new Constitution ought to be broadened, so as to allow persons with a personal interest in a matter to approach the Supreme Court directly, notwithstanding that their rights as such have not been infringed. Provision might also be made for persons acting in the public interest. In both cases, the Supreme Court might be given a discretion to decide whether to entertain such applications directly, or to order instead that they proceed through the lower courts first.

The Effect of Physical Absence, Contempt and the 'Dirty Hands' Doctrine on the Right to bring a Constitutional Application

Recourse to section 24 will not be prevented merely because the applicants

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101 1998 (2) *BCLR* 224 (ZS).

physically outside the country. Even persons who may be guilty of contempt will not necessarily be precluded from instituting constitutional applications. In Minister of Home Affairs v Bickle [102] the Supreme Court held that the effect of section 24, as read with sections 18 (1) and (9) of the Constitution, is that courts cannot, except in the most exceptional circumstances, deny aggrieved persons access to them.[103] Fieldsend CJ said: 'This constitutional right of access should prevail unless it is plain that the contempt either of any process or of the law of which the applicant may be guilty itself impedes the course of justice' (emphasis added).[104] The learned Chief Justice referred with approval to the English decision of Hadkinson[105] v Hadkinson where Denning LJ said: 'It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.[106] In the Bickle case Fieldsend CJ said: 'The public policy consideration in this case appears to me to be governed by section 24 of the Constitution.[107] He added:

‘It is interesting to note that in England, where until 1879 there was a

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[102]1983 (1) ZLR 99 (5).

[103]Ibid. at page 106.

[104]Ibid.

[105]1952 ALL ER 567 (CA).

[106]Ibid. at page 574, quoted by Fieldsend CJ at pages 106-107 of *Minister of Home Affairs v Bickle*, (*supra*).

[107]At page 106 of the judgement. The facts of the *Bickle* case were as follows: Mr Bickle (who later became the respondent when the case went on appeal) had instituted legal proceedings against the Minister challenging the validity of an order made by the Minister declaring his property to be forfeited to the state. Bickle, a Zimbabwean citizen, was outside the country when he instituted the proceedings, and he had remained abroad. This was because although he intended to return to Zimbabwe, he feared that the Minister would unlawfully make a detention order against him. (The Minister, in the course of seeking to justify the forfeiture order, had made certain statements which 'justified Bickle's fear of detention should he return' (per Fieldsend CJ, at page 102 of the judgement)). The Minister argued, as a preliminary point, that Bickle had no right to institute proceedings because he had put himself physically beyond the jurisdiction of the court and was therefore a fugitive from justice. In the High Court, Gubbay J decided the point against the Minister, who then appealed to the Supreme Court. There Fieldsend CJ, writing for a unanimous bench, held that, as no process, either judicial or executive, had been issued against Bickle, he could not be held in contempt either of any process or of the law.

judicial procedure for declaring a person and outlaw, the courts did not deny a declared outlaw access to them without exception. In, for example, Hawkins v Hall[108] … an outlaw was allowed to apply to the court to set aside an attachment which had been irregularly issued against him and was successful in his application. See too Davis v Trevanion[109] …. If that principle were to be applied here Bickle, even if he were an outlaw, would be entitled to seek the protection of the court from the action taken against him and his property. He would be defending himself against what he alleges is an illegal action.'[110]

Notwithstanding the Bickle decision, the Supreme Court has more recently ruled in Associated Newspapers of Zimbabwe (Private) Limited v Minister of State for Information and Publicity in the President's Office and Others[111] that a corporate entity could not challenge the constitutionality of provisions in the Access to Information and Protection of Privacy Act[112] because it had 'dirty hands'. The applicant, the owner of a newspaper called The Daily News had failed to register in terms of the Act.[113] Because it had failed to comply with the impugned legislation, Chidyausiku CJ ruled that the applicant had 'dirty hands' such as to preclude it from proceeding with the constitutional application.[114] He said: 'The applicant's contention that it is not bound by a law it considers unconstitutional is simply

[108] (1856) 1 BEAV 73; 41 ER 109.

[109](1845) 14 LJ QB 138.

[110]*Bickle* (*supra*), at 107.

[111]Not yet reported, judgement no SC 20/03.

[112][Chapter 10:27].

[113]Section 66 of the Act stipulates that 'a mass media owner shall carry on the activities of a mass media service only after registering and receiving a certificate of registration in terms of this Act.'

[114]At page 10 of the cyclostyled judgement.

untenable. A situation where citizens are bound by only those laws they consider constitutional is a recipe for chaos and a total breakdown of the rule of law.[115] He dismissed the contentions that the applicant was not barred from proceeding because it had made an open and candid disclosure of its conduct and was acting in response to its conscience.[116] He said that '[c]itizens are obliged to obey the law of the land and argue afterwards.' [117]

Although the applicant raised the Bickle case in its heads of argument, the Supreme Court did not refer to it in the judgement. The court's failure to do so can only be described as astonishing.[118] Instead, the court relied on an English case, F Hoffman – La Roche and Co. A.G. and Others v Secretary of State for Trade and Industry[119] that had not been raised by either side in the proceedings and which was not in fact relevant. As Geoff Feltoe notes, 'the Hoffman case did not involve a constitutional challenge and the dirty hands doctrine was not an issue at all. [Moreover] … the court in the Hoffman case … certainly did not rule that a person who is arguing that a law requiring compulsory registration was a violation of his fundamental rights must first comply with that law before he is entitled to a ruling from a Constitutional Court regarding the constitutionality of that law.'[120] In fact,

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[115]Ibid.

[116]Ibid, at pages 11-13.

[117]Ibid, at 13.

[118]This point has been made by a number of academic writers who have discussed the case. See for example: Geoff Feltoe, 'Whose hands are dirty? An analysis of the Supreme Court judgement in the ANZ case' (unpublished paper in the possession of the author); Trust Maanda, 'An analysis of the Supreme Court judgement in the ANZ matter as read with the Constitution of Zimbabwe and the Access to Information and Protection of Privacy Act', *Zimbabwe Human Rights Bulletin* (2003) 9, page 151; Tawanda Hondora, 'Whose hands are dirty: the Daily News?' *Zimbabwe Human Rights Bulletin* (2003) 9, page 162; and Sir Louis Blom-Cooper, 'Mugabe's judges are paper tigers', *The Times*, 14 October 2003. The case is also discussed in Otto Saki, 'Independent voices gagged!' *Zimbabwe Human Rights Bulletin* (2003) 9, page 159; Alex Magaisa, 'Clean hands? Thou hath blood on your hands: a critique of the Supreme Court judgement in the ANZ case', *Zimbabwe Human Rights Bulletin* (2003) 9, page 165; and Nkosi Ndlela, *Critical analysis of media law in Zimbabwe* (2003) at 33-34.

[119][1975] AC 295.

[120]Feltoe (*supra*) at page 3.

the essence of the Bickle decision is that compliance with an impugned law is not a necessary prerequisite to challenging the constitutional validity of the law concerned. As Blom-Cooper points out, the dirty hands doctrine is not relevant in the context of public law since it '…applies exclusively in private law.'[121] Referring to English constitutional history he said:

'The Zimbabwean judges approach does not even have historical support, let alone modern authority. When John Hampden in 1635 refused to pay money in response to the decree of Charles I commanding support to furnish the navy's ships, the judges heard the case. After argument in the Exchequer Chamber, seven judges found for the king, holding that the monetary exaction was justifiable; five judges found for Hampden. The majority took the absolute view that the king can do no wrong – and certainly not during a state of emergency. Parliament's consent for taxation was held not to be necessary. The majority decision was reversed by the Long Parliament and the Bill of Rights declared that it was illegal to raise money without parliamentary approval. Doubtless, the Zimbabwean judges would say that Hampden had been defying the law of the land and could not challenge the king's edict in his courts.'[122]

In an American case, People v Hawkins,[123] a decision of the Illinois Supreme Court, it was held that a person's right to challenge the constitutional validity of legislation was not affected by his having 'dirty hands'. A similar approach was followed by the European Court of Human Rights in Van der Tang v Spain.[124]

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[121]Blom-Cooper (*supra*).

[122]Ibid.

[123]326 Ill 3.d 992.

[124](1996) 22 E.H.R.R. 363. Both cases are discussed by Feltoe (*supra*) at 4.

Clearly, a new Constitution must contain a provision which encapsulates the approach adopted in the Bickle case. The 'dirty hands' doctrine must not be allowed to preclude constitutional litigation. In order to develop an effective culture of constitutionalism, access to the courts on matters relating to the Declaration of Rights must be guaranteed in all circumstances.

Applications Made to the Supreme Court under Section 24 (2) during Proceedings in a Subordinate Court

Section 24 (2) of the Constitution says:

'If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.'

In Mandirwhe v Minister of State[125] Baron JA said that subsection (2) '… contemplates that proceedings have been commenced in the [High Court] or in a subordinate court in circumstances in which it was not anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects subsection (1) to be invoked.'[126]

So the trial does not have to be completed when the referral is made. In fact, it is important to understand that the proceedings are not transferred to the Supreme Court, only the constitutional question. Once that question has been answered, the proceedings continue in the court in which they commenced.[127]

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[125] 1986 (1) ZLR 1 (S).

[126] Ibid, at 8.

[127] Ibid.

A referral in terms of section 24 (2) will only be possible if there is a 'live' issue for the Supreme Court to consider. Issues that are of purely academic interest may not be referred.[128] The presence of the word 'shall' in section 24 (2) means that the lower court judge or magistrate must make a referral when requested to do so by one of the parties. It is only if a referral request is 'frivolous or vexatious' that it may be turned down.

In Mukonoweshuro v Mahofa,[129] an election petition case being tried before the Electoral Court, the petitioner applied for a referral to the Supreme Court of the question of whether or not the appointment of judges to the Electoral Court was inconsistent with sections 18 and 92 (1) of the Constitution. In a curious ruling Guvava J accepted that the issue was not frivolous and vexatious but declined to make the referral. She said:

> 'It is not disputed that the issue which has been raised in the Supreme Court is pertinent. In determining whether or not to refer a matter in terms of section 24 (2) of the Constitution the court must be satisfied that the raising of the question is not merely frivolous and vexatious. In my view the description "frivolous and vexatious" attaches to the raising of the question and not the issues forming the question. A distinction between the two must be made. While it appears to me that the content of the question cannot by any standards be described as frivolous and vexatious, the raising of the question on the other hand, especially the circumstances and the manner in which the question is raised leads to no other conclusion than that it is merely frivolous and vexatious' (judge's emphasis).[130]

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[128]This was the position in the *Mandirwhe* case.

[129]This is in fact a decision of the Electoral Court, established by the Electoral Act. It is therefore surprising that the judgement bears the heading 'High Court of Zimbabwe' and the judgement no HH 60-2005. In addition to the Election Petition number EP 10/05.

[130]Ibid, at pages 4-5 of the cyclostyled judgement.

She ruled that since the constitutional issue concerned was already pending before the Supreme Court in another case '… no useful purpose would be served by referring a hundred and one cases which basically raise the same point.'[131] She added that the 'sole reason' for not postponing the matter until the determination of the case before the Supreme Court was the need to complete election petitions within the time period – six months – prescribed by the Electoral Act.[132]

With respect, Mukonoweshuro was incorrectly decided. Guvava J erred in not making the referral when requested by the petitioner to do so. The question was not '… raised solely for the purpose of abusing the process of the Supreme Court'.[133] It is clear that both the constitutional question itself and the reason for raising it were valid. The petitioner rightly believed that it would be a waste of everyone's time were the trial to proceed, only to be nullified if the Supreme Court ruled, in the case pending before it, that the judges of the Electoral Court were not validly appointed. The petitioner would also incur considerable – and unnecessary – expense, in such a situation. The judge's contention that a referral would cause delay, so that the petition might not be determined within the stipulated six-month period, is also untenable. A referral in such circumstances would simply have had to be dealt with by the Supreme Court as a matter of urgency.[134]

Even if neither of the parties requests a referral, the court of first instance

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[131] Ibid, at page 5.

[132] Ibid.

[133] Ibid.

[134] See also *Bennett v Undenge*, not yet reported, Election Petition EP 11/05, where the petitioner requested that the same issue be referred to the Supreme Court. Makarau J declined to make the referral. She did not expressly state that the request was frivolous and vexatious. However, this is implicit in her comment, at page 1 of the judgement, that the request '… was raised on the assumption that the Electoral Court is a special court in terms of section 92 (1) of the [Constitution]. It is not.' For the reasons given above, it is submitted that the request for a referral was validly made.

may do so on its own initiative. This is what happened in Banana v Attorney-General.[135] There the issue was whether adverse pre-trial publicity meant that a fair trial had become impossible, contrary to section 18 (2) of the Constitution. It was held that the publicity had not reached a point that would preclude a fair trial. In addition, attention was drawn to the fact that judges, by virtue of their training, are less likely to be influenced by pre-trial media reports.

The referral procedure ought to be retained since it may help to expedite the resolution of human rights issues. Whether the language used in section 24 (2) could be improved in a new equivalent provision – so as to prevent the kind of adverse decision handed down in Mukonoweshuro – is doubtful. However, where no referral is made, the constitutional issue concerned may still reach the Supreme Court by way of appeal.

The Constitutional Jurisdiction of the High Court

The current Constitution does not expressly grant the High Court jurisdiction over constitutional matters. This is a pity because in a number of cases judges have thwarted important human rights litigation on the – erroneous – ground that the High Court has no right to adjudicate over constitutional issues. In fact, the High Court has a 'constitutional jurisdiction.' Section 81 (1) of the Constitution states that the High Court '… shall have such jurisdiction and powers as may be conferred upon it by or in terms of this Constitution or any Act of Parliament.' According to sections 13 and 23 of the High Court Act,[136] that court has full original civil and criminal jurisdiction over all matters in Zimbabwe. The words 'civil case' are defined in section 2 of the Act as meaning '… any case or matter which is

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[135] 1999 (1) *BCLR* 27 (ZS).

[136] [Chapter 7:06].

not a criminal case or matter.' Clearly, this includes constitutional cases and matters.

Notwithstanding these provisions, some controversy arose because section 24 (4) of the Constitution refers only to the constitutional jurisdiction of the Supreme Court. It does not refer to the High Court. However, in S v Chakwinya[137] Gillespie J, a High Court judge, made it clear that this does not mean that the High Court is powerless to give remedies to protect persons' constitutional rights.[138]

He said that section 24 (4) specifically mentions the Supreme Court

> '…ex abundante cautela and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue. Ubi ius, ibi remedium; and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it. The court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law.'[139]

In the Chakwinya case the High Court was concerned with a person's right to be tried within a reasonable time, in conformity with section 18 (2) of the Constitution. Because the facts disclosed that there had been a lengthy delay in this regard, the court ordered that proceedings in the matter be permanently stayed.

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[137] 1997 (1) ZLR 109 (H).

[138] Ibid, at 115.

[139] Ibid.

Gillespie J's interpretation of the ambit of section 24 (4) appeared to have been overruled by a subsequent Supreme Court decision, S v Mbire,[140] although that decision made no reference to Chakwinya. In Mbire Gubbay CJ said: 'It is only the Supreme Court that is empowered to make … an order [permanently staying criminal proceedings] under the authority of section 24 (4) of the Constitution when an application or referral comes before it pursuant to subsections (1) or (2).'[141] Read in the context of the judgement, however, it is clear that the Chief Justice's point was to make it clear that the Magistrates Court has no jurisdiction over constitutional issues.[142] He was not denying the High Court's jurisdiction in such cases. Gillespie J has himself construed the 'Mbire dictum' in this way in a subsequent High Court decision, S v Mavharamu.[143] In another High Court decision, S v Kusangaya[144] Devittie J said: 'The jurisdiction of the High Court to grant a stay of prosecution is consequent upon the exercise of its inherent review jurisdiction. I am satisfied that where rights enshrined in the Constitution are breached, this court has jurisdiction to grant an appropriate remedy. In my view, the provisions of the Constitution which provide for reference to the Supreme Court of constitutional questions, merely provide a procedural mechanism whereby constitutional matters may be raised by the lower courts for decision by the Supreme Court. The inherent jurisdiction of the High Court is not thereby affected.'[145]

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[140] 1997 (1) ZLR 579 (S).

[141] Ibid, at 581.

[142] See in particular Gubbay CJ's observation at 581 that '…the Magistrates Court had no jurisdiction to stay criminal proceedings upon the constitutional violation contended for.'

[143] 1998 (2) ZLR 341 (H) at 351.

[144] 1998 (2) ZLR 10 (H).

[145] Ibid, at 13.

In Banana v Attorney General,[146] a subsequent Supreme Court decision, Gubbay CJ ruled that '…the High Court [has] jurisdiction to entertain … applications in terms of section 24 (4).[147] He also held that the High Court has, in addition, an inherent common law constitutional jurisdiction.[148] In Banana the jurisdiction of the High Court was emphasised by the fact that Gubbay CJ actually criticised the High Court for making a referral to the Supreme Court under section 24 (2) of the Constitution, instead of determining the constitutional issue itself, although he accepted that the referral had been competently made.[149] The approach adopted in Banana is consistent with the Supreme Court's own earlier decision in Minister of Home Affairs v Bickle and Others.[150] There Georges CJ acknowledged the constitutional jurisdiction of the High Court. His[151] criticism of the High Court was limited to expressing the view that it

> '…should not, despite the wish of the parties, deal solely with the constitutional issue. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.'[152]

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[146] 1999 (1) BCLR 27 (ZS), also reported at 1998 (1) ZLR 309 (S).

[147] Ibid, at 30 and 313 respectively.

[148] Ibid.

[149] Ibid.

[150] 1983 (2) ZLR 400 (S).

[151] Ibid, at 432.

[152] Ibid.

In other words, his conclusion was that the High Court is entitled to deal with constitutional issues if a remedy depends upon it. Thus, the absence of any mention of the High Court in section 24 (4) does not affect the High Court's constitutional jurisdiction since an omission in that provision cannot limit or remove a jurisdiction conferred by both the High Court Act and the Common Law.

In spite of the Supreme Court's rulings in Banana and Bickle and the High Court's rulings in Chakwinya, Mavharamu and Kusangaya, a High Court judge handed down a decision in February 2003 in which he said that the High Court does not have any jurisdiction over constitutional matters! In the decision concerned, Nyamandlovu Farmers Association v Minister of Lands, Agriculture and Rural Resettlement and Another,[153] Ndou J completely ignored both the Banana and Bickle cases as well as section 81 (1) of the Constitution and sections 2, 13 and 23 of the High Court Act. He did refer to Chakwinya and Kusangaya, but stated that they were wrongly decided.[154] He relied instead on his own – flawed – understanding of what Gubbay CJ said in the Mbire case. As has been said already, the former Chief Justice's comments in Mbire on section 24 (4) must be read in the context of the judgement as a whole. Ndou J said in Nyamandlovu that the '…reference to the Supreme Court alone in section 24 is a deliberate limitation of the inherent jurisdiction of the High Court. It is consistent with making constitutional matters the domain of the Supreme Court sitting as a Constitutional Court. Section 24 does not mention the Supreme Court ex abundante cautela. It does so by design.'[155] In fact, as has already been shown above, the omission of the High Court in section 24 (4) does not in

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[153] Not yet reported, judgment no. HB 19/2003.

[154] Ibid, at page 7 of the cyclostyled judgement.

[155] Ibid.

any way limit the constitutional jurisdiction conferred on the High Court by both the High Court Act and the Common Law.

Ndou J also attempts to justify his conclusion by advancing the remarkable contention that because the Supreme Court normally sits as a five judge bench when hearing direct constitutional applications in terms of section 24 (1), this must mean that the High Court is precluded from dealing with constitutional matters![156] The Supreme Court has in fact often dealt with constitutional matters on appeal, sitting as a three judge bench. Finally, Ndou J makes some completely irrelevant references to the constitutional jurisdiction of courts in other countries.[157] Rather surprisingly, he cites a passage from my book, Constitutional Law of Zimbabwe, on another issue in a different part of his judgement, but ignores that part of the book dealing with the High Court's constitutional jurisdiction! The poor quality of the High Court's decision in the Nyamandlovu case, and the failure of the judge to apply binding Supreme Court precedents, is deeply disturbing.

Equally disturbing are the comments of Ziyambi JA in S v Makamba,[158] a bail application heard by a single Supreme Court judge in terms of rule 5 of the Supreme Court (Bail) Rules. She said that '…only a Constitutional Court is endowed with jurisdiction in [constitutional]

matters.' [159] This is not correct. High Court judges and Supreme Court

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[156]He says at page 7 of the judgement: 'It is only when [the Supreme Court] is so composed that it is in a position to deal with constitutional matters.'

[157]Ibid, at pages 7 and 9-10.

[158]Not yet reported, judgement no SC 11/04.

[159]Ibid, at page 12.

judges sitting either on their own or on a bench of less than five judges, may adjudicate on constitutional matters.

The Supreme Court's decision in Capital Radio (Private) Limited v Broadcasting Authority of Zimbabwe and Others[160] has – hopefully – finally put an end to the notion that the High Court lacks jurisdiction in constitutional matters. Chidyausiku CJ spoke of a litigant's right '…to institute a constitutional application in the High Court.'[161] He added: 'The provisions of section 24 do not, in any way, circumscribe the locus standi of an applicant in the High Court. In the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish locus standi. In a constitutional application in the High Court all that a litigant is required to show to establish locus standi is a substantial interest in a matter.[162] The High Court has now followed suit. In Chituku v Minister of Home Affairs and Others,[163] Makarau J expressly approved of the stance adopted in Chakwinya and Kusangaya. She said that section 24 (4) '…adds original jurisdiction on the part of the Supreme Court without taking away the inherent jurisdiction that this court has always had to redress any actionable wrongs brought to its attention.'[164] Thus section 24 (4) '…does not make the jurisdiction of the Supreme Court … exclusive for the purposes of non-suiting litigants before [the High] Court.'[165]

However, it would be a good idea if the equivalent of section 24 (4) in the

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[160]Not yet reported, judgement no SC 128/02.

[161]Ibid, at page 4 of the cyclostyled judgement.

[162]Ibid, at pages 4-5.

[163]Not yet reported, judgement no HH 6/04.

[164]Ibid, at page 7 of the cyclostyled judgement.

[165]Ibid, at page 8.

new Constitution were to contain a reference to the High Court. This would eliminate all doubt about the jurisdiction over constitutional issues.

3. Fundamental Values, International Law and the Interpretation of the Declaration of Rights

A South African Perspective

Zimbabwe's Constitution does not contain a preamble setting out the fundamental values of the Constitution (although the Declaration of Rights does contain a short preamble). The fundamental values of the South African Constitution are set out in the Preamble and section 1. They are:

a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b) Non-racialism and non-sexism.
c) Supremacy of the Constitution and the Rule of Law.
d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

These values ought to be included in a new Zimbabwean Constitution. In addition, a reference to 'access to courts' would also be appropriate. It may be that 'access to courts' is implicit in the 'rule of law' – how else is the latter to be upheld without the courts – but 'access to courts' must be listed as a distinct value. In recent years in Zimbabwe constitutional provisions, legislation and even the courts themselves have sought to deny persons access to the courts. This has been a serious problem in cases involving constitutional or human rights issues.

A new Constitution's interpretation provision must state that when interpreting the Constitution (particularly the Declaration of Rights) courts

must do so in a way that seeks to give effect to the fundamental values of the Constitution. In this way the importance of those values will be enhanced. Thus, for example, the validity of legislation establishing an 'ouster clause' would be tested against a Declaration of Rights that must be interpreted in the light of fundamental values such as 'access to courts.'

Section 39 of the South African Constitution says:

1) When interpreting the Bill of Rights, a court, tribunal or forum –
   a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;
   b) must consider international law; and
   c) may consider foreign law.
2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

This is a useful interpretation provision that could be of use in formulating an equivalent provision in Zimbabwe's new Constitution. What is of particular interest about section 29 is the requirement that South African courts 'must consider international law.' In Government of the Republic of South Africa and Others v Grootboom and Others[166] Yacoob J said:

> 'Section 39 … obliges a court to consider international law as a tool to the interpretation of the Bill of Rights. [However] … the weight to

[166] 2000 (11) *BCLR* 1169 (CC).

> be attached to any particular principle or rule … will vary. However, where the relevant principle or rule … binds South Africa, it may be directly applicable.'[167]

As used in section 39 (1) (b) 'must' is mandatory in nature, so that its effect is to impose a mandatory duty upon the courts to consider international law.[168] Richard Blake notes that even if the language of a constitutional provision is clear, the court's duty to consider international law remains.[169] It would appear that this duty exists regardless of whether the parties have themselves referred the court to international law. Yacoob J's use of the word 'obliges' in Grootboom is to the same effect. A failure to consider relevant international law by an inferior court would probably justify the Constitutional Court setting aside the decision concerned, at least where the relevant international law might reasonably be regarded as likely to have affected the court's decision.

Devenish says that the use of the word 'consider' means that courts are '… not necessarily [obliged] to apply the norms of international law.'[170] However, O'Shea sees significance in the shift from 'regard to' in the interim South African Constitution to 'consider' in the current South African Constitution.[171] He argues that 'consider' emphasises that merely looking at international law will not suffice: the court must 'genuinely consider' international law.[172] In other words, 'consider' embodies the idea

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[167]Ibid, at 1185, paragraph 26.

[168]De Waal et al, *Bill of Rights Handbook* (2001), at 141.

[169]Richard Blake, 'The World's Law in one Country: The South African Constitutional Court's Use of Public International Law' (1998) 115 *SALJ* 668, at 683.

[170]Devenish, A Commentary on the South African Bill of Rights (1999) at 622.

[171]O'Shea, 'International Law and the Bill of Rights,' *Bill of Rights Compendium*, at 7 A 2.

[172]Ibid.

of judges seriously and sincerely addressing their minds to international law.

It is to be hoped that Zimbabwean courts will also come to be under an obligation to 'consider' international law when interpreting constitutional provisions. The word 'consider' seems to strike the right balance between the need to take international law into account on the one hand, and fidelity to the text of the Constitution on the other.

4. The Kariba Draft

On the whole, the Kariba Draft is a disappointing document. However, some of its provisions are worth having a look at. Section 35 of the Draft is concerned with the interpretation of the fundamental rights and freedoms, and reads as follows:

Interpretation of Chapter III:

(1) When interpreting this Chapter, a court, tribunal or forum must -

- (a) give full effect to the rights and freedoms set out in this Chapter;
- (b) promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (c) consider international law, treaties and conventions; and
- (d) pay due regard to the other provisions of this Constitution, in particular the principles and objectives set out in Chapter II;

In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting a written law, and when developing the common law or traditional customary law, every court, tribunal and forum must be guided by the spirit and objectives of this Chapter.

It is obvious that section 35 has been strongly influenced by the equivalent provision in the South African Constitution (section 39). One difference is that the South African provision says that courts 'may consider foreign law.' No such language appears in the Kariba Draft. It is possible that 'foreign law' is implicitly included in the words '… other relevant factors to be taken into account.' It would be much better though if 'foreign law' was mentioned expressly. Probably its absence is due to ZANU PF's obsession with protecting Zimbabwe's 'sovereignty.'

Sections 9-12 of the Kariba Draft set out certain 'fundamental constitutional principles.' Section 9 (1) is particularly striking. It is entitled 'Authority of the People' and makes the very important point that since legal and political authority derives from the people it must be exercised 'solely to serve and protect the people's interest.' This theme is developed in subsection (2) which emphasises that public power must be exercised 'on trust for the people of Zimbabwe' and 'within the bounds of lawful authority.'

The responsibility of the state and the government to promote toleration, peace, unity and stability are the subject of section 10. Democratic principles are entrenched in section 11, but perhaps the most important fundamental principle is the 'rule of law' contained in section 12. Today the 'rule of law' is – rightly – understood as being more than just a synonym for legality. If we say that the rule of law applies in a certain country we mean that the laws – and the legal system – have attained a certain standard. If the laws uphold basic human rights, establish equality before the law and circumscribe discretionary power, then they are consistent with the rule of law.

The effect of section 35 (1) (d) of the Kariba Draft is to give the fundamental principles a 'radiating effect' in respect of the 'fundamental human rights.'

In other words, the Fundamental Principles influence – or even determine – the way in which the human rights provisions are to be understood. Unfortunately, the general interpretation provisions, sections 269-284 (i.e. those governing the interpretation of the entire Constitution, not just the Bill of Rights) do not call for the other constitutional provisions to be interpreted in the light of the Fundamental Principles. This is regrettable and ought to be corrected. However, even if no such correction occurs, modern purposive interpretation stipulates that constitutional provisions must be construed against the background of the Constitution as a whole. Thus, in this way, the Fundamental Principles may still influence the interpretation of the Constitution as a whole.

5. The NCA Draft

The interpretation provision in the NCA Draft (section 9) has also been influenced by the South African Constitution. Unlike the Kariba Draft, the NCA Draft does state that courts 'must consider relevant foreign law.'

In Constitutional Cases Concerning the Declaration of Rights, Courts must base their Decisions on Cases and Authorities cited in Argument by the Parties.

The courts – in particular the superior courts – have the power to determine 'what the law is.' The interpretation given to a provision in an Act of Parliament by a court may or may not be the same as that intended by the members of Parliament who enacted it. So statutory interpretation is a very important judicial power. It is therefore vital that this power should only be exercised after a hearing at which all of the parties have been allowed to make representations concerning the meaning of disputed legislation. A judicial decision which is not based on such representations can hardly be said to be fair. In a number of cases in recent years both the Supreme and High Courts have arrived at decisions not based on

arguments put forward by any of the parties. [173] Sometimes key points in those arguments have been completely ignored. It is doubtful whether such decisions are consistent with section 18 (9) of the Constitution which stipulates that everyone is entitled to a fair hearing before an independent and impartial court.

In Kauesa v Minister of Home Affairs Namibia and Others, [174] a decision of the Supreme Court of Namibia, Dumbutshena AJA (a former Chief Justice of Zimbabwe) said:

> 'It is the litigants who must be heard and not the judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants. [Sometimes however] … a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such circumstances to inform counsel on both sides and to invite them to submit arguments.' [175]

This is surely the approach that ought to be adopted by Zimbabwe's own judiciary. A new Constitution ought to contain a provision that encapsulates this kind of thinking. It should state that in constitutional litigation the bench must address the arguments submitted in the heads of arguments submitted by the parties. Although this is – probably – implicit in section 18 (9) of the current Constitution, it ought to be made explicit. If the court finds fault with the arguments submitted it may dismiss them but with reasons.

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[173] For example, see judgments of Chidyausiku CJ in Associated Newspapers of Zimbabwe (Pvt) Limited v Minister of State for Information, not yet reported, judgment no. SC 20/03; and Malaba JA in Quinnell v Minister of Lands, Agriculture and Rural Resettlement and Others, not yet reported, judgment no. SC 47/04.

[174] 1995 (11) *BCLR* 1540 (NMS).

[175] Ibid, at 1545.

Amending a new Bill of Rights

At present, all of the provisions in Zimbabwe's Constitution are amended in the same way. Section 52 (3) of the Constitution stipulates that Amendment Bills must receive '… the affirmative votes of not less than two-thirds of the total membership of each House.' (However, if the required votes in the Senate are not forthcoming, the House of Assembly can override the Senate.) [176] Should this remain the position under a new Constitution? Perhaps certain particularly important rights ought to be subject to a more stringent amendment procedure, with the parliamentary voting threshold raised to three-quarters of the membership of each House. Maybe some rights ought to be immunised against amendment altogether.

A number of provisions in the Declaration of Rights have been amended since independence. Some of these amendments were specifically designed to nullify court rulings on human rights issues. Thus, after the Supreme Court ruled in S v A Juvenile[177] that the imposition of corporal punishment on juveniles was a violation of section 15[178] of the Constitution, the provision was amended to state that such punishment is not inhuman or degrading! Obviously, handing down judgments only to see them nullified by constitutional amendments constitutes a waste of the court's time.

6. Property Rights

Land

Taken together, sections 16 A and 16 B of the Constitution have effectively

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[176] Section 52 (4) of the Constitution.

[177] 1989 (2) ZLR 61 (S).

[178] Protection against torture and inhuman and degrading punishment and treatment.

nationalised commercial farm land. Quite a number of the farms acquired by the state are covered by bilateral investment protection agreements.

Section 16 (9b) of the Constitution says:
Nothing in this section shall affect or derogate from–

(a) any obligation assumed by the State; or

(b) any right or interest conferred upon any person;

in relation to the protection of property and the payment and determination of compensation in respect of the acquisition of property, in terms of any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations.'

That provision came into force in December 1996, as a result of a constitutional amendment. However, in 2005 another constitutional amendment brought into being a new provision, section 16 B. Subsection (2) of that section says that 'notwithstanding anything contained in this chapter … no compensation shall be payable for [agricultural] land [acquired] … except for any improvements effected on such land before it was acquired.' In a recent decision the Supreme Court has made it clear that – in its own opinion – section 16 B (2) overrides section 16 (9b). Effectively, this means that the Constitution does not protect investment agreements covering what is deemed to be 'agricultural land.'

The words 'agricultural land' are not defined in the Constitution. This is cause for concern because almost any land is, in one way or another, potentially 'agricultural.' Section 16 B (2) (a) (iii) says that agricultural land may be acquired '… for whatever purpose, including, but not limited to–

A. Settlement for agricultural or other purposes; or
B. The purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
C. The relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B' (emphasis added).

Quite conceivably, therefore, this provision could be used to acquire residential, mining, and other land. According to section 16 (10) of the Constitution, 'land' '… includes anything permanently attached to or growing on land' (emphasis added). The import of the words 'permanently attached' is obvious. Note too the word 'includes,' which means that the definition is not exhaustive. Finally, this definition of 'land' operates 'in this section' (section 16 (10)) – i.e. within section 16. Section 16 B is a different section, so that 'agricultural land' as used in that section (i.e. 16 B) could be given a broader meaning.

Sadly, section 57 of the Kariba Draft essentially reproduces sections 16 A and 16 B. This is unfortunate because the whole economic future of Zimbabwe depends on the enactment of a Constitution that contains a sensible land rights provision.

General Property Rights: The Distinction between 'Deprivation' and 'Acquisition' of Property

A discussion of general property rights has to draw a distinction between 'deprivation' and 'acquisition.' Section 16 of Zimbabwe's current Constitution is entitled 'Protection from Deprivation of Property.' However,

no such protection is actually afforded by the provision. [179] In Hewlett v Minister of Finance[180] the Supreme Court held that section headings are not part of the substantive content of the Constitution. [181] Since the word 'deprivation' does not appear in the substantive portion of section 16, that provision provides no protection against compulsory deprivation of property. The word that does appear in section 16 is the word 'acquisition.' Thus, it is only if the state goes beyond depriving someone of his (or its) property and proceeds to itself acquire the property concerned that section 16 will be engaged.

In Hewlett monetary compensation had been awarded to the applicant under an Act of Parliament. However, the Act was subsequently repealed and the new legislation stated that no compensation awarded in terms of the repealed Act should be paid. So the state effectively cancelled the debt it owed to the applicant. The court held that the extinction of the debt was a deprivation, but not an acquisition, of the property concerned. Fieldsend CJ examined the distinction between the two concepts. He said:

> 'A liquor license, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a license to another without compensation it would almost certainly be unconstitutional. But if a government decided to introduce prohibition and to withdraw all liquor licenses it could not be said that by its mere extinction a licensee's license had been acquired.' [182]

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[179]Linington G, *Constitutional Law of Zimbabwe* (2001), at 447.

[180]1981 ZLR 571 (S).

[181]Ibid, at 590.

[182]Ibid, at 589.

Applying this approach to the facts before him, he held that

> '… the extinction of a money debt of the nature in issue here, with a consequent benefit flowing to the state that it is no longer liable to repay that debt, does not amount to acquisition of property by the state. To disregard the ordinary meaning of the words 'compulsorily acquired' so as to extend the limitation imposed by section 16 (1) to prevent the cancellation of an obligation voluntarily assumed by the state, as was this obligation, would be to extend unjustifiably the meaning of the clear words of the section.[183]'

On this basis, the applicant's case was dismissed. The decision in Hewlett was unsatisfactory in that it gave 'compulsory acquisition' an unduly formal meaning and took too little account of the benefit gained by the state from the extinction of the debt. Two South African academics have criticised the decision, observing that

> 'the literalist approach of Hewlett … reflects an uneasy approach of the court to the extension of the concept of property. While the court was willing to accept that the concept of "property" was broad enough to cover [debts], it was not willing to accept that the concept of "compulsory acquisition" was broad enough to cover what had happened to the [debts] as a result of the legislation. It seems that once "property" extends to cover incorporeal investments there must be a concomitant extension of the concepts of "compulsory acquisition" and "expropriation" to cover

[183] Ibid, at 596.

> situations where the state gains a benefit by extinguishing the incorporeal property of a private person.'[184]

Clearly, a narrow and formalistic understanding of 'acquisition' is unacceptable. Protection against certain forms of 'deprivation' of property must be provided in a new constitution. For example, mining rights and claims are forms of property and if they are extinguished or cancelled, either by legislation or through government action, compensation ought to be payable. Certain excessive forms of regulation on the part of government ought also to be seen as 'expropriation.' In Davies and Others v Minister of Lands, Agriculture and Water Development[185] Zimbabwe's Supreme Court had to consider whether 'designation' of land constituted expropriation. The effect of 'designation' was to severely limit what a landowner could do in respect of the land concerned. The value of the land was also lowered, and its marketability made more difficult. Notwithstanding these 'effects,' the court ruled that a 'compensable taking' of property had not occurred in the circumstances.[186]

In order to deal with problems of this sort what is required is a more sophisticated constitutional provision dealing with property. For example, section 26 of the Swiss Constitution addresses the issue of 'constructive expropriation.' The provision '… requires the state to compensate property owners for certain losses caused by limitation that was not intended but had the substantive effect of expropriation, even when the state did not acquire the property.'[187]

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[184] Chaskaslon M and Lewis C, 'Property,' in: Chaskalson et al (eds.), *Constitutional Law of South Africa* (1996), at 31-15.

[185] 1997 (1) SA 228 (ZS).

[186] Ibid, at 237.

[187] Van der Walt A J, *Constitutional Property Law* (2005), at 209.

Economic and Social Rights

Bills of Rights have always contained what are known as 'political' rights, such as: liberty, freedom of expression, freedom of assembly and association, freedom of conscience, protection of law, protection against torture and inhuman punishment and treatment. Some of the more modern Constitutions go further and entrench certain economic and social rights. For instance, the South African Constitution has provisions which provide for the rights to: housing; health care, food, water and social security; and education.

The problem with economic and social rights is the fact that upholding them may impose serious strains on a state's finances. This issue was considered by the South African Constitutional Court in Government of the Republic of South Africa and Others v Grootboom and Others, [188] a case concerned with the meaning of section 26 of the South African Constitution. Section 26 says:

1) Everyone has the right to have access to adequate housing.
2) The state must take reasonable legislative and other measures to achieve the progressive realisation of this right.
3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Writing for the court, Yacoob J said: '… The obligation to take the requisite measures … does not require the state to do more than its available resources permit. This means that both the content of the obligation in

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[188] 2000 (11) *BCLR* 1169 (CC).

relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'[189] (emphasis added). Does the state have a discretion to determine the level of resources to be made available? Or does the word 'available' impose an obligation upon the state to provide those resources that it is objectively capable of obtaining? The court held that it is for the state to determine what resources are available. The correctness of this decision is debatable. In another decision, Soobramoney v Minister of Health, Kwazulu-Natal, [190] the court said that when allocating resources, the state must act rationally and in good faith. [191] Moreover, if the court in Grootboom had referred to the Indian Supreme Court's decision in Pashim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another, [192] it might have realised that it actually has the power – and duty – to question the reasonableness of resources allocated by the state. 'Reasonableness' is a broader concept than 'rationality.' An allocation of resources will be reasonable if it reflects what the state can and should do in a particular situation. Samity was concerned with the allocation of financial resources to medical facilities. The court said: '... It is the constitutional obligation of the state to provide adequate medical services to the people. Whatever is necessary for this has to be done'[193] (emphasis added). Later the court added: '... The state cannot avoid its constitutional obligation ... on account of financial constraints.' [194]

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[189] Ibid, at 1192.

[190] 1997 (12) *BCLR* 1696 (CC).

[191] Ibid, at 1706.

[192] (1996) *AIR SC* 2426.

[193] *Samity* at 2431.

[194] Ibid.

Although the Indian court qualified its remarks by noting the need for a 'time bound plan [to] … be chalked out,' [195] it clearly regarded itself as having the power to question the allocation of state resources. [196]

The Constitutional Court held in Grootboom that 'the term "progressive realisation" [as used in section 26 (2) of the South African Constitution] shows that it was contemplated that the right could not be realised immediately. [197] I disagree. The right to housing is contained in a separate subsection[198] and ought therefore to be read separately. Had it been the intention of the creators of the Constitution to subject the right to housing entirely to progressive realisation, subsections (1) and (2) would no doubt have been fused together.

Another important consideration concerns the meaning of the word 'adequate' in subsection (1). 'Adequate' cannot be regarded as having the same fixed, limited meaning in all contexts. Thus something that would constitute 'adequate' housing in an immediate crisis situation – tents for example – might not constitute 'adequate' housing in a non-temporary, non-emergency situation. Contrary to the ruling of Yacoob J, the right to 'adequate housing' does not come into existence through 'progressive realisation.' Construed properly, it is clear that the right has existed since the commencement of the Constitution. 'Progressive realisation' is not responsible for establishing or creating the right to adequate housing but

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[195]Ibid.

[196]For more details see Greg Linington, 'The Role of International Law and Foreign Law in the Interpretation of a Bill of Rights: Some Lessons from South Africa.' *Zimbabwe Human Rights Bulletin* 2003 (10) 86 at 93.

[197]Grootboom, op. cit. n 52, at 1192, para 45.

[198]Subsection (1) of section 26.

rather with expanding and developing the content of the right. This point is well made by Craig Scott and Philip Alston. They state that '… positive rights … that involve "progressive realisation" – a realisation that deepens and expands with the passage of time – coexist with obligations with more immediacy in terms of the time span in which they must be met.' [199]

Support for the existence of an immediate minimum core housing right is to be found in article 2 (1) of the ICESCR, which obliges states '… to achiev[e] progressively the full realisation of the rights recognised in the … covenant' (emphasis added). Here 'full' seems to imply that some lesser content level exists until such time as fullness is attained. As De Waal et al note, '… that … full realisation … can only be achieved progressively does not alter the obligation of the state to take those steps that are within its power immediately….' [200] This is important because '[t]o read the principle of progressive realisation as incompatible with immediate duties to ensure key protections would be, in effect, to conceptualise duties to ensure positive rights as never capable of being violated, as constantly receding into the future.' [201]

As Zimbabwe moves towards a new Constitution it will be necessary to decide which – if any – economic and social rights are to be included in the Declaration of Rights. A forward looking approach ought to be adopted. Although the government of Zimbabwe does not currently have

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[199] Scott and Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's

[200] Legacy and *Grootboom's* Promise,' (2000) 16 SAJHR 206, at 227.

[201] De Waal et al, *Bill of Rights Handbook*, (2001), at 441.

[202] Scott and Alston, op cit n 184, at 227.

the resources to uphold economic and social rights in a meaningful way, drafters of the new Constitution must work on the assumption that the situation will improve with the passage of time.

7. Conclusion

This paper can scarcely claim to be a comprehensive review of issues relating to the Bill of Rights. However, I hope that I have at least drawn attention to some of the issues that must be addressed if Zimbabwe's new Constitution is to have a meaningful Bill of Rights. I wish I could say that I see academics influencing the constitution making progress in a worthwhile way. Alas, this is unlikely. When Isaac Bashevis Singer won the Nobel Prize for Literature in 1978, he said: 'We writers can't make the world a better place. We can't even make it worse.' Sadly, we lawyers and political scientists are unlikely to be any more successful, but we must at least make the effort. Which is why we are here today.

Hans-Peter Schneider:
Unitary and Federal States: Historical and Political Perspectives

1. Historical Introduction

The first documented federal system came into being among the ancient Israelite tribes over 3000 years ago. Of similar antiquity were the confederations of the Bedouin tribes and the Native confederacies in North America. The early leagues of Hellenic city-states in Greece and Asia Minor were designed to aggregate communal democracies to foster trade, political domination and military defence. The Roman Republic established asymmetrical arrangements whereby Rome became the federate power and weaker cities were attached to it as federal partners. Even the first Islamic state founded by the Prophet in Medina can perceived as a federation of independent communities. The medieval period saw self-governing cities in what is now northern Italy and Germany, and cantons in Switzerland linked in loose confederations for trade and defence purposes. The Swiss Confederation established in 1291 lasted despite some disruptions until 1847. In the late sixteenth century an independent confederation, the United Provinces of the Netherlands, was established during a revolt against Spain. Both the Swiss and Netherlands confederations were affected by the Reformation which sharpened internal disputes. This period also saw the first writing on explicitly federal theory, exemplified by the Politica Methodice Digesta of Althusius and subsequently by the efforts of German theorists to provide a grounding for a decentralised Holy Roman Empire.

Since the peace of Westphalia in 1648, the Dukes and rulers of the member states of the German Empire enjoyed full sovereignty, and their relationship to the Emperor became questionable. Several of the British settlements in North America, particularly in New England, were based on federal arrangements growing out of Reformed Protestantism. Following the American Revolution the newly independent states established a confederation in 1781. Its deficiencies, however, led to its transformation in

1789, following the Philadelphia Convention of 1787, into the first modern federation. Switzerland, after a brief civil war, transformed its confederation into a federation in 1848. Canada became the third modern federation in 1867. Germany followed as the fourth example in 1871. Not long after, in 1901, Australia became a full-fledged federation. In addition, during the latter part of the nineteenth century and the early twentieth century a number of Latin American republics adopted federal structures in imitation of the U.S. federation.

The second half of the twentieth century has seen a proliferation of federations as well as other federal forms to unite multi-ethnic communities in former colonial areas and in Europe. New federations or quasi-federations were founded in Asia, for example, in Indochina (1945), Burma (1948), India (1950), Pakistan (1956), Malaya (1948 and 1957) and then Malaysia (1963); in the Middle East, e.g. in the United Arab Emirates (1971); in Africa, e.g. Libya (1951), Ethiopia (1952), Rhodesia and Nyasaland (1953), Nigeria (1954), Mali (1959), the Congo (1960), Cameroon (1961), and Comoros (1978); and in the Caribbean, e.g. the West Indies (1958). Among the federations founded or restored in central and eastern Europe were those of Austria (1945), Yugoslavia (1946), Germany (1949) and Czechoslovakia (1970). In South America, Brazil (1946), Venezuela (1947) and Argentina (1949) adopted new federal constitutions.

Between 1960 and the late 1980s, however, it became increasingly clear that federal systems were not the panacea that many had imagined them to be. Many of the post-war federal experiments experienced difficulties and a number of them were temporarily suspended or abandoned outright. These experiences suggested that, even when undertaken with the best of motives there are limits to the appropriateness of federal solutions or particular federal forms In certain circumstances. Despite these

difficulties there has been a revival of interest in federal political solutions in the 1990s. Belgium (1993), South Africa (1996) and Spain (which as a result of the operation of the 1978 constitution has in practice become a federation in all but name) have been moving towards new federal or quasi-federal forms. In Italy too there has been pressure for the adoption of a federal system. Progress towards greater integration in what has become the European Union has also heightened interest in federal ideas. Political leaders, leading intellectuals and even some journalists increasingly refer to federalism as a liberating and positive form of political organisation.

A distinctive feature about the current popularity of federalism in the world is that the application of the federal idea has taken a great variety of forms. The degrees of centralisation or decentralisation differ across federations as do their financial arrangements, the character of their federal legislative and executive institutions, institutional arrangements for facilitating intergovernmental relations, judicial arrangements for umpiring internal conflicts, and procedures for constitutional amendment. Among interesting recent developments has been the acceptance in an increasing number of asymmetrical relationships of member units to federations or to supranational organisations. Examples in practice include Belgium, Malaysia, Russia, Spain and, following the Maastricht Treaty, the European Union. Another has been the trend for federations themselves to become constituent members of even wider federations or supranational organisations. Examples are Germany, Belgium and now Austria within the European Union. It is also worth noting that the three members of the North American Free Trade Agreement (NAFTA), Canada, the USA and Mexico are each themselves federations. Thus there has been an emerging trend towards three or even four (not just two) levels of federal organisation to reconcile supranational, national, regional and local impulses in order to maximise the realisation of citizen preferences.

2. The Notion of Federalism:

Definitions and Structures There has been much scholarly debate about the definition of federalism. For the sake of clarity we may distinguish three terms: ,,federalism," ,,federal political systems," and ,,federations." ,,Federalism" is basically not a descriptive but a normative term and refers to the advocacy of multi-tiered government combining elements of shared-rule and regional/local self-rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union. The essence of federalism as a normative principle is the perpetuation of both union and non-centralisation at the same time. ,,Federal political systems" and ,,federations" are descriptive terms applying to particular forms of political organisation. The term ,,federal political system" refers to a broad category of political systems in which, by contrast to the single central source of authority in unitary systems, there are two (or more) levels of government which combine elements of shared-rule through common institutions and regional self-rule for the governments of the constituent units. This broad genus encompasses a whole spectrum of more specific non-unitary forms, i.e. species, ranging from ,,quasi-federations" and ,,federations" to ,,confederacies" and beyond. Indeed, Daniel Elazar has identified the following as specific categories: unions, constitutionally decentralised unions, federations, confederations, federacies, associated statehood, condominiums, leagues and joint functional authorities.

Furthermore, other political systems outside the general category of federal systems may incorporate some federal arrangements because political leaders and nation-builders are less bound by considerations of theoretical purity than by the pragmatic search for workable political arrangements. Such considerations may also lead to hybrids such as the European Union which, although originally a purely confederal

arrangement, has in recent years been moving towards incorporating some features of a federation. Within the genus of federal political systems, federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens.

The generally common structural characteristics of federations as a specific form of federal political system are the following:

- two orders of government each acting directly on their citizens;
- a formal constitutional distribution of legislative, executive and judicial authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each order;
- provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber;
- a supreme written constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units or their representatives in the second chamber;
- an umpire (in the form of courts or provision for referendums) to rule on disputes between governments;
- processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.

3. Constitutional Principles of Federalism

Federal systems are based on a set of principles enshrined in the constitution as written or unwritten legal requirements:

Federal Freedom

An important feature of every federal constitutional order is federal ‚freedom', the quality of autonomous statehood (sovereignty) of the members of a federation and their organisational, material and functional independence of wider state structures. In the federal state all three powers - legislative, executive and judicial - are distributed between the federation and the member states. In so far as a constitution does not explicitly allocate competencies to the federation, the members are responsible for the fulfilment of state tasks and possess an autonomous sovereignty not derived from the federation. The autonomous statehood of the members is expressed above all in their power to establish their own constitutions, to create their own state organs and to structure the legal position of their citizens and the process of forming the political will as matters of their own concern (within the limits imposed by a minimum of structural homogeneity). In addition, and in so far as they have the legislative competence, they possess a share of external competence: they can conclude treaties with foreign states and accordingly even take an the status of subjects of international law.

The autonomous statehood of the members also requires financial independence from the wider state. The principle of ‚he who buys, pays' largely determines the type and extent of fulfilment of state tasks. A federal constitution therefore demands not just separate budgets for federation and members, but also allocates separate tax revenues to the members. Accordingly, it also bases their respective expenditures an a separate expenditure responsibility of the members and even provides for a ‚right' to have their necessary expenditures covered. Only with this financial independence the member states achieve that freedom of manoeuvre of autonomous political action which corresponds to the principle of federal "freedom" in federally structured states.

The principle of federal ‚equality' takes an greater relevance in the participation of the member states in the legislation and administration of the federation. It is concretised here as a ‚right' to political participation an the basis of equal rights which as a rule is realised via a second chamber alongside Parliament. For this reason, the second chamber consists in same federal states (e.g. the USA, Canada, Switzerland) of the same number of members from each sub-national entity, either elected directly by the people or indirectly by the sub-national Parliaments. By contrast, the Basic Law, following German tradition, opted with the Bundesrat (Federal Council) for an assembly of government representatives, whose entitlement to seats and votes is graded in relation to population size. North Rhine-Westphalia therefore currently has six members (and votes) in the Bundesrat and Bremen just three. This differentiation demonstrates that, in the Federal Republic at least, the principle of equality of Länder participation in the affairs of the federation is not realised in pure form. Thus, it has also some asymmetric features.

Federal Solidarity

The legal equality of competencies and status of different member states (in terms of size, population and financial capacity) presuppose forms of cooperation and compensation mechanisms which are rooted in a third element of federal order, the principle of federal "solidarity". The Basic Law itself speaks in this respect of the ‚social federal state' (Article 20/1 BL). What is meant here with regard to federal-state cooperation is the unwritten principle of "federal comity" (or courtesy), as reflected first of all in member-friendly behaviour on the part of the federation vis-a-vis its component units and on the part of those units vis-a-vis one another, and second, in the style and procedure in which federation and component units deal with one another. Inherent in this principle is the duty of federation and members to mutual support and consideration. All of those participating in a constitutional "union" are therefore required to work together in

accordance with the aims of the union and to contribute to its strengthening and to meeting the concerns of its component units.

The idea of federal solidarity has its effects primarily in fiscal and financial matters. With particular reference to "horizontal" financial equalisation, the Federal Constitutional Court of Germany has even spoken explicitly of a "solidary community" of the Länder. This provision translates into reality the federal principle of ,all for one, and one for all'. The principle applies not only to the relationship between federation and members, but also to the financial relations of the members to one another. It commits individual member states, irrespective of their autonomous statehood and financial independence, to providing support to other, financially weaker members. This applies similarly for the federation. It too has to take appropriate measures to even the differences in financial capacity of the individual member states - if need be through federal supplementary grants ("Bundesergänzungszuweisungen"). Beyond that it can award financial support to especially important investment projects of the members, and is constitutionally required to ensure that a member enters a financial crisis sufficient to endanger its liquidity. Seen in this light, the federal solidarity principle has an importance in the field of public finances which can hardly be exaggerated.

Federal Unity

Federal orders are subject finally to the principle of federal ,unity', which should not be taken to mean uniformity, hut rather agreement amid difference (concordantia oppositorum). What is sacrificed in a federal state is above all the establishment and maintenance of that unity of political action and effect which belong to the very essence of modern statehood. This requires that there should be a minimum level of homogeneity of fundamental constitutional principles at both the federal level and in the members, on whose basis such important aims of modern industrial

societies as unity of economic, monetary and social conditions can be achieved. This is above all the federation's responsibility, given its primary function in providing and taking responsibility for the cohesion of the political system in its entirety and variety.

When one speaks of federal "unity", this comprises not only unity of state action and effect, but also and always the uniformity or, better, the equivalence of living conditions in society. Without such a minimum level of social and economic homogeneity, a federal state would be exposed from the outset to the danger of fragmenting over the antagonistic differences of interest of its individual components and - as a number of contemporary examples have shown (eg. Canada and Yugoslavia) - gradually to fall apart a "rich" South and a "poor" North can, for example, be tolerated as long as the people do not see this as a condition determined by fate, but rather one which can be changed by their own efforts, and as long as a state compensation system ensures that differences of interest do not become so wide that they remove the barriers which hold back the pursuit of naked self-interest. Seen in this light, the federal system requires a high degree of altruism, self-sacrifice and self-control in the common conviction that the strength of the whole can only grow out of the welfare of the weak. For this reason, it is not just a moral appeal which lies behind the concern to overcome German division by "sharing", but also a deeply held federal principle with direct constitutional relevance. The question is whether and how far this principle was come in mind in the process of German unification.

4. Some Comparative Aspects of Federalism

Comparisons among federations are useful, but not because their institutions are easily exportable to different situations. Indeed, rarely do institutional structures applied to different countries work in the same way. The need to adapt them to differing social, economic and political

conditions invariably affects their operation. Nevertheless, comparative analyses arc useful because they give insights or draw attention to the significance of certain features in a particular political system. The ways in which similar institutions operate differently, in which different institutions operate in similar ways, and in which unique institutions or traditions affect the political processes which predominate, can help us to understand a particular federal system more clearly.

I will do so in terms of five sets of comparative questions. These are:

- the processes of federalisation;
- the social bases of federalism;
- the institutional structure of the federations;
- their political cultures, i.e. ideas of federalism;
- the functional dynamics arising from the interaction of the first four aspects.

Carl Joachim Friedrich has noted that federalisation may occur by either aggregation of formerly separate political units or by devolution through the granting of constitutional autonomy to political units formerly subordinate within a unitary political system or empire. In this respect, a simplistic contrast might be made between those federations like the United States, Switzerland and Australia which at their formation were created by aggregating distinct political units on the one hand, and Canada in 1867, the Federal Republic of Germany in 1949, India in 1950 and Nigeria in 1954 which emerged from preceding unitary political systems on the other hand.

W. S. Livingston in his classic work on constitutional amendment in federal systems emphasised the importance of the social basis of federalism. Indeed, he referred to federal institutions as the mere "instrumentalities"

of federal societies. From a comparative perspective, one might identify five aspects for consideration:

- the degree of territorial, ethnic or religious pluralism or homogeneity;
- the degree of economic regionalism or integration;
- the extent of economic disparities between the constituent units;
- differences in social and political ideology;
- the impact of the international context upon internal relations.

Among those federations where the territorial distribution of linguistic or religious groups and their concentration in constituent units is particularly notable are Switzerland, Canada (particularly in the case of Quebec), and some of the newer federations such as India and Nigeria. In such cases, federalism has provided a political expression for internal ethnic and religious cleavages. While such cleavages may sharpen the character of internal territorial diversity, it should be noted that in the case of Switzerland the situation is moderated by cross-cutting cleavages since the linguistic and religious cleavages do not coincide. By contrast, in Canada the religious and linguistic cleavages have tended to reinforce each other. One should note also the tendency to political polarisation in such bi-communal societies as Canada and Belgium, which contrasts with the tri-communal character of Switzerland or the multi-communal character of India and Nigeria. There are other federations, however, such as the United States and Australia, where the constituent units are not marked by sharp ethnic cleavages. In both these federations there is more general homogeneity although there are some variations of political culture and historical tradition. The same could also be said of the nine English-speaking provinces of Canada.

The international context of each federation is another factor which may affect internal relations and attitudes. A classic example has been Switzerland. With Germany, France and Italy as its neighbours there has been a long tradition of avoiding alliances which might be a source of internal disunity among its own linguistic groups. Another example is Canada. The Canadian provinces represent a string of beads along the United States border with their populations concentrated in a narrow band 100 miles wide and 500 miles long. In such a situation not only language and economic regionalism but relations with the United States have often caused internal contention. By contrast, in Australia and the United States, internal regionalism has been less affected by international relations. This is explained by Australia's continental isolation, and by the United States' domination of relations with its continental neighbours.

With regard to institutional structures turning first to the form of the distribution of powers between the orders of government, federations may be broadly grouped into two categories according to whether the allocation of legislative and executive authority for particular subjects coincides or is divided between different governments. In one category are the United States, Australia and Canada where generally legislative and executive responsibility for a particular area is assigned to the same government. Thus, in these federations, in constitutional terms the central governments generally have both legislative and executive responsibility for the areas of jurisdiction assigned by the constitution to them, and the states and provinces have both legislative and executive responsibility for the areas of jurisdiction assigned by the constitution to them. By contrast, the Federal Republic of Germany and Switzerland constitutionally concentrate much of the legislative authority in their central governments while constitutionally allocating administrative authority for many of those same areas in the Länder and the cantons. This arrangement makes possible the combination of a high degree of legislative centralisation with extensive administrative decentralisation.

An important factor affecting the character of inter-governmental cooperation and the expression of regional viewpoints within the institution of national government is the form of executive-legislature relationship existing within each order of government. Broadly, federations may be categorised in terms of whether the "separation of powers" between executive and legislature has prevailed within each order of government, or a parliamentary executive responsible to the legislature has been the arrangement within national and within state governments. The first two modern federations, the United States and Switzerland, both incorporated the separation of powers between executive and legislature within their national and state or cantonal governments as a further expression of the principle of the diffusion of authority considered to be the essence of federalism. The difference between the two was simply that in the United States federal executive authority was concentrated in a single individual, the President or the Governor, while in Switzerland the preference was for collegial executives within each government. A second category consists of those federations, Canada, Australia, the Federal Republic of Germany, Belgium, India and Malaysia, which have combined federalism and parliamentary executives. In these federations, legislative and executive authority has been fused within their national and within their state governments through making the executive directly responsible to the legislature.

Most federations have second chambers in two forms: In some federations the second chambers are indirectly elected by the legislatures of the states. The United States had that arrangement until 1912 and at the current time among parliamentary federations having this form of federal second chamber are Austria, India and Malaysia. The second form found in other federations has been a directly elected federal second chamber. The United States and Switzerland evolved to this form and Australia, a parliamentary federation, has bad it from the beginning. Germany has

been unique among federations in having a federal second chamber composed of representatives of the executives of the Länder, thus providing a constitutional expression of "executive federalism".

A second feature common to most parliamentary federations, by contrast with those incorporating the separation of legislative and executive authority within their national institutions, has been the weakened expression of regional and minority views within their national institutions. By comparison with the United States and Switzerland, in Canada and Australia the opportunities for the representation of provincial, state or minority views are more limited for two reasons, First, there has been the relative political weakness of their second chambers in the national Parliaments since the cabinets have been responsible to the other chambers (although the Australian Senate can on occasion exert some control if it is willing to contemplate double dissolution). Second, these federations have been marked by the prevalence of strong party discipline within the popularly elected chambers (including the Australian Senate). Here too the Federal Republic of Germany displays some of the tendencies characteristic of the other parliamentary federations, but the unique form of its parliamentary second chamber, the Bundesrat, has had a strongly mitigating effect. The extensive range of national legislation over which the Bundesrat is able to exercise a veto ensured the governments of the Länder a powerful influence upon national policy-making, and has created a strong inducement for national governments to take into account in their legislation the views of the various Länder.

Every federation has found it necessary to strike its own particular balance between the pressures for the provision of a uniform standard of services for its citizens and for the re-cognition of diversity. The clash between the values of uniform treatment for all citizens within a federation and of autonomous decision-making for regionally distinctive constituent units is

displayed particularly vividly in the realm of fiscal federalism. Thus, the use in many federations and most notably in the United States of conditional grants to support social programmes in less wealthy states has at the same time often limited the autonomy of state governments by influencing state priorities and expenditures. Parallels to this in Germany have been described as the "golden lead". The different balance between these two values that has been struck in different federations is exemplified by the differing proportions of unconditional as opposed to conditional transfers employed. In comparative terms the United States relies the most heavily on conditional transfers. Interestingly it is Canada and Germany which in their arrangements and fiscal transfers have most respected the autonomy of the regional units by having a large proportion of these transfers unconditional. Equalisation arrangements do play a major role in these two federations in assisting poorer provinces or states, but a large proportion of the total transfers of fiscal resources within these two federations are made with only rudimentary, or no conditions as to their expenditure imposed upon the recipient governments. Of special interest elsewhere are the efforts that have been made in Germany since reunification to cope with the problems of the new eastern Länder and the sharper disparities there.

5. Conclusions

Three concluding points arise from this review of federalism from a global perspective. First, the existence of two different sovereignties over one people on the same territory is not a contradiction, but a result of the constitutional division of powers and functions and their allocation to different levels of government. Thus, sovereignty in federal states is always divided and limited. Second, the different elements of federalism do display a number of similarities and differences with various aspects of federations, but in the United States on the one hand and more unitarian systems like India or the Federal Republic of Germany on the other hand,

they have been brought together in their own unique blend of institutions and processes. Third, both types of federations exemplify a complexity of institutions and processes which is typical of all federations. As Alec Corry, a noted scholar of Canadian federalism, used to say regularly to his students, "a neat and tidy mind is a crippling disability in efforts to understand the operation of federal systems".

Dele Olowu:
Decentralization and Local Government in the Zimbabwean Constitution

1. Introduction

Local community governance is essential not only for the practice of good governance but also of economic growth and development. For this reason most of the developed countries of the world, irrespective of their political or economic systems, have a robust system of local or community governance. This also explains why many developing and former communist states have made solid efforts to enhance the capacities of their systems of local governance since the third wave of democratic revolution swept through the world in the 1980s and 1990s and the results have been quite impressive. Africa may be the only exception to this general principle even though there have been some progress as well in some countries. Unfortunately, Zimbabwe has not been part of the good news as far as the effort to enhance the capacity of local governance is concerned. It is ironic that over time, the resilient institutions of local governance that were inherited at independence have deteriorated over time-both in the cities or in the rural areas. It is even further ironic that though community organs were crucial during nationalist struggles in the countries in which political independence involved military engagement between occupying powers and nationalist forces, the story of local governance has been lack-luster in these countries in Africa (Mozambique, Uganda, Angola, Ethiopia) once the nationalist party emerged victorious.

Local government, a statutory not a constitutional issue in many British influenced traditions have become de jure and de facto constitutional in many developing countries towards the end of the last century as they sought to strengthen their local government systems. Examples of countries that have written local government into their national constitutions include the following within and outside Africa: India, China, Indonesia, Philippines, South Korea, Brazil, Colombia, Bolivia, Uganda, Ghana, Nigeria and South Africa. [202]

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[202] Kersting, N, J. Caulfield, R. Andrew Nickson, D. Olowu & H. Wollman (2009) Local Governance Reform in Global Perspective, Urban and Regional Research International, VS Verlag fur Socialwissenschaften

It is also significant that research to-date shows that all through Africa, when people are allowed to freely express their preferences in Africa's emerging democracies, the people have often sided with the opposition rather than the governing forces at the central government level.

In this paper, we highlight why local government is essential for economic development, democracy and good governance as well as the challenges confronting local government in a country like Zimbabwe and the approaches that have been adopted to tackle such challenges. Finally, we take a close look at the provisions of the various Zimbabwe constitutions and constitutional drafts. However, we start with a clarification of the relationship between decentralization and local self-government.

Decentralization is the process of transferring planning, management responsibilities, resources, and authority and/or accountability arrangements from the central to sub-national or local organs of governance. Decentralization can take different forms: the dispersal of central government responsibilities through de-concentration or field administration or the delegation of specialized authority to manage executive agencies to a management team or via devolution of responsibilities, human and fiscal resources to locally governing bodies that are semi-autonomous from the national government, normally referred to as local authorities or government. The totality of local governing (government, private, civic, community) organs in a community constitutes the local governance architecture. Specifically, this paper is subdivided into the following subsections:

2. Local Governance, Economic Development and Good Governance

The Place of Local Government in the Zimbabwe constitution and constitutional drafts.

Local Government and Economic Development

Local governments make five important contributions to local economic development.

First, in most countries, they are assigned with the authority to provide the main local basic services that facilitate private economic production. Second, as a result of this first role, they set standards for other institutional actors to operate within their respective communities. Thirdly, they may contract other institutional –public, civil society and private, local and central government-- actors to produce basic local services. Sometimes, they compete with the local organs and at times collaborate with them and with one another to ensure that local citizens are provided with quality services. Fourthly, they also serve as agents of central government for the delivery and management of a wide variety of services. Finally, as a result of all these they contribute greatly to the integration of different types of local and public services and hence, to integrated local development. By their actions or inactions, they serve to attract or repel local economic actors (private and public, traditional and modern, domestic and external) into their domain[203]. For these reasons, local governments are responsible for the most basic (and not-so-basic) local services in industrialized countries and are responsible for up to 60% of the total government expenditure in some OECD (Nordic) countries whereas comparable figures in developing countries is lower –average of 23%. The exceptions are China and some of the federally ad quasi-federally–governed developing countries[204].

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[203] Olowu, D (1988) African Local Governments as Instruments of Economic and Social Development The Hague, International Union of Local Authorities, Publications 1415; Bennett, R (1994) Local Government and Market Decentralization: Experiences in Industrialized, Developing and Former Eastern Bloc Countries Tokyo, United Nations University Press

[204] China -51%, South Africa-27%, Indonesia-24%, Nigeria-23%, Brazil-20%. Shah 2006; Olowu, D & J.S. Wunsch (2004) *Eds Local Governance in Africa: The Challenges of Decentralisation* Boulder, Lynne Rienner Publishers

Here is some controversy in the literature on whether local governments can promote pro-poor outcomes. There are those who hold that of the three economic functions of government, i.e., allocation, stabilization and distribution, local governments can have the least impact on redistribution, which is the essence of poverty reduction[205]. In the World Development Report of 2004 however, the World Bank[206] argued that decentralized organs could promote pro-poor development through direct action by sub-national government (when there is devolution), by acting on service providers (through deconcentration) and through direct links between service providers and clients when there is a delegation to special purpose agencies. How this operates is a function of the nature of the services (whether easy or not easy to monitor), nature of politics (whether pro-poor or clientelist) and type of the community (whether homogenous or heterogeneous). Much of course depends on whether the national government adopts policies to empower local governments and/or the people and also whether local governments in turn empower other institutional actors and the citizens.

Pro-poor or not, local governance organs are critical to the development of basic services that are essential to economic and political development in all countries.

3. Local Government and Good Governance

Local governments contribute to improved governance in some five important ways. First, they help to increase participation in the governing processes, as more people are able participate (both formally through voting and informally through citizens' complaints etc) than would be the case if all that existed were national organs. It is also possible for local

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[205] Jutting, J, E. Corsi, A. Stockmayer (2005) 'Decentralization and Poverty Reduction' *Policy Insights No. 5* Paris OECD; Smoke, P (2006) 'Fiscal Decentralization in Developing Countries: Bridging Theory and Reality' in Y. Bangura & G. Larbi Eds *Public Sector Reform in Developing Countries: Capacity Challenges to Improve Se*rvices New York, UNRISD, pp.195-227

[206] World Bank (2004) World Development Report 2004 Making Services Work for Poor People, 74-75, 186-189

representatives to represent more people than national representatives and thus increase the people's voice in governance. On the other hand, it is possible that local government would lack so much lack capacity and would thus not be a respected or reasonable voice. We return to this point later on.

Second, local communities form the basis of representation in national assemblies and legislatures and thus further give voice to the local population even at the national level. One of the two organs in most bicameral legislatures are constituted on the basis of local representation—even in Zimbabwe the National Assembly is based on constituencies based on local community structure.

Thirdly, local governments by dint of their relative proximity to the people should at least theoretically be more accountable than national entities. Citizen access is likely to be easier both in terms of physical and socio-psychological distance but the reality may be different for a variety of reasons, which we review later.Fourthly, local governments promote solidarity with community members and are particularly effective in involving marginalized groups such as women and handicapped and youths. Many countries have actually mandated quotas for the representation of such marginalized groups in local government—e.g. India reserved a third of all local government seats for women and caste groups. This led to dramatic improvements in the visibility and extent of popular participation. Two states with the worst schooling and literacy rates recorded 20% increase in schooling and literacy between 1991 and 2001. More girls were also able to attend school than was possible in Rajasthan and Madhya Pradesh[207]. Similar experiences have been recorded in other countries. Similarly, decentralization and local

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[207] UNDP (2002) Human Development Report 2002, New York, Oxford University Press

government have become an important part of conflict resolution in many conflict –prone societies such as the Sudan, Nigeria, Ethiopia citing only examples from Africa.

Finally, local governments provide a framework for experimentation and innovation, partnership with other institutional actors and for citizenship. They could also help to promote information dissemination and citizenship education.

4. Prospects vs. Problems and Challenges

In essence, there are four main reasons why many central governments in Africa especially since the 1980s have given prominent emphasis to the importance of effective local governance: [208]

- MDG progress requires effective local institutions to manage the delivery of basic services such as primary health, primary education, water & sanitation, etc.;
- Poverty is caused as much by powerlessness as by lack of incomes and access to services, and participatory local institutions contribute to empowerment of the poor;
- Local governance can deepen democracy and strengthen the legitimacy of regional and national institutions[209];
- Effective governance, both local and national, requires "bottom-up" strengthening of capacity for accountable decision-making, resource management, and monitoring service delivery.

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[208] UNDP (2002) Human Development Report 2002, New York, Oxford University Press Millett, K, D.Olowu & R. Cameron Eds (2006) *Local Governance and Poverty Reduction in Africa* Tunis, Joint Africa Institute

[209] An important study on India showed that the population perceived local government structures as more effective and responsive than national and regional (state) entities. See Mitra, 2001

But there are also serious challenges and they include the following:

Sustaining Support for Decentralized Governance

The fundamental problem of decentralized local governance in developing countries is the fear of national leaders that the transfer of power represents a zero-sum game in which local leaders (who might also be politicians in a different party) gain power and resources at their expense. This could be a real problem in view of the nature of highly personalized nature of politics especially in many African countries and the tendency for the opposition to gain in strength in the major especially capital cities.

Those who initially supported democratic local governance may therefore develop cold feet and are not able to sustain the process. This is worsened by the extent to which the administrative elites are able to provide the details that make decentralization feasible as a positive –sum game in which all players win and the ability of community elites to demand and make downward accountability from local governance actors effective.

At the end, as Table 1 attempts to summarize the process perfectly, the state of decentralized governance often is the product of the balance between the forces in favor and against it in a country. Unfortunately, in many countries and in Zimbabwe in particular, the forces in power have been more against it than for it. The current struggle is however suggestive that there are latent forces for decentralized governance as well.

Table 1: Roles and Influence of Key Stakeholders in Initiating and Sustaining Decentralization

Phase	Political elite stakeholders	Bureaucratic Stakeholders	Community Stakeholders
Engaging Decentralization	Strength of Elite Political consensus for DG	Technical & Pol Insight to the complexity of DG	Strength of bottom-up pressure for DG
Detailing Decentralization	Consistency of DG details with political intent	Articulation & implementation of DG support requirements	Extent of involvement of CS and CBOs in technical details
Sustaining Decentralization	Balance between pol. Recentralizers & Decentralizers in power	Balance btw bureaucratic recentralizers and decentralizers	Capabilities of communities, CS and CBOs in enforcing downward accountability & supporting DG

Source: Adapted from Ndegwa & Levy 2004: 286

Disconnect

There is a disconnect between the national and local levels. Such disconnect between micro and macro, upstream and downstream aspects of economy and society fosters a less effective development process and overall development outcome—even though the local level may actually experience a deeper, more focused development impact.

In fact, in many developing countries, absence of or weak local capacity has been used as the reason why decentralization is doomed to fail. Hence policies designed to support their sustenance beyond an initial period have been put in place by only a few governments. Fortunately, there exists widespread international experience within developing countries that demonstrates the fact that decentralization and the building of local level capacity cannot only occur simultaneously but can be mutually reinforcing. Some national examples are highlighted in this paper.

Elite Capture and Corruption

A number of decentralization programmes have simply transferred power, authority and resources from a group of elites at the national to the local levels. Such elites might be traditional or conservative and against all forms of modernity or change or they might be transformative or corrupt. This simply fuels greater corruption at the local levels and there are fewer constraints against corruption and violence at these levels as effective rules against financial and human resource management corruption are weak if existent at all. The Bolivian bold attempt at decentralization in the late 1990s is one such example in spite of some positive advantages in a few localities.

Inadequate Human Resource Incentives

Weak individual (human resource) incentives put available capacities out of reach of district and community level authorities. For instance, the remuneration packages for staff at local communities are often set at levels lower than at the national government. But national governments are themselves also disadvantaged compared to other sectors –private and international--in the competition for scarce skills. In the age of globalization this has assumed a challenge of enormous proportions. While the conventional explanation that individual incentives are not exclusively monetary is correct, it hides the reality of the sharp disparities that exist between wage levels within the various sectors and also that workers at various levels lack the essential salary and non-salary incentives as well. That human resources constitute the crucial element in the strategic management of any organization is well accepted in all organizations today, public as well as private. It is quite clearly important for organizations engaged in local level development and local governance. Unfortunately, this issue fails to receive the critical recognition it deserves in capacity development initiatives by development partners, although this might be

changing –see below. Rather, there is preference for workshops and training rather than providing appropriate individual incentives. The result is workshop and training fatigue in many such situations. It is therefore instructive that a World Bank initiative in Uganda on capacity building relied on market forces that led to the return of substantial number of Ugandans both within and outside the country to return to work in local communities.

Another study noted the movement of many high level personnel to local communities in Nigeria following the bold reforms of the system of local government including massive inflows of revenues and tax sources[210]. On the whole, local governments' share of GDP is 12.7% in OECD countries but only 5.7% in developing countries[211]. This pattern is also reflected in human resource levels—OECD local governments have more personnel than their central governments and also double the global average for local governments. (See Table 2).

Table 2: Government Employment as % of Population

Region	Sample Countries	Total Gov't	Central Gov't	Local Gov't	Teaching & Health
Africa	20	2.0	0.9	0.3	0.8
Asia	11	2.6	0.9	0.7	1.0
E. Europe	17	6.9	1.0	0.8	5.1
L.America	9	3.0	1.2	0.7	1.1
MENA	8	3.9	1.4	0.9	1.6
OECD	21	7.7	1.8	2.5	3.4
Total	86	4.7	1.2	1.1	2.4

Source: Schiavo-Campo 1998

[210]Adamolekun, L (1999) 'Decentralization, Sub-National Governments and Intergovernmental Relations' in L. Adamolekun Ed Public Administration in Africa: Main Issues and Selected Country Studies, Boulder, Westview Press, pp. 49-67

[211]This does not include China whose local governments control 51% of the country's consolidated public expenditure, 10% of GDP and are responsible for 89% of total public employment.

A more recent survey of local governments in OECD countries by Wollman and Bouckaert[212] showed that even though local governments have suffered attrition in the Western world since the 1980s as a result of private sector like innovations (the new public management), their operations remain sizeable. Table 3 below shows the percentage of total public employment that the respective local governments were responsible for by 2000:

Table 3: Total Public Employment for Local Governments in selected OECD Countries

Country	%
United Kingdom	52.4
Sweden	82.7
France	48.4
Germany	88.5
Australia	88.8
Belgium	65.6
Canada	86.9
Italy	42.1
Netherlands	25.8
USA	86.5

Whereas local governments existed before national governments were created in most industrialized countries and have continued to be important political and economic entities, developing country national governments have sought to create prototypes of the Western local government structures, but they lack the essential powers, authority and resources. It is important to note that some developing countries have

[212]Wollman, Helmut and G. Bouckaert (2006) 'State Organization in France and Germany, between Territoriality and Functionality' cited in N. Kersting, J. Caulfield, R. Andrew Nickson, D. Olowu & H. Wollman*, Local Governance Reform in Global Perspective*, Urban and Regional Research International, VS Verlag fur Socialwissenschaften, 2009, p. 36

successfully improved the capacity of their respective local governments—in Asia (India, China already cited above, Philippines, South Korea, Indonesia, Japan etc). Schiavo Campo and McFerson[212] [213] note that the most important change that has taken place in the world of local government employment has been the increase of local government employment levels in Latin America to the same level as at the central government. A few countries in Africa—Nigeria, Ghana, Uganda, Zambia--have also increased their levels of local government employment in Africa. [214]

Institutional Incentives

A third challenge therefore for local level development is the nature of institutional incentives. Organizations function the way they are because of the institutional incentives, which exist or are missing. Organizations provide opportunities for cooperation among individuals and the organizational rules determine the response of these individuals to either cooperate or shirk. Hence, institutional incentives are those elements that make people who work in or with these organizations – as leaders, officials and clients – to display diverse behavior modes that either support or undermine local development.

When local development organs possess the following critical attributes they are able to improve development outcomes:

- clearly defined boundaries
- equivalence between benefits and costs

[212]Wollman, Helmut and G. Bouckaert (2006) 'State Organization in France and Germany, between Territoriality and Functionality' cited in N. Kersting, J. Caulfield, R. Andrew Nickson, D. Olowu & H. Wollman*, Local Governance Reform in Global Perspective*, Urban and Regional Research International, VS Verlag fur Socialwissenschaften, 2009, p. 36

[213]Schiavo-Campo, S & H. M. McFerson (2008) *Public Management in Global Perspective*, New York, M.E. Sharpe

[214]International Labor Organization (2001) The Impact of Decentralization and Privatization on Municipal Services JMMS/2001, Geneva

- collective choice arrangements
- effective monitoring
- graduated sanctions
- conflict resolution mechanisms
- existence of multiple layers of nested enterprises

These principles have been distilled from the experience of differing local organizations across time and space in the differing cultural contexts.[215] Since these principles are at the heart of poor performance of local governance organs especially in developing countries, it is necessary to elaborate briefly on each principle.

- Clearly Defined Boundaries:

  The boundaries of the service area and the individuals and/or households' rights to use these services must be clearly defined. This is the foundation for organizing collective action and for building a sense of community. Without this, community members do not have a clear sense that 'outsiders' would not reap their investments. Boundaries define who is entitled to benefit from collective action activities and it is also best if each community is as homogenous as possible as this lends strong credence to a 'subjective' feeling of community that is crucial to effective collective action activities. For instance, the use of arbitrary principles of size (presumably to ensure adequate number of persons to support service provision) to demarcate local communities has actually weakened African local governance as the resulting local authorities were not empowered to deliver basic services even though largest by

[215]Ostrom, E (1990), Governing the Commons: The Evolution of Institutions for Collective Action New York, Cambridge University Press

comparative global standards. In some cases, such large size led to serious conflicts and at times intra-community violence. [216] For instance, the South African government spent considerable resources to incorporate black and white citizens of the new South Africa in the same municipalities but even then the sense of community remains weak within the new municipal system. [217] In Nigeria the effort to ensure that all local authorities have a minimum population of 150,000 since 1976 resulted in many long-standing communities being lumped together, including subjugating local community chiefs to more powerful ones, leading to arson in different parts of the country.

- Equivalence Between Benefits and Costs:

  The strongest economic argument for local level governing organs is that they ensure that potential users bear the costs of services they demand. Communities may decide to assist poorer or neglected members as to promote solidarity but this must be explicit with a clear sense of expectations from those being assisted.

- Collective Decision-Making:

  A substantial number of persons within the community must be involved in setting the rules for services enjoyed within that community—so as to ensure that they tailor the rules to their local circumstances. The cost of changing the rules should also be kept low; otherwise they would not be able to change them with changing circumstances.

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[216] Olowu, D (1988) *African Local Governments as Instruments of Economic and Social Development* The Hague, International Union of Local Authorities, Publications 1415

[217] Pycroft, C (2000) 'Democracy and Delivery: The Rationalization of Local Government in South Africa' *Public Administration and Development* Vol. 19, No.3, pp. 233-245

- Monitoring:

  Effective monitoring is important and hence those who monitor should be objective and should be accountable to the community. Unfortunately, financial audits in many developing countries are organized by national governments and even when well done (as in Chile) they rarely feedback into the local community.

- Graduated Sanctions:

  There must be a certainty that community members who violate rules receive graduated sanctions from other members of the community depending on the seriousness of their offense.

- Conflict Resolution Mechanisms:

  Community members have access to low-cost, local arenas to resolve conflicts between one another and between members and officials. There should therefore be a system of dispensing justice cheaply. This is a major problem in many communities as the cost of using the official systems of social adjudication are beyond the capacity of ordinary citizens. They therefore resort to violence or to informal mechanisms. In some extreme cases, long-enduring systems are used that are already out-of-step with the modern day challenges—e.g. traditional systems that forbid women to be seen outside or not to be able to participate in the local economy, etc.

- Nested Enterprises:

  Different types of institutions are required to meet different needs. Public institutions provide services whereas private sector and voluntary organizations are often effective in producing services. Even within the same sector, there are lots of opportunities for contracting and partnership. These often help to

enhance capacity for local communities especially when the communities are not sufficiently financially mature to hire their own personnel.

The absence of these conditions has often meant weakened local governing organs, which are then mistaken for the absence of capacity. The problem is that the local governing organs have not been well constructed and no amount of infusion of fresh capacity would provide any changes until the fundamental issues relating to the institutional infrastructure are addressed.

For all of these reasons, many developing countries already have in place programmes of decentralized governance that are meant to enhance the capacity of local governing organs to enable them deliver on basic services and local level development. But the outcome has often belied the intention and huge resource inputs in pursuit of such CD objectives.

Some of the more effective strategies for containing these problems and challenges include the following:

- Effective Intergovernmental Arrangements especially covering political, administrative and financial support to local governments on a sustainable basis. How this is provided is perhaps the most crucial.
- Support for Capacity Building—human and institutional incentives, structures and processes
- Constitutional Protection of Local Government

Due to time and space considerations, we take on the last one for a more elaborate discussion.

5. Constitutional Provisions on Decentralization and Local Government in the Zimbabwe Constitution and Drafts

I have gone to these lengths to help the conference delegates to understand why the constitutional provisions for local governments can become important in developing countries. Also to correct the impression that constitutional protection alone are not sufficient to ensure virile local governments.

In the constitution, the following are critical points to watch as far as local governments are concerned:

1. Status of local government and its protection from arbitrary central government encroachment by legislation or other actions
2. Boundaries and limits of local communities and areas
3. Functions and financing of local government
4. Human resources management for local government
5. Accountability arrangements for local government—importance of multiple accountability structures—upward, downward and lateral

As we cannot have an exhaustive discussion of these issues here, we use the above-mentioned issues as a framework to analyze the provisions on decentralization and local government in the current Zimbabwean constitution and proposals for change.

Like other African countries, Zimbabwe inherited a fairly well decentralized governance system from her colonial powers but within a short after independence, these countries have transformed themselves into highly centralized states. Zimbabwe represents the example of a country that once had very robust institutions of local governance

especially in the urban centers but the powers and resources of these institutions have systematically degraded over time as a result of political developments at the national level. A 1994 study by this author found the Zimbabwean city of Harare and Kariba to manifest all the indicators of a sound local governance system at par with similar capital cities in RSA (Cape Town and Durban), India (Bombay) and Canada (Toronto). In fact, in some important respects, the two sample Zimbabwean cities were better managed than some cities in India (Delhi and Hydebrad) and Nigeria (Lagos and Kano). [218] Within a decade, most of these elements of good governance had been eroded as a result of the power struggle at the national center, one of whose elements is what I now understand to be major constitutional amendment on municipal government to neutralize the growing power of the opposition to the ruling party especially in the cities of Bulawayo and Harare. [219]

Status of Local Governments in the Constitution

The Present Zimbabwe constitution contains no provision on local government. One might have thought that this was a legacy of the British colonial inheritance as local government is regarded as a statutory not a constitutional issue in erstwhile British colonies. In contrast, however, traditional chiefs and provincial and district governors i.e. the apparatus of the central government's field administration system receive copious mention and provisions in sections 111a and b respectively. It is instructive that chiefs and provincial, district and regional governors are all to be appointed by the President of the country. It is not surprising that one commentator on the Zimbabwean constitution observed that 'devolution was one of the rallying points of the constitutional review debates of the 1999-2000 period'.

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[218] Olowu, D & J.S. Wunsch (2004) Eds Local Governance in Africa: The Challenges of Decentralisation Boulder, Lynne Rienner Publishers

[219] Nyathi, M (2009) Background to the Model Constitution, Processed.
Ibid.

It is also instructive that the proposed draft Constitution of the National Constitutional Assembly (NCA) as one of the seven reasons they rejected the draft constitution of the Constitutional Commission issued by the Zimbabwe government that was rejected in a referendum in February 2000.

This new draft by the NCA contains perhaps the most elaborate provisions on devolution especially when this is taken with the proposed amendments to the Model constitution (MC) by the Zimbabwe Lawyers Association.[220]

The NCA draft believed that its provision was to answer the call by 'many Zimbabweans for the devolution of governmental powers to people in provinces and other levels' It thus provides for a system of provincial governments with a provision for an elected executive Governor and a provincial assembly-chapter 13 and local governments –chapter 14 that separates urban from rural areas. The proposed modifications to these provisions in the Model constitution are also well thought out.

In the first steps towards a Power Sharing agreement (PSA) in 2007 the Kariba draft was developed. The Kariba draft does not go as far as either the NCA draft or Model constitution. Nevertheless, the Kariba Draft in section 11 (4) states that 'the policies of the state must be guided by the principle of devolution of governmental functions and responsibilities and the provision of the necessary resources to the people at appropriate levels'.

Regrettably, the MDC's proposals on the constitution are completely silent on the issue of devolution and local government. May be it is because the party believes that the provision in the draft NCA in which it has participated is adequate.

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[220]Ibid.

On the whole, there is an emerging consensus that Zimbabwe would continue to be a unitary state that uses federal principles to organize its provincial system of government. Local governments remain a national institution and the relationship between the national government, provincial local governments remain unclear. There are also differences in terms of how the provincial government would be constituted. The Kariba Draft expects provincial executives (governors) to be appointed (section 247) while the NCA would have this office elected by the Provincial Assembly at its first sitting (section 146, 3). The Model Constitution (MC) on the other hand would want this office elected by the electorate (Section 165). These differences give an insight on the understanding that the various stakeholders have on the type of decentralization that the future Zimbabwe should have: federal, quasi-federal or devolved unitary government.

Boundaries and Limits of Local Communities

Among the different entities supporting decentralization the issue of how many provincial authorities should exist is one of the most crucial differences between the parties. The present constitution as amended did not contain any specific reference to provinces or local governments only to communal lands. From the other proposals it is evident that Zimbabwe has 10 provincial areas. Kariba Draft specifically lists these ten provinces (section 244 (1)) and stipulates that the number of provinces in Zimbabwe must remain fixed at 10 except by an act of Parliament, when it has consulted the Zimbabwe Electoral Commission (244 (2)). NCA reduced the numbers of provinces to five but MC queries the rationale for reducing these provinces and concedes only that Harare and Bulawayo continue to exist as urban provinces and hence not part of the rural provinces (sec. 161). Hence, MC makes a case for eight (8) provinces.

Surprisingly, only the Kariba Draft makes a distinction between urban and rural local authorities and expects that different classes of local authorities

would be created in the rural and urban areas respectively (section 248-249). All the proposals have relatively brief provisions on local government.

Functions and Financing of Decentralized Governments

The present constitution has nothing on local governments. Its provisions on provincial governors do not stipulate the functions of the provinces either (sec 111A). The Chiefs and Deputy chiefs are appointed by the President to preside over 'tribes people' (section 111 1-3).

The Kariba Draft is more elaborate on the responsibilities of 'Traditional leaders'-disputes resolution, allocation of communal land, upholding cultural values' (section 252). Most of the proposals concur with these provisions. NCA stipulates that traditional leaders should be incorporated into the local government structures. MC does not agree with this provision and separates traditional rulers from the local government system.

The various constitutional proposals are also quite elaborate on the responsibilities of provinces. Essentially these include mainly serving as planning and development agencies of the national government and of their constituency, management of tourism and natural resources etc. (Kariba Draft sec 246). The NCA adds public transport and roads, housing and rural development, soil conservation and provincial tax, although this is not further clarified. MC has a more ambitious role for provincial government. He adds education, health and water management to their functions as well as shop and liquor licensing. These latter would make provincial governments really important and major players in the new Zimbabwe state.

Again, all the proposals are less elaborate on local government functions.

Indeed only NCA and MC mention local government finances—and neither of these in any elaborate form. Section 153 (2) of NCA states that 'an act of Parliament will provide for the establishment and powers of local government, including by-laws and regulations and to levy rates and taxes'.

MC is also quite elaborate than other proposals on the financial bases of decentralized government, especially of the provincial government-sections 176-182 (including the provision for expenditure authorization and control etc).

Accountability Arrangements for Decentralized Governments

The proposals make decentralized organs to be self-accounting. Elaborate provisions exist on the powers and roles of provincial governments. The provincial Parliament is expected to hold the Executive accountable. As usual, the provisions in this respect on local governments are minimal or none existent.

Kariba Draft makes Senators and Members of the National Assembly in the province automatic members of the provincial council (sec 245b). Similarly, a provincial governor becomes automatically a Senator on his/her election (sec 247, 3). Moreover, the National Parliament may actually assign some or all of the functions of the provincial government to the national government, if it judges this to be in the interest of efficiency and good governance (sec 246, 2).

This is meant to propose closer intergovernmental relationships but also ensure that provincial governments are responsible and accountable in their actions, decisions and programmes. However, such provisions such as these could become troubling for the autonomy of the decentralized organs. In the first place, decentralized governments are not created exclusively to promote efficiency but higher levels of citizen participation

and legitimate and accountable governance. Besides, individual national politicians may hold a province ransom, especially if there are strong political differences between the national and provincial governments.

NCA did not therefore support the idea of automatic membership of the Provincial council. Rather, all members some 30-50 in all, must be elected on the basis of proportional representation (sec 158). MC agreed with this principle of election, except that it opts for a combination of constituency based and proportional representation. In addition, MC makes provision for provincial attorney and auditor as well as the right, as the NCA, of the President and the Governor to dissolve the provincial council if they can muster the necessary three-quarters and two thirds majority respectively in their respective Parliaments (sections.). In contrast, MC also provides that the Provincial assembly can legislate a vote of no confidence in the provincial government.

Human Resources Management in Decentralized Government

Neither the present constitution as amended nor the proposals make any provision for the management of human resources in decentralized organs—at the provinces or the local authorities. The only exception is MC. In sections 185 it makes provision for a Provincial Public Service that would be professional and meritocratic. It follows this with the provisions for a Provincial Police department –an innovation in the discussions (section 186). As in all other respects even MC has no provisions for local government human resource management.

Some Remarks

It is evident that the Kariba Draft is cautious on decentralization and how strong decentralized government should be in Zimbabwe. One therefore finds that NCA's (with further elaborations by MC) provisions on decentralized government to be more robust.

Zimbabweans must therefore reach fundamental choice concerning decentralized governance –would they prefer a limited or a more robust form of provincial government. A more robust form would help to resolve some of the serious conflictual issues among the groups, as each group would be able to pursue its cultural and socio-economic agenda. On the other hand, the costs may be high in terms of financial and human resources to drive such a more full-fledged three-tier system of governance. Nevertheless, it is important to point out that these multi-tiered approach with robust autonomy for decentralized governance has been adopted in most developing countries that were serious about decentralization—Uganda, Philippines, India, Nigeria, Ethiopia, RSA just to mention a few. [221]

The rationale for this choice is that a strong bulwark is needed to discourage and restrain the inevitable proclivities towards recentralization of powers and resources by central governments of their decentralization agendas.

A second observation is that a number of crucial provisions are still missing even in the most advanced of the proposals on decentralized governance. These include the following among others:

- Intergovernmental Financial Resource Sharing: There is a need for a more elaborate research and discussion of financial resource sharing to support the ambitious decentralization programmes that some of the proposals contain. Many decentralization programmes have floundered because there were not sufficient financial resources to underwrite

[221] Kersting, N, J. Caulfield, R. Andrew Nickson, D. Olowu & H. Wollman (2009) *Local Governance Reform in Global Perspective*, Urban and Regional Research International, VS Verlag fur Socialwissenschaften

decentralized responsibilities. This arises because of what is referred to as the intergovernmental paradox whereby financial resources can be more easily collected centrally whereas the logic of effective services delivery is that they be handled by the most proximate institutions to the people who need those services. What most industrialized countries –and increasingly the decentralizing developing and transitioning countries—have done is to device mechanisms for resource transfer from national to provincial and local authorities. This takes the form of general and specific transfers and loans. There also needs to be more elaborate and structured discussion of the taxes available to provincial as against local authorities.

- Power of Decentralized Organs to make intergovernmental and inter-organizational contracts: Decentralized organs are semi-autonomous agents. They need to be able to make contracts with governmental and non-governmental bodies especially as non-governmental organs are playing ever more active roles in delivery of services. The separability of provision from production of public services has further facilitated this process as is globalization and increasing roles of civic and community groups in service delivery around the world.

- Citizenship: It is surprising that even though there is evidently a serious and continuing debate in Zimbabwe on citizenship, it is amazing that this is not linked directly or indirectly to provincial or local community areas. It is likely that this is an oversight and would still emerge as an important issue in future discussions on the subject.

- Recall: The Zimbabwe proposed constitutions all stipulate recall

at the national level but not at the local level. Recall has been used positively and successfully in Ethiopia, Nigeria and Uganda.

6. Conclusion

It is impossible not to commend the sacrifices of the Zimbabwe people across the social spectrum to reach out to one another in fashioning a constitution for themselves. One commend in particular, the role played by the civic groups that included opposition politicians, trade unions, churches of all hues and in particular, the international community that have consistently maintained a principled stance on the sides of the people of Zimbabwe in trying times.

The proposals for improving governance as they pertain to decentralization are quite sensible but they need to be further refined and broadened in some specific areas as discussed in this paper.

Norbert Kersting: Zimbabwean Constitution: Best Anchor for a Fair Electoral System

Elections are important elements of democracies and (with referendums) the only way to organize mass participation. They provide legitimacy and government accountability. Low voter turnout can be seen as an indicator for low legitimacy and low political stability.

Voter Turnout

Although there are some exceptions and periodical ups and downs, a decline of voter turnout is a worldwide trend. This is also common for Southern Africa. The analysis of official electoral data based on registered voters leads to distortions because large "non-registered" population groups are not represented. In Southern African countries voter turnout recorded as a percentage of the estimate of the total eligible voting-age population, is "relatively high" in countries such as Tanzania (71%) Malawi (75%), Namibia (85%), "low" in South Africa (61%), Zambia (62%), and "very low" in Botswana (49%) and Mozambique (40%). In Zimbabwe, voter turnout declined from 95 per cent in 1980 to 54 per cent in 1990 to less than 40 per cent in 2004. In the 1996 elections, only 32 per cent of registered voters cast their vote.

SADC and AU

The lack of participation in certain groups, such as youth and women, however, is becoming apparent to these regional bodies. SADC, in its Article 5 and Principles and Guidelines Governing Democratic Elections, therefore encourages the empowerment of the younger generation to vote. This is a major principle emanating from the AU in its Declaration on the Principles Governing Democratic Elections in Africa (AHG/DECL1 [XXXVIII]) and its Guidelines for African Union Electoral Observation and Monitoring Missions (EX/CL/35 [III] Annex II.). It is also embedded in the charter of the AU.

African regional organisations and initiatives, such as the African Union (AU), Southern African Development Community (SADC) and New Partnership for Africa's Development (Nepad), endeavour to ensure the transparency and integrity of the electoral process as a whole. SADC, for example, calls not only for higher participation and electoral turnout but also for equal opportunities in exercising the right to vote, for non-discrimination in the registration of voters, for freedom of association and for equal opportunities for organisations.

2. Quality of Electoral Systems

To evaluate and define the quality of electoral systems various writers have endeavoured to seek universal normative concepts. Five criteria may be used to understand the quality of electoral systems. These are: representation, concentration, participation, transparency and simplicity. The "constitutional" criteria for free, fair, equal and the secret vote may also be included. In addition to these criteria the consolidation of democracies also becomes important in younger democracies and developing countries, and highly segregated countries, such as South Africa. This includes incentives for reconciliation, the encouragement of cross-cutting political parties, the promotion of parliamentary opposition as well as costs and administrative capacity].

Participation

Electoral systems are significant democratic instruments for making participation possible. This is important in relation both to input legitimacy and to political incumbents and parties. In addition to the election of parties at the local level, the election of candidates (in other words, the personal vote) is seen as important. In some countries citizens have no or few rights to nominate candidates within parties as there are no primaries or pre-elections or polls. The personal vote, therefore, offers the voter the possibility of something that is seen as a special motivation to cast a ballot.

Clientelistic networks should be used to build a bridge between the voter and the candidate. Preferential voting and the personal vote, meaning a vote for a candidate and not just a vote for a party, are seen as a factor in boosting voter turnout.

Transparency

Transparency is the key aspect of the legitimacy of electoral systems. The institutional procedures of both ballot casting and counting should therefore be controllable. For example, inside the polling station and in electoral administration, the sealed transparent ballot box and the "four eyes principle" enhance trust and the legitimacy of elections.

Representation

Electoral systems should allow all groups in society to be represented in the elected institution. Electoral systems should hold both government and representatives accountable and enhance responsiveness.

Concentration

Electoral systems should guarantee the decision-making capacity of the electoral institution. High levels of fragmentation and a large number of party factions may be counter-productive and inefficient in this regard

Simplicity and the Reduction of Complexity

Ease and simplicity affect information cost and the limited resources of voters' time. Elections are, firstly, a choice between different ideas and programmes and, secondly, a choice between parties and persons. These act as an information clue.

Secrecy and Privacy

The reduction of supervision and the concomitant threat to the secrecy of the ballot may, however, be the most crucial issue. It is adopted in a wide range of conventions and declarations, to which many Western

democracies are signatories. These conventions and declarations include the Universal Declaration on Human Rights (Article 21[3]), the International Covenant on Civil and Political Rights (Article 25) and the European Convention on Human Rights (Protocol 1, Article 3).

Development of Democracy

In new democracies, Parliament and party systems are often not consolidated. Electoral systems can, however, provide incentives for Reconciliation. They can encourage crosscutting cleavages and the development of catch all political parties overcoming cleavage structures within the society, They can, furthermore, promote parliamentary opposition for a vibrant and effective Parliament. Costs and administrative capacity should also be recognised and electoral systems should not ask too much of the public administration or the institutions implementing the elections.

3. Electoral system FPTP- Proportional or Mixed Voting systems

It is often seen as a mere academic discourse but the electoral system predetermines democratic political culture extensively. If you introduce a proportional electoral system…. then a better representation of all groups (minorities, women etc) will occur and you may have a higher voter turnout. Proportional representation systems, as implemented with the wave of democracy in Spain and Greece in the 1970s and with the second wave in Eastern Europe, Latin America and, later in the 80s and 90s, in South Africa in 1994 strengthen inclusiveness and allow minority representation. This was attractive for the former ruling parties no matter what ideological direction (former communist parties, parties from the apartheid regime etc.) because with this electoral system their representation (although at a lower level) in Parliament was secured. They are seen as responsible for slightly higher voter turnouts. They may, however, result in weak geographic representation, which can reduce the accountability of

members of Parliament. Because of strong party influence during nomination, in theory proportional electoral system depend on strong inner-party democracy, which is often lacking. Proportional electoral systems are regarded as better able to produce a higher voter turnout. There are no by elections.

Do electoral systems matter in Africa?

Namibia, with its proportional representative system, has a very high electoral turnout; South Africa has a relatively low one. In Zimbabwe this could bring a broader representation but as in South Africa, a strong inner party hierarchy may pose problems.

If you were to introduce "First Past The Post (or other majoritorian/pluralist systems such as a Two round system)" then it is simpler. The people know their candidate and the candidate will be more responsive. Majority systems can be differentiated as FPTP systems, which are used mostly in African Commonwealth states, and two-round systems, used mainly in former French African colonies. FPTP are simple to understand, offer strong geographical representation and accountability, and lead to clear majorities. They may, however, exclude minorities. They also seem to result in the election of fewer women. Furthermore, gerrymandering can become a problem. Turnout is high in Tanzania and Malawi, with their FPTP, but was low in Zimbabwe. Mainly because of its lack of representation there is no country worldwide which introduced FPTP or any other majority system in the last decades. In addition to all other arguments, as a result of the HIV/Aids pandemic that has taken the lives of many elected incumbents, the FPTP systems result in numerous and very costly by-elections. In Zimbabwe If you implement a mixed system… then you are supposed to have "the best of both worlds". Internationally, there is a trend towards mixed electoral systems. In fact there are different mixed systems. The most common ones are the "Mixed

member proportional/parallel system". In both you have two votes. In parallel systems the e.g. half of the parliament is elected directly by the first vote (constituency candidate) and half of the Parliament is elected by the second vote from a party list (party candidate). In Mixed member proportional systems e.g. a number of candidates is directly elected (constituency candidates). The second vote is decisive for the overall proportional representation. The Parliament seats are filled up with candidates from party list until this proportion is achieved. However, the people might get confused voting for two candidates at once such as one for a direct elected candidate and one for the party. Mixed member Parallel/proportional systems have been introduced in Japan, Thailand and Senegal, in Mexico (in 2000), New Zealand (in 1996) and Lesotho (in 2002). Mixed systems are seen as including the "best of two worlds". They lead to less party fragmentation, higher inclusiveness and higher accountability. They are, however, more complicated, and sensitive to strategic voting. Mauritius, with its complicated mixture of majoritarian multi-member constituencies and block votes, has a high turnout, Lesotho, which switched from the FPTP to Mixed System, a relatively low one. In Zimbabwe the introduction of a Mixed System could be built upon existing structures and constituencies, but depending on the size of the Parliament it would include a merger of constituencies. But additionally it gives all political parties a chance to have a national party list for half of the Parliament. There is no need to use by-elections because of the "outgoing" directly elected candidate from a party list. Regarding Floor Crossing it can be differentiated between directly elected members and party list members as e.g. in New Zealand, party defection is allowed for directly elected members of Parliament.

In 2006, globally 21 countries used a Parallel and nine a Mixed Member Proportional (MMP). 47 countries, mostly the former British colonies did have the old First past the Post (FPTP). But even the Welsh assembly, the

Scottish Parliament and London metro used MMP. 22 countries use Two Round systems and 70 countries mostly in Latin America introduced List Proportional System (List PR) predominantly with closed lists instead of open lists of candidates.

There was a trend towards mixed systems but in some countries parallel systems were abandoned and proportional systems were reintroduced. The reasons were mostly concerning political arguments. Smaller parties wanted a better chance to be represented. In Russia the executive wanted less fragmentation and fewer regional leaders to be represented in the Parliament. Here, a List proportional system was introduced plus a 7% threshold was introduced to avoid fragmentation and to strengthen the executive.

4. Electoral rules and infrastructure

Besides the important selection of an electoral system, electoral rules and infrastructure are also good indicators of the quality of elections. The important factor in low turnout is voter registration. It is also a field of manipulation, often invisible to electoral observers. To combat such manipulation, automatic registration or mandatory registration, such as that carried out in the Nigeria elections of 2007, could be a solution. With proper registration, all citizens are included. The only countries in which there is automatic or compulsory registration are Angola, Lesotho and Madagascar. Links to national registration records or data matching with other agencies takes place only in the Seychelles.

In Southern Africa at no level are voting rights extended to citizens of other SADC member countries or to other foreigners. The discussion of the voting rights and voting possibilities for citizens living abroad is being discussed intensively for example in Zimbabwe and South Africa. Citizens

abroad tend to have a higher motivation to vote, but they are often seen as more critical to the ruling government. This discussion is often strongly related to the existence of postal voting facilities. In fact, in some countries postal voting and later on even online voting was firstly introduced for the citizen living abroad. Although Zimbabwe had some experience with postal voting, the Diaspora was seen as critical. The old principle of “no representation without taxation” does not seem valuable because of the low tax rate in developing countries and because of the importance of remittances done by the citizen living abroad. Some countries are strict regarding citizenship and do not allow a double passport system (see e.g. Germany) In South Africa in the case of the “Richter against South African Ministry of Home affairs” the Constitutional Court voted in favour of a special vote for citizens living abroad. Although it was briefly before the election, the IEC had to make provision to allow voting from abroad. It turned out that although expectations were high, only around 20.000 registered voters cast their vote in a South African embassy. In other countries such as Germany one has to apply for a special vote for postal voting and your vote is counted in the constituency where one is registered and where one resided last.

Internationally there is a trend towards higher convenience and a move away from absentee voting such as advance voting, postal voting etc. Citizens try to avoid queuing up in a particular polling station. Projects to connect polling station are costly, but besides the different accessibility (“digital divide”) and other problems the new information and communication technologies allow new solutions. Advanced voting facilities seem to be one instrument. Electronic voting machines, which can be combined with electronic registration, are already used successfully in many countries such as India, Brazil and Venezuela.

Africa and Latin America seem to be leading when it comes to women electoral rights. The idea is to give women a critical minority in Parliament.. In older democracies such as France and Belgium, for example, new quotas are strengthening the role of women and representatives of regional minorities in local Parliaments. The 1997 SADC summit committed itself to equal representation of women. The SADC declaration on gender requires at least 30 %t representation in all decision-making bodies by 2005. However, in 2006 only Mozambique and South Africa had met the 30% target with Namibia and the Seychelles close to this percentage. Gender quotas are being discussed in different ways in Botswana, Mozambique, Namibia, Tanzania and South Africa. Some countries are focusing on either voluntary or compulsory democratisation within parties, forcing them to implement double quotas (a certain percentage of women on the list and in higher rankings) or 'zebra' party lists (one women,one man, one woman, ….). Others are focusing directly on quotas within Parliament using constitutional or electoral law. These quotas seem to have no or little influence on voter turnout. It has included women quota in its constitution (as well as 16 other countries worldwide including the African countries Kenya, Rwanda, Senegal, Somalia, Tanzania und Uganda). In the Rwandan Constitution: Article 9(4) concludes that the State of Rwanda shall ensure "that women are granted at least 30 percent of posts in decision making organs". For the Chamber of Deputies (Lower House), this is specified in article 76, for the Senate in article 82. In Africa and worldwide Rwanda is a leading country with 56,3% women in Parliament. In South Africa the ANC implemented a gender quota and women in Parliament constitute 43% of its members. In this regard, South Africa is worldwide number 3 after Rwanda and Sweden (47%). South Africa and Sweden do not have constitutional provision, but political parties do have quota provisions (IDEA 2009). In Zimbabwe in 2008 ZANU-PF had a quota on women and fielded 30 female candidates in the 2008 parliamentary elections. In the Zimbabwean Lower House 32 of 210 representatives (15,4%) are women in the Upper House 23 (including 2 provincial governors) of 93 members are women (25%).

Besides elections the constitution has to provide for other forms of participation such as referendums, agenda citizen initiatives and agenda initiatives. There seems to be a worldwide trend towards direct democracy instruments such as referendums and initiatives. African Union's Charter (2007) and New Partnership for Africa's Development (Nepad) strategy papers (2003) recommend these instruments. In Latin America a trend towards direct democracy is obvious. It is seen as a panacea to solve the problem of strong personalization of African party politics and solely “electoral democracy”. Referendums initiated from below are a constant threat and a “sword of Damocles” for politicians forcing them to be responsive to peoples' demands. In Africa countries referendums are solely implemented at the national level and –except some obligatory constitutional referendums- mostly “non binding” presidential plebiscites. There are no citizen initiatives and agenda initiatives. Referendums were often used to support a regime change in the 1960s (independence) and in the 1990s (multiparty system) and to strengthen and finalize conflict resolution. Nevertheless the predominantly used presidential plebiscites are characterized by governmental control within de facto one party political systems. Failing referendums in Zimbabwe 2000 and Kenya 2005 show that their influence on governmental behavior could be important. A broader implementation of citizen initiatives at the local level could be an additional instrument strengthening accountability. The Uganda constitution seems to be quite advanced in this regard and allow initiatives. To avoid an inflation of referendums this process is mostly highly formalized and restricted. In some cases a collection of signatures starts the initiative (submission) as a kind of petition for a vote by the citizens is necessary. This formal collection of a certain number of signatures mostly has to be fulfilled in a certain period. In general, the barriers and costs to start this political process are relatively high.

The quorum for this submission (initiative petition) should depend on the size of the political entity. In Europe in bigger, municipalities or provinces it is normally around three percent of the population. In small local authorities, up to fifteen percent of the population have to sign the petition. Article 74 of the Uganda constitution describes the quorum a constitutional referendum can be requested by half of all members of the Parliament by the majority of the total membership of each of at least one half of all district councils or: "(c) if requested through a petition to the Electoral Commission by at least one-tenth of the registered voters from each of at least two-thirds of the constituencies for which representatives are required to be directly elected under article 78(1)(a) of this Constitution." (Uganda Constitution 1995: Article 74). This can be regarded as a high threshold for a national referendum.

The choice of the right electoral infrastructure and electoral system depends on "where you come from, and where you want to go?" The electoral infrastructure should guarantee for fair and free elections. The electoral system effects political attitudes and behaviour (MP's relationship to his constituency and to his own political party) and the role and independence of the Parliament. Although details on the legal electoral framework have to be defined in the electoral laws, the Zimbabwean constitution should provide anchors for the best solution regarding the electoral system and infrastructure for the peaceful future of Zimbabwean democracy.

Geoff Feltoe:
Elections and the New Constitution of Zimbabwe[222]

1. Introduction

Periodic elections are an essential ingredient of any democratic system of governance. There are two main components of a democratic election: the electorate must be able freely to express their electoral choices and the electoral process must be fair. The announced results of the election must be an accurate reflection of the democratic will of the voters.

A paradigm for the holding of free and fair elections is something like this:

Political Environment

Democratic elections cannot take place in an environment of complete political intolerance. There can't be free and fair elections –

- if the party in power believes it has a right to govern in perpetuity and doesn't accept the democratic premise that all political parties should be able to compete freely to win electoral support;
- if the ruling party or an opposition party resorts to violence and intimidation to prevent their political opponents from campaigning or to force supporters of other parties to vote from them or refrain from voting;
- if the ruling party uses politicised security forces and intelligence units, and militias to violently intimidate the electorate. (Here security sector reform is imperative in order to restore the professionalism and neutrality of these forces. This must be a

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[222]The following abbreviations are used to refer to the various drafts constitutions that have been drawn up by Zimbabweans:

NCAD – The draft compiled by the National Constitutional Assembly.

LSD – The draft compiled by the Law Society of Zimbabwe.

ZCCD – The draft compiled by the Zimbabwe Constitutional Commission in 1999.

KD – The Kariba draft constitution.

PSTD – The draft compiled by the Parliamentary Support Group.

pivotal component in the constitutional reform process.);

- if a politicised police force turns a blind eye to the violence being perpetrated by supporters of the ruling party (Again reform of these forces is imperative).

Regrettably, particularly in elections since 2000, there have often been high levels of violence and widespread intimidation. For instance, in relation to the environment preceding the 2008 run-off presidential election, the Pan African Parliament observers noted that "the prevailing political environment through the country was tense, hostile and volatile as it has been characterised by an electoral campaign marred by high levels of intimidation, violence, displacement of people, abductions and loss of life". They concluded that: "the … atmosphere prevailing in the country did not give rise to the conduct of free, fair and credible elections".[223]

There are a number of other institutional factors that can prevent free and fair elections. Free and fair elections can't occur–

- if the body running elections and its electoral officials behave in a politically partisan fashion. (The impartiality and professionalism of these bodies has to be restored.);
- if the prosecution authorities are politically biased and use their powers as a weapon against the opposition by bringing bogus charges against them (Reform would be required to restore the professionalism and impartiality of these authorities);
- if the courts are politically biased and likely to decide in favour of the ruling party when opposition parties bring election challenges before the courts. (The independence and impartiality of the courts would need to be re-established.);

[223]The Pan-African Parliament Election Observer Mission to the Presidential Run Off and By-Elections in Zimbabwe Interim Statement at pp 1& 3.

- if the mass media are politically biased and do not provide balanced coverage to election campaigns. (Reform would be needed to ensure that all political parties have reasonable access to the media.)

Thus before there can be free and fair elections, all the participants must accept the basic democratic ground rules for holding elections and these rules must be impartially enforced.

2. Constitutional provisions guaranteeing political rights

In 2009 a new section was inserted into the Constitution of Zimbabwe. [224] If observed these provisions would go a long way towards ensuring free and fair elections. The new section reads:

> 23A Political rights
>
> (1) Subject to the provisions of this Constitution, every Zimbabwean citizen shall have the right to–
>
> (a) free, fair and regular elections for any legislative body, including a local authority, established under this Constitution or any Act of Parliament;
>
> (b) free, fair and regular elections to the office of President and to any other elective office;
>
> (c) free and fair referendums whenever they are called in terms of this Constitution or an Act of Parliament.
>
> (2) Subject to this Constitution, every adult Zimbabwean citizen shall have the right–
>
> (a) to vote in referendums and elections for any legislative body established under this Constitution, and

[224] Section inserted by section 5 of Act No. 1 of 2009 (Amendment No. 19)

(b) to do so in secret; and to stand for public office and, if elected, to hold office.

The constitutional entrenchment of the guarantee of the right to vote in this provision has implications for the up to three million adult Zimbabwean citizens presently outside the country as economic or political refugees. It is strongly arguable that the authorities are obliged to allow these citizens to vote outside the country if it is not reasonably possible for them to return to the country in order to vote in the referendum on the proposed new constitution and, if the constitution is approved, the elections following upon it being passed into law. Based on an almost identical provision in the South African Constitution, the South African Constitutional Court ruled that to require registered voters living outside the country to return to the country to vote imposes an unreasonable obligation on them and it ruled that the restrictions on the right to a special or postal vote in the Electoral Act are unconstitutional. [225] It is particularly important that externally based citizens be allowed to vote in the referendum on the draft new constitution so the new constitution has a buy in from as many Zimbabweans as possible.

If voters outside the country are allowed to vote and the new constitution retains voting within constituencies, their votes could be allocated to the constituencies in which they resided before leaving the country. If such voting is allowed proper safeguards would obviously have to be in place to ensure that this potentially large numbers of votes is not fraudulently manipulated.

[225] See Appendix 2 to this document where a detailed summary is given of this South African case.

Although section 23A section covers most of the main political ingredients for democratic elections, some additional guarantees could be incorporated into this section. There should be further guarantees along the lines of section 19(1) of the South African Constitution such as guarantees of –the right to form political parties;

- the right of members of political parties to engage freely in party activities and to recruit party members;
- the right of political parties to electioneer freely by holding meetings and rallies[226,]
- the right of political parties to have proper access to the mass media to disseminate information about their policies in order to try to persuade voters to vote for them[227;]
- the right of the electorate to receive balanced and accurate information about the election campaigns of the respective parties;
- the right to fair delimitation of constituencies and the right of the public and Parliament to be properly consulted during the delimitation process;
- the right of political parties to be consulted about the number and location of polling stations;
- the right of the electorate to receive adequate information about the electoral process;
- the right of political parties to be supplied with information by the Zimbabwe Electoral Commission about such things as the number of the ballot papers printed;
- the right to up to date and accurate electoral rolls and the right to have the rolls audited at periodic intervals to ensure

[226] See Appendix 3 for an analysis of the current restrictions on this right.

[227] Ibid.

that they are accurate;
- the right of access to the electoral rolls;
- the right of the electorate to have the elections monitored by impartial, independent observers.

Not all of these guarantees need necessarily be contained in the Constitution; some could be included in the electoral laws. However, their inclusion in ordinary legislation obviously doesn't give them the same status as constitutional guarantees.

3. Electoral Laws

The Constitution sets out the composition and method of appointment of the Zimbabwe Electoral Commission and its functions. The Zimbabwe Electoral Commission Act [Chapter 2:12] provides for the terms of office, conditions of service, qualifications and vacation of office of members of the Zimbabwe Electoral Commission. The Zimbabwe Electoral Commission Act [Chapter 2:12] provides for the terms of office of Commissioners and the appointment of the Chief Elections Officer.

The Electoral Commission is the key body in ensuring that elections are free and fair. It has the constitutional duty to conduct and supervise elections to ensure that they are conducted "efficiently, freely, fairly, transparently and in accordance with the law." [228] This body must be scrupulously impartial in the performance of all its duties. The Electoral Commission must be independent and free from political interference from any quarter. In fact a clause was added into the constitution in 2009 requiring the state to take adequate steps to ensure that the Commission is able to exercises its functions independently and its staff carry out their

[228] Section 100C(1)(a) of Constitution.

duties fairly and impartially. [229] This rather vague provision should be made clearer and more specific and should prohibit any political interference in the performance of the duties of Commissioners and its staff.

The manner in which the 2008 elections were conducted, especially the run-off presidential election, has been subjected to heavy criticism. It has been suggested that the Commission failed in its constitutional duties to conduct the elections impartially and to ensure that the elections took place in a manner that was free and fair. [230]

It is vitally important that the process for selection of new Commissioners ensures that the persons appointed will carry out these constitutional duties properly. The Constitution provides for the appointment of the Zimbabwe Electoral Commission. The President appoints the Commission Chairperson and eight other Commissioners. Commissioners are appointed for 6 years and they can be re-appointed for one further term. The chairperson must be judge or a person qualified to be a judge. The President appoints the Chairperson after consultation with the Judicial Service Commission and the Parliamentary Standing Rules and Orders Commission. He is not obliged to follow the advice of either body or he could take the advice of one and disregard the advice of the other. He appoints 8 other Commissioners from a list of not less than 12 nominees submitted by SROC. At least 4 of these Commissioners, apart from the Chairperson, must be women. The Standing Rules and Orders Committee has selected its 12 nominees for the new Commission after holding public interviews.

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[229] Section 100H of the Constitution.

[230] See D Matyszak, Hear no evil, see no evil, speak no evil: A critique of the Zimbabwe Electoral Commission Report on the 2008 elections (Research and Advocacy Unit, Zimbabwe)

This appointment process allows the President a fair amount of latitude when constituting this body. As a likely electoral candidate, as well as the head of the political party that will be contesting the election, it would be better if the President were to be obliged to appoint as Chairperson and members the persons recommended by the other recommending bodies.

An interesting and far reaching provision also introduced in 2009 is a provision aimed at trying to ensure political neutrality on the part of Commissioners. This provides that Commissioners who are political party members must relinquish their party membership without delay on becoming Commissioners and Commissioners will cease to be Commissioners if they become political party members. [231]

The Commission must be able to appoint professional staff who will administer the election process impartially and fairly. This is particularly important given the past allegations that the Commission's secretariat has carried out their duties in a politically biased manner. [232]

Registration of voters

An accurate and up to date voters' roll is essential for the holding of a fair elections. An incomplete voters' roll may disenfranchise people entitled to vote. An inflated roll lends itself to electoral fraud, by devices such as ballot box stuffing, multiple voting or manipulation of the figures on returns.

It has repeatedly been alleged that the current electoral roll is highly inaccurate and needs either to be completely overhauled or a new voters' roll should be compiled. A recent report reveals huge anomalies in the

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[231] Section 100E of the Constitution.

[232] Persons with military backgrounds and who are strongly aligned to ZANU PF have been placed in senior positions in the secretariat and there have been allegations that these persons have manipulating the process in favour of ZANU PF.

voters roll, including many thousands of duplicate voters and dead voters. It also alleges that the names of many people who should be registered have been omitted from the roll. [233]

The registration of voters is currently done by the office of the Registrar-General. Under the present constitutional provisions ZEC does not register voters; it merely supervises the registration of voters by the office of the Registrar-General. [234] The Registrar-General is widely perceived as being politically partisan and has been accused of deliberately keeping the roll in an inaccurate state so that results of elections can be fraudulently manipulated. It has also been alleged that he has conducted the registration process so as to favour one of the parties and discriminate against the other.

The Zimbabwe Electoral Support Network has recommended that the function of voter registration be removed from the Registrar-General of Voters and taken over by the Electoral Commission using staff appointed by the Electoral Commission. [235]

Ideally no elections should be held until the Electoral Commission has conducted a full audit of the voters' roll to check its accuracy. If, as expected, the roll is found to be inaccurate, the Commission must order a postponement of the election in question until the roll has been cleaned up or, if the roll is seriously inaccurate, until there has been a fresh registration of voters in that constituency.

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[233] D Matyszak Seeing double and the dead: A preliminary audit of Zimbabwe's Voter's Roll (October 2009 Research and Advocacy Unit.)

[234] Section 100C (1)(b) of the Constitution.

[235] Proposals for Electoral Reform: The Electoral Act: A position paper.

cleaned up or, if the roll is seriously inaccurate, until there has been a fresh registration of voters in that constituency.

Timeous Announcement of Election Results

In 2008 there was a very long delay in releasing the results of the first round of the presidential election and the MDC has to resort to litigation to try to have these results released, but the court decided it could not order the Electoral Commission to release the results as the Commission had decided to order a partial recount of the votes, a decision the court said it could not interfere with. [236]

The Law Society Draft Constitution proposes to have constitutional provisions that not only require immediate counting of votes as soon as the polls have closed but also that the results of the election must be announced within forty-eight hours from the close of polling unless there are exceptional circumstances as determined by the Electoral Commission, provided if the clear reasons why it is necessary to delay the release of results beyond the forty-eight hours must be publicly revealed.

Changing the Ground Rules for Elections

Previously there was a provision in the Electoral Act that allowed the President to make changes to the electoral laws, which provision was used on a number of occasions to effect important changes just before elections. This provision was later repealed but in 2008 elections the President used his powers under the Presidential Powers (Temporary Measures) Act to change an electoral provision disallowing the police from being inside polling stations; the President reversed this and reintroduced police officers into polling stations. The Constitution should obviously

[236]Movement for Democratic Change and Another v Chairperson of the Zimbabwe Electoral Commission and Others (E/P 24/08) [2008] ZWHHC 1 (14 April 2008). This decision has been subject to a lot of criticism.

disallow one of the political contenders in an election from using this power to alter electoral provisions. Only Parliament should have the power to change electoral laws.

Executive Power

Under the current Constitution there is an Executive President who is directly elected in a national poll. To be elected as President, the person concerned must receive at least 50% of the votes plus one vote. If that majority is not attained, then there will be a second round of voting at which the two strongest candidates contest against one another. Constitutional Amendment No 19 incorporated the section of the Inclusive Government Agreement that provide whereby a Prime Minister identified as Tsvangirai, will be the Prime Minister and will share power with the President during the transitional period up to the next elections.

During the Constitutional reform programme, the people will have to decide what construct of executive power they would prefer. They will have to decide whether to retain a directly elected executive President without a Prime Minister (KD) or a directly elected executive President who shares power with a Prime Minister appointed by the President from the party able to command majority support in Parliament (ZCCD) or a non-executive, ceremonial President appointed by Parliament and an executive Prime Minister (NCAD).

If it is decided to retain an executive President, the current system of directly electing the President with a vote of not less than 50% plus one vote would probably be the most suitable system. If on the other hand, we move to a system whereby the Prime Minister is head of government, then the non-executive President should simply be appointed by an electoral college of Parliament. (NCAD).

Parliamentary System

Presently there is a bicameral Parliament. There is a Senate consisting of 93 members. 60 are elected (6 are elected in each of the 10 provinces); there are 10 governors, 18 Chiefs and 5 persons appointed by the President. The House of Assembly consists of 210 constituency members. [237] They are elected on a first-past-the-post system basis, the winner being the person who wins a plurality of votes in their constituencies, which means that a candidate can win even though his or her share of the overall vote is far less than 50%.[238] Candidates can either stand for office on behalf of a political party or can stand as independents.

During the constitutional reform outreach programme the people will be asked whether they want to continue with a bicameral Parliament or have a unicameral parliamentary system. If they opt for retention of a Senate, the next question will be whether all the Senators should be elected or whether some should be appointed and, if the latter, how the appointed members should be appointed and on the basis of what criteria they should be appointed.

Concurrent Elections

Under the present constitution four elections are held at the same time, namely the Presidential election, the election for members of the House of Assembly, the election of the elected members of Senate and local government elections. This makes for a complex voting system and there is strong argument that local government elections should be held separately from the elections for the national Parliament.

It is possible that the people may opt for a system of elected Provincial

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[237] For the full composition of the two Houses see Appendix 1.

[238] In some countries, such as France a candidate must obtain at least 50% of the vote in a constituency to be elected.

Assemblies. If that is the case, then the system for electing such representatives and the timing of such elections would have to be decided. (NCAD and LSD draft constitutions both have provision for elected provincial assemblies and devolution of powers to provincial levels.)

4. Electoral System to Elect Parliamentarians: FPTP or PR or MMPS

It has been rightly said that the choice of electoral system is one of the most important institutional decisions for any democracy. It is a decision that can have a profound effect on the future political life of the country.

As indicated above, the current system of elections for Parliamentarians is the first-past-the-post system in single member constituencies (FPTP). This is the system that has been used over many years and it is the system with which Zimbabwean voters are familiar.

The main advantages of the FPTP system are that it is a simple system for voters and leads to greater accountability of parliamentarians. The voters in a constituency can decide which candidate will be most likely to represent them well in the national Parliament and they can hold their elected representative accountable. However, the system also has serious drawbacks. The main one is that political parties are not represented in Parliament in proportion to their share of the overall popular vote. A political party may hold a majority of the seats in Parliament without having attracted a majority of the popular vote nationally. The biggest political party often tends to be over-represented and smaller parties may not be represented at all in Parliament. A lot of votes are “wasted” because only the votes for the winning candidates in the constituencies are taken into consideration. Systems of proportional representation, on the other hand, do not waste votes because seats are allocated in accordance with each party's share of the national vote.

Careful consideration should be given during the constitutional reform exercise as to whether this system should be retained or whether we should adopt either a system of proportional representation or a mixed member system. Only three of the drafts suggest introducing some form of proportional representation. [239]

In societies that are in transition after conflict or political polarisation, there are strong arguments for adopting a system based on proportional representation. In South Africa the choice of electoral system was discussed extensively before the transition from authoritarian to democratic rule and it was decided that the proportional representation would best achieve this transition because it would lead to greater inclusiveness. It would allow smaller parties to be represented and the use of the party list system would enable all parties to ensure the election of women, ethnic minorities and other disadvantaged groups by ranking them high on the party list.

Systems of proportional representation do not waste votes because seats are allocated in accordance with each party's share of the national vote. The main problem with proportional representation systems is that of accountability of parliamentarians to the electorate at local level; because the parliamentarians are elected on the basis of their share of votes at national level or votes at both national and provincial level, they do not represent people within specific areas within provinces. They are thus remote from the voters and not easily accessible to members of the public.

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[239] ZCCD: 150 members of House of Assembly elected in constituencies & 50 elected by some unspecified form of proportional representation. NCAD: 70 elected constituency MPs & 70 MPs elected by proportional representation (presumably on national basis). PSTD: House of Assembly with 120 members elected by proportional representation, conducted on provincial basis with 12 members elected in each of 10 provinces. But this draft also offers an alternative – 60 elected from 6 constituencies per province & 60 under system of proportional representation based on votes cast nationally. KD retains the present constituency based system for electing members of the National Assembly.

In South Africa where a system of proportional representation is used the ANC has tried to overcome the problem of remoteness of parliamentarians from local people, especially the rural people, by assigning each of its members in the National Assembly to a specific geographic area that would be his or her unofficial "constituency." They have also allocated money to all members of the National Assembly to allow them to visit and maintain offices in their "constituencies." But this scheme has not been very successful as most members do not reside in their constituencies and the money allocated is insufficient for them to visit their constituencies regularly and their constituencies will normally not be able to travel to the place where "their members" are usually to be found.

The other potential problem with the proportional representation system is that no one party may emerge with the majority of the seats and this would necessitate the forming of coalition governments that may be weak and unstable. Coalition governments may better suit authoritarian states that are in transition to democracy, but in Zimbabwe the inability of the two main parties to work together in the GPA would make it likely that a coalition government of these two parties will simply be a recipe for further deadlock.

A paper produced for the Zimbabwe Election Support Network entitled Possible Systems of Representation for Zimbabwe (August 2009) analyses various electoral systems.

It summarises the main types of fully proportional representation. The first is a national system of proportional representation with the whole country being a single constituency. This system is more suitable for small or uniform countries and is not appropriate for Zimbabwe. The system of electing parliamentarians in a number of multi-member constituencies rather than on a national basis may still not produce an accurate overall

proportional result and can still leave smaller parties without representation. Finally there is the compensatory system that combines a system of proportional representation applied at provincial level with a compensatory proportional representation system at national level. For instance, if the House of Assembly has 210 seats, 150 of these could be filled by elections on a proportional representation at a provincial level and the remaining seats could be compensatory seats to top up the provincial seats to accurately reflect the proportions of the vote nationally. Of the 400 seats in the South African National Assembly, 200 are allocated on the basis of their proportions of the vote in each of South Africa's nine provinces and 200 are allocated to parties on the basis of their proportions of the total national vote. The 200 national seats are compensatory seats distributed according the proportional shares of the total national vote.

If a party list system of proportional representation is to be adopted in Zimbabwe the simplest system for the voters would be to have a closed party list system. In this system the party would provide a list of their candidates to fill the seats on offer in a constituency. Voters would simply vote for the list they favour which would contain candidates' names in the order presented by the party concerned; they would not be able to indicate their preference for particular candidates on the list. Winning candidates would thus be elected in the exact order they appear on the list.

Finally there are mixed systems. The advantage of these systems is that they combine the advantages of the constituency-based systems with those of the proportional ones. One of these systems is the Mixed Member Proportional System (MMPS). This combines the FPTP system and a party List PR system. Usually the political parties will draw up a list of candidates in order of priority to fill top up PR seats. These lists will be made public before the election. Voters in constituencies cast two ballots. The first is to elect a member of Parliament to represent them from the

candidates standing in their constituency. The second ballot is to vote for a political party. Voters may vote for a political party that is different from the party affiliation of the person they voted for as their constituency Member of Parliament.

In most countries using this system, but not all, half the seats are elected from FPPS and half from the List PR system. The results from the List PR system are used to top up the FPTS so that the result is proportional for the whole Parliament.

The Zimbabwe Election Support Network favours the MMPS system because it allows for the election of representatives to represent constituencies, a system which Zimbabweans are used to. This will maintains a direct link between the Member of Parliament and the constituents, while the PR element will ensure that the overall result fairly reflects the relative strengths of the parties in the overall poll.

5. Conclusion

The recent history of elections in Zimbabwe has not been a particularly auspicious one. Elections have often been highly contentious and fractious affairs. The constitutional reform programme provides an ideal opportunity to reflect on ways of reforming the electoral system to ensure that in future the people of Zimbabwe will have the assurance that elections will be both free and fair. It is not, however, only the electoral process itself that needs to be improved; all the necessary institutional structures that are essential for free and fair elections must also be put in place. Above all, the political contenders must all be prepared to play by the rules that are required for the election process to be both free and fair

Appendix 1

House of Assembly	Senate
210 members Qualifications for candidates: Citizen & registered voter 21 and over Ordinarily resident in Zimbabwe for 5 years over last 20 years	90 members 60 elected (6 in each of ten provinces) 10 provincial governors 18 chiefs (including President & Deputy President of Council of Chiefs) 5 appointed by President Qualifications for candidates: Citizen & registered voter 40 or over Ordinarily resident in Zimbabwe for 5 years over last 20 years

Appendix 2

The Diasporan Vote

Up to 3 million Zimbabwean citizens have left the country for political or economic reasons, and now live overseas. There seems little doubt, however, that over a million have done so and that, if they were able to vote, their votes would have a considerable effect on the result of any election held in Zimbabwe.

Do they have a right to vote? In February 2009 the Constitution was amended to include a new section 23A, which includes a guarantee of the right of citizens to vote in elections. This section is very similar to section 19(2) & (3) of the South African Constitution.

In a recent judgment (Richter v Minister of Home Affairs & Ors 2009 (3) SA 615 (CC)) the South African Constitutional Court dealt with the question whether or not South Africans living overseas had the right to vote. Mr Richter was a South African citizen, a registered voter, who was teaching in

the United Kingdom. He wanted to vote in the recent general election in South Africa but couldn't do so because the South African Electoral Act limited the right to a special vote (i.e. a postal vote) to people who were temporarily outside the country for a holiday, or for a business trip or in order to participate in a sporting event. He argued that the restriction violated his right to vote under section 19(2) & (3) of the South African Constitution.

The Constitutional Court upheld Mr. Richter's argument, on the following grounds:

- The right to vote imposes an obligation on the State to take positive steps to ensure that it can be exercised.
- A citizen must be prepared to take reasonable steps to exercise the right to vote — e.g. he or she must be prepared to travel to a polling station and stand in a long queue — but the burden imposed on voters must be reasonable and must not prevent a voter who is prepared to take those reasonable steps from exercising his or her vote.
- If a statutory provision prevents a voter from voting despite the voter's taking reasonable steps to do so, the provision infringes the right to vote enshrined in section 19 of the South African Constitution (and by analogy section 23A of our Constitution).
- To require registered voters who are living outside the country to return to the country to vote imposes an unreasonable obligation on them.
- Hence the restrictions on the right to a special or postal vote contained in the South African Electoral Act were unconstitutional.

The court went on to point out that South African citizens abroad benefited the country through remittances and in other ways. Furthermore, out of

214 countries surveyed, 115 were found to make provision for voting by absent voters, and only 14 restricted their entitlement to vote on the basis of the activity undertaken abroad by the absent voters (Zimbabwe is one of those 14 countries — section 71 of our Electoral Act is even more restrictive than the South African Act).

It would be virtually impossible for a Zimbabwean court to come to a different conclusion if a member of the Zimbabwean Diaspora were to seek to enforce his or her right to vote:

- The constitutional provision relied on by the South African court is virtually identical to section 23A of our Constitution.
- Many members of the Zimbabwean Diaspora remain registered on voters' rolls in Zimbabwe (and, for practical and legal reasons, they cannot be removed from the rolls).
- It is unreasonable to expect most of those people to return to Zimbabwe in order to vote; the only way they can reasonably be expected to vote is through postal voting or through casting their votes outside the country.
- Section 71(1) of the Electoral Act, which restricts postal voting to Government employees, is therefore unconstitutional in that it denies most members of the Zimbabwean Diaspora their right to vote.

So the question is not: Should members of the Zimbabwean Diaspora be permitted to vote? They are entitled to vote now, and the only question is: What steps is the Inclusive Government going to take to enable them to exercise their constitutionally-guaranteed right to vote?

The Government is obliged to provide facilities — special voting, postal votes, voting at embassies, and so on — to enable the Diaspora to vote. The Government and the Zimbabwe Electoral Commission may find this a daunting task, but it is one they must face.

Appendix 3

Laws affecting freedom of assembly and freedom of expression

In 2002 two laws were passed. These are the Public Order and Security Act [Chapter 11:17] (Act No. 1 of 2002) ["POSA"] and the Access to Information and Protection of Privacy Act. [Chapter 10:27] (Act No. 5 of 2002). ["AIPPA"].

In the past the police have applied POSA to so as to prevent many public demonstrations by those opposed to ZANU PF and to block many political meetings and rallies by the MDC. These gatherings were frequently brutally broken up and many participants were arrested and often subjected to ill-treatment whilst in custody. On the other hand, pro-ZANU PF gatherings were freely allowed. This pattern has been repeated at the time of elections. POSA should be revised and the police must enforce its provisions fairly and without discrimination.

AIPPA has been used to close down the only independent daily newspaper and several other publications critical of the ZANU PF government. Many independent journalists were prosecuted under this legislation for operating without being accredited or for making "false statements." A whole raft of other criminal offences has negatively impacted on freedom of expression. These were originally contained in POSA but they were later transferred to the Criminal Law (Codification and Reform) Act. These offences include making false statements prejudicial to the State, bringing the President into disrepute, criminal defamation and bringing the police into disrepute.

The Board established under the Broadcasting Services Act [Chapter 12:06] has ensured that the Zimbabwe Broadcasting Corporation continues to hold a monopoly over electronic broadcasting. Instead of

playing the role of a public broadcaster, this Corporation has effectively become a propaganda station on behalf of ZANU PF.

These media laws need to be changed so as to allow for media diversity and the establishment of a genuine public broadcaster and so that at election time there can be free campaigning by all political parties and there can be balanced coverage of the campaigns by the various parties.

Lia Nijzink:

The Relative Powers of Parliaments and Presidents in Africa: Lessons for Zimbabwe?

1. Introduction

Does the way executive-legislative powers are balanced in the constitution facilitate or impede the emergence of a strong Parliament? What lessons can be drawn from a comparison of the constitutional design of executive-legislative relations across Africa? This paper aims to explore the future strength of the Zimbabwean Parliament by taking a closer look at the constitutional design of executive-legislative relations across the continent and compare these patterns with the designs as they are being proposed in the various draft constitutions that are currently under discussion in Zimbabwe.

The paper starts with a short description of the current state of knowledge about Parliaments in Africa, thus identifying the constitutional design of executive-legislative relations as an important precondition for the emergence of strong Parliaments on the continent. The paper then turns to the various constitutional designs in Sub-Saharan Africa and provides a detailed description of the relative powers of African Parliaments and presidents, highlighting the rise of hybrid or semi-presidential designs. The paper subsequently compares these patterns with the designs as they are included in the various drafts for a new Zimbabwean constitution and discusses the importance of specific elements of constitutional design for the future strength of the Zimbabwean Parliament.

What we know about African Parliaments?

A review of the existing studies about African Parliaments (Nijzink et al 2006) suggests that powerful presidents are an important reason why modern Parliaments in Africa are generally regarded as weak institutions. Therefore, the constitutional design of executive-legislative relations is an important dimension of the institutional capacity of Africa's Parliaments. What are the relative powers of the legislative and executive branches of

government? To what extent is a particular constitutional design of executive-legislative relations conducive to the emergence of a strong Parliament, i.e. a Parliament that serves as an institution of countervailing power and a source of accountability and good governance?

Especially in the African context where neo-patrimonialism and 'big man' rule are more than just minor legacies from a distant past the balance of constitutional powers between Parliaments and presidents seems crucial if Parliaments are to exert any influence on law-making or hold strong executives to account. At first glance, legislatures in Africa's current regimes seem to have limited institutional capacity to make laws, represent citizens and call strong presidents to account. Legislative strengthening and capacity building is currently receiving ample attention from international donor organisations and development partners sometimes with adverse effects (Burnell 2009). To what extent is the strength of Parliament a matter of resources? What exactly is the importance of the constitutional design of executive-legislative relations?

In this paper the constitutional design of executive-legislative relations is seen as an important dimension of the capacity of Parliaments. Parliamentary performance can usefully be defined as the output of Parliament in terms of its main responsibilities of law-making, oversight and representation. It needs to be acknowledged that individual MPs, parliamentary committees, political parties and, where applicable, the different Houses all have a role to play in the performance of Parliament. It also needs to be acknowledged that tensions exist between these three classic parliamentary responsibilities in the sense that time, finances and personnel are relatively scarce resources, and they are not always equally available for work on the three responsibilities. At the same time, the realities of party political dynamics often prevent Parliaments from

fulfilling their responsibilities and performing to their full potential. That said, parliamentary capacity can best be understood as the formal rules, structures and resources that give Parliaments the potential to exert influence. Thus, the constitutional design of executive-legislative relations is an important dimension of parliamentary capacity but whether Parliaments are actually using this potential in practice is a matter for separate empirical investigation.

Are African Parliaments effectively overseeing the development and implementation of pro-poor public policy? Are they pro-actively assisting in developing a democratic culture? Are they central agents in the promotion and realisation of human rights? The existing studies of African Parliaments do not provide us with many sound and well operationalised measures of parliamentary performance. There is even less scholarship dealing with the strength or effectiveness of Parliaments on the African continent from a comparative perspective. This paper is hardly the place to begin to fill this gap in our knowledge. What will be presented here is a comparative overview of one dimension of parliamentary capacity: the constitutional design of executive-legislative relations as they are currently in place in 45 countries in Sub-Saharan Africa. Regardless of the overall weakness of African Parliaments, there are important variations across the continent in terms of the relative constitutional powers of Parliaments and presidents which in turn point to important differences in parliamentary capacity.

2. Constitutional Design of Executive-legislative Relations

The nature of executive-legislative relations differs significantly in parliamentary versus presidential systems. Where president and Parliament have their own electoral mandates, i.e. are separately elected, and the executive does not depend on the continued support of the legislature to stay in power executive-legislative relations are of a

different nature than in systems in which the executive is selected by the legislature and stays in power only as long as it has the continued confidence of the legislature. So before we take a detailed look at the relative powers of Parliaments and presidents, we need to consider the distinction between parliamentary and presidential systems.

Only seven of the 45 countries in Sub-Saharan Africa included in this analysis do not have a popularly elected president. In two of these countries, Swaziland and Lesotho, monarchs serve as both head of state and head of government, which means the executive has a separate mandate, albeit not from the electorate. Another two countries, Eritrea and Ethiopia, have parliamentary systems, in the sense that the legislative and executive powers originate from the same electoral mandate, but given the history of these two countries their current regime type cannot be regarded as part of a British colonial legacy. In other words, only three countries on the continent, Botswana, Mauritius and South Africa, retained the parliamentary regimes they inherited as part of their British colonial legacy and still show the two characteristics that classify them as parliamentary regimes: the executive needs the continued confidence of the legislature to stay in power and shares its electoral mandate with the legislature. [240]

Where executive and legislative powers are fused rather than separated, it is difficult to measure the capacity of the legislature in terms of formal constitutional powers. Legislatures in parliamentary regimes, per definition, have the power to censure the executive. Likewise, the calling of new elections, per definition, affects both branches of government and is therefore not a power that one branch of government has over the other. In so far as one can speak of the institutional capacity of legislatures vis-a-vis the executive in parliamentary regimes, it clearly requires measures other

[240] A. Lijphart, *Parliamentary Versus Presidential Government* (Oxford University Press, 1992)

than those we can develop by analysing constitutional provisions about censure and dissolution. Within the context of this paper, we will not be able to further explore this. Instead, we will focus our attention on regimes with separately elected presidents. Given the fact that 85% of current regimes in Sub Saharan Africa have a separately elected president, measuring the powers of these presidents relative to the powers of their Parliaments is key to assessing the level of capacity of legislatures on the continent.

To collect the data presented here the full texts of the constitutions of 45 countries on the African continent[241] were obtained and the provisions related to the doctrine of the separation of powers were coded. Thus we compiled an overview of the patterns of executive-legislative relations on the continent by answering the following questions:

a. Is there a separation of the origin of the executive and legislative branch of government? In other words, do the executive and the legislature have shared or separate electoral mandates? And what are the relative powers of the president and Parliament over cabinet formation?

b. Is there a separation of survival of the two branches of government? In other words, to what extent do the two branches of government depend on each other to stay in office? And what are the relative powers of the president and Parliament over cabinet dismissal?

c. Is there a separation of offices in the two branches of government?

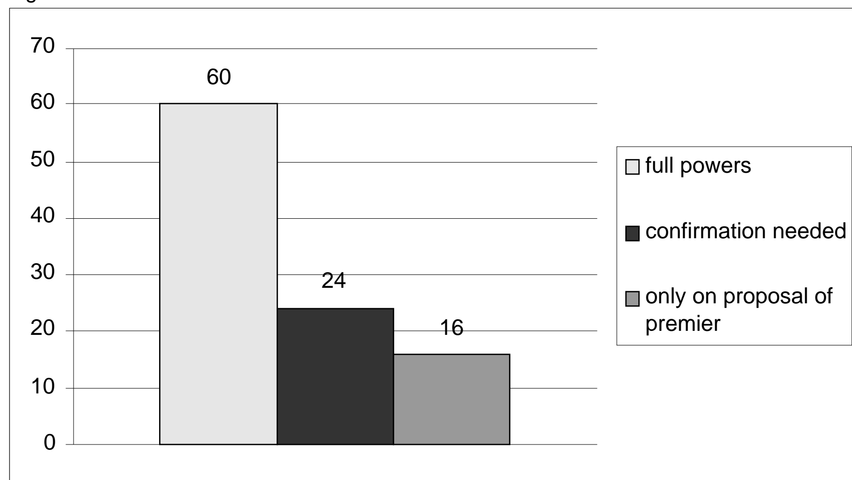
[241] Not included for various reasons are DRC, The Gambia and the Central African Republique

In other words, can a seat in government be combined with a seat in the National Assembly?

3. Powers in Relation to Cabinet Formation and Dismissal

Above, we already discussed the fact that 38 of the 45 countries in our analysis have separately elected presidents, i.e. executives withan electoral mandate that is separate from the mandate of the legislature. Here we are discussing the relative powers of these 38 presidents and the Parliaments in their countries over cabinet formation.

Figure 1: Cabinet Formation



Looking at Figure 1 we see that in 60% of our cases the President has unrestricted powers to name the cabinet without any formal involvement of Parliament in the process of cabinet formation. This is also the case in the current Constitution of Zimbabwe as amended in 2001. In a quarter of our cases, including countries like Ghana and Nigeria, some form of confirmation by Parliament is needed when the president appoints a

cabinet. In 16% of our cases the President can only appoint cabinet members on the proposal of the Premier. In other words, the powers over cabinet formation are shared within a dual executive. This is the case in Tanzania and Cape Verde, for example.

The latter element of constitutional design immediately brings us to the issue of semi-presidentialism: constitutional designs can be considered semi-presidential when the constitution gives considerable authority to a popularly elected President but also establishes the existence of a Premier and a cabinet who are subject to confidence of the National Assembly. In 22 of the 38 countries included in our analysis the constitution creates the position of a premier. [242] The precise relationship of the President to the Premier and more importantly of the Premier and cabinet to the National Assembly vary considerably across semi-presidential regimes worldwide thus giving rise to further distinctions between different subtypes of semi-presidentialism. In this paper, we will try and classify African countries according to these different presidential and semi-presidential (sub) types by presenting an overview of the details of their constitutional designs of executive legislative relations.

Figure 1 showed us that in most African countries with a separately elected President, the Constitution gives considerable powers to the President in terms of cabinet formation. Unlike semi-presidential designs elsewhere in the world, the 22 African designs with a dual executive (i.e. president and premier) do generally not require a formal investiture vote or confirmation by the National Assembly for the appointment of the Premier. Tanzania and Congo Brazzaville seem to be the only exceptions. However, in some of the semi-presidential designs in Africa the constitution

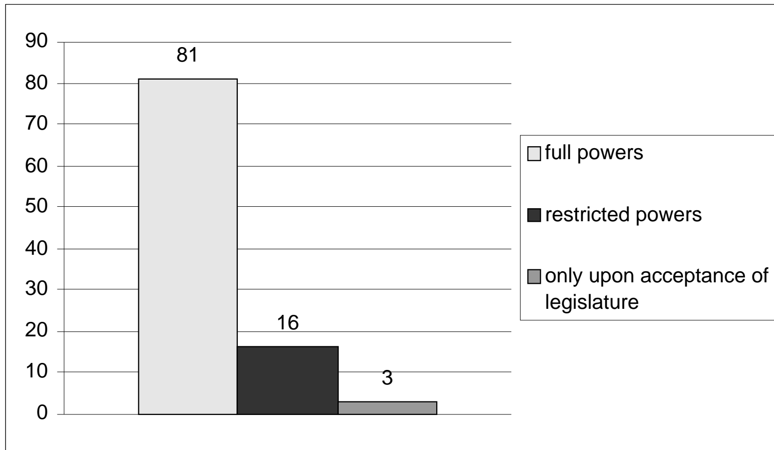
[242]Not included are the current power sharing arrangements in Kenya and Zimbabwe which provide for the position of a Premier in Kenya and Zimbabwe

prescribes consultative processes between the President and the political parties represented in the National Assembly regarding the appointment of the Premier. For example, in four of the five Lusophone countries in Africa, the constitution stipulates that the President names the Premier after listening to the political parties with representatives in the Assembly and taking the results of the parliamentary elections into account. Such provisions give the President considerable power vis-a-vis Parliament when it comes to cabinet formation. Although he is not completely free in choosing who will head the cabinet, the required consultations are clearly far less restricting than an investiture vote or some other form of parliamentary confirmation of the appointment of the Premier.

As mentioned above, in 16% of our cases including Tanzania and Cape Verde the President appoints other members of the cabinet but he can only do so on the proposal of the Premier, in other words, the composition of the cabinet is a joint decision of the President and the Premier. This suggests a balance of power between the President and the Premier and at least theoretically a certain degree of parliamentary influence in cabinet formation through the influence of the Premier. However, other constitutional provisions may counteract this potential influence of the National Assembly and cause the power balance between President and Premier to tip rather heavily in favour of the President (see Fig:2).

When it comes to powers over cabinet dismissal African presidents are even more powerful than during the process of cabinet formation: in about 80% of our cases the President has unrestricted powers to dismiss members of the cabinet. On the other end of the scale we find the President in Cape Verde, who has no independent powers to dismiss cabinet. The Premier and cabinet can only be removed by Parliament. In other words, the President can only dismiss the Premier in a situation where the latter has lost the confidence of the legislature. Furthermore,

Figure 2: Cabinet Dismissal



the President can only dismiss individual ministers when the Premier asks him to do so. Of our cases, only 16 % fall somewhere in between the two extremes of unrestricted power versus no independent power to dismiss cabinet members. In these cases various restrictions are placed on the President's power over cabinet dismissal either requiring consultative processes or special circumstances.

In Guinea Bissau, for example, the President has the power to dismiss the Premier after listening to the political parties represented in the National Assembly and taking election results into account. The Constitution also states that the President may dismiss the entire cabinet in case of a serious political crisis that is a threat to the normal functioning of the institutions of the Republic after listening to the Council of State and the parties represented in Parliament. What exactly constitutes a political crisis is a matter of interpretation but together these provisions give the President rather broad powers when it comes to cabinet dismissal. As with ministerial appointments, the Guinean President can only dismiss.

individual members of the cabinet on the proposal of the Premier, suggesting a certain balance of powers. However, the fact that the President can dismiss the Premier on the basis of a consultative process heavily tips that balance in favour of the President.

Finally, there is another element of constitutional design of cabinet power that can considerably strengthen the position of the President vis a vis the Premier: his powers to chair cabinet meetings. Only in Cape Verde, Madagascar, Sao Tome & Principe and Senegal (about 10% of our cases) is the President not part of the cabinet and does the Premier have full powers to chair cabinet meetings. In those designs, the President can only take over this position upon request from the Premier. In the other 18 constitutions that create the position of the Premier, the President has full powers to chair cabinet, thus turning the Premier into an assistant to the President tasked with executive-legislative relations rather than a second agent of the executive with whom powers and responsibilities are shared.

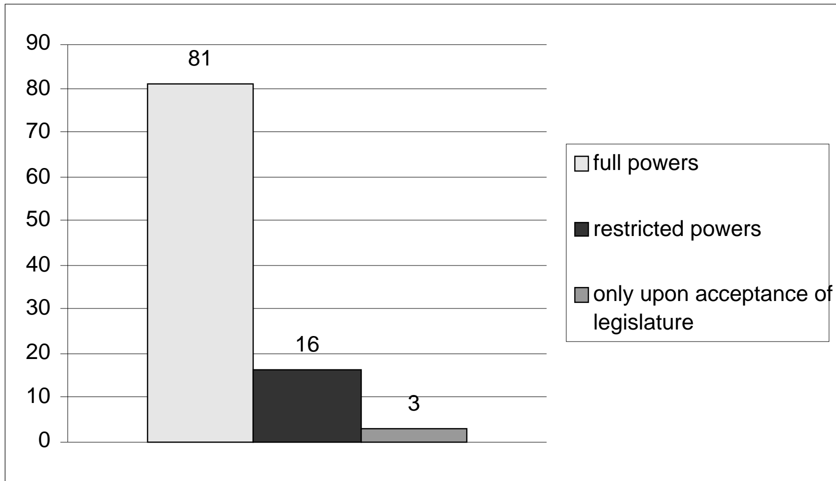
The design in Guinea Bissau is ambiguous in this respect. Although articles 101 and 97 of the Constitution say that the cabinet consists of the Premier, who presides, and the ministers and deputy-ministers, article 69 establishes that the President can preside over cabinet meetings 'whenever he wants' (quando entender). This means the President does not need to announce when he intends to take over the chair and the Premier does not need to give his consent. It gives the President the opportunity for direct involvement in the day to day running of the government, thus, effectively sidelining the Premier and bringing the cabinet under the President's control.

4. Separation of Offices and Separate Survival

Generally, presidents in Africa are not only powerful in relation to their premiers and cabinets but also in relation to the Parliaments of their

countries. Most of the designs we are studying here create a distance between the legislative and executive branches of government which instead of strengthening the autonomy of the legislature seems to bolster the President's already strong position

Figure 3 Separation of Office



In 62% of our cases the Constitution establishes the separation of offices in the sense that a seat in the National Assembly is incompatible with a position as a member of the government. This does not necessarily mean that members of Parliament cannot be chosen to take up a ministerial post. It simply means that if a member of the National Assembly is to be appointed as a minister he or she will have to ask for the suspension of his or her parliamentary seat or simply give it up. Such provisions physically remove members of the cabinet from the sphere of influence of the National Assembly and place them firmly within the realm of the executive, with in most of our cases powerful Presidents.

In 20% of our cases the Constitution stipulates the opposite: someone can only take up a cabinet position if he or she is a Member of Parliament. The combination of a seat in Parliament and cabinet post in required. In other words, the constitution stipulates that all ministers need to be MPs in order to be part of the cabinet. Interestingly, this is the design of choice in the parliamentary systems of Botswana and Lesotho but also in many countries with elected presidents: Kenya, Namibia, Tanzania, Uganda, Zambia and Zimbabwe (current constitution).

This element of constitutional design is especially telling about the degree of parliamentary autonomy when regarded in combination with provisions for the inclusion of special seats in Parliament. Countries such as Kenya, Tanzania, Uganda and Zimbabwe all have a number of special parliamentary seats that allow the president to appoint someone from outside Parliament to a ministerial post and subsequently appoint this person to Parliament. Namibia, although not having any special parliamentary seats, has a constitutional provision making members of the executive who have not been elected to Parliament ex officio MPs without voting rights, thus allowing the president to appoint ministers from outside Parliament. In other words, theoretically, the requirement that ministers need to be MPs limits the choice of the president in cabinet formation. However, provisions for special seats undermine any advantage Parliament might have gained in this regard. In fact, it seriously undermines the autonomy of the legislature when the executive can determine part of its composition simply by appointing a portion of its members.

The case of Namibia points us to another detrimental effect of the constitutional provision dealing with the combination of offices. In small Parliaments like the Namibian National Assembly with only 72 seats, the requirement that all ministers need to be MPs might have the effect that

more than half of the members of Parliament are actually members of the cabinet, thus making it extremely difficult for the legislature to flex its muscles vis-à-vis the executive. In fact, ministers do make up more than the majority of Namibian MPs which means that cabinet alone can determine the outcome of a vote in the National Assembly. In order to get government decisions accepted in Parliament, there is no need for any backbench involvement, let alone any cross party support. This specific set of circumstances explains why the National Assembly in Windhoek has been described as a rubberstamp of presidential decisions. [243] It makes the Namibian legislature a Parliament without any autonomy.

Figure 3 also shows that in the remaining 18% of our cases the combination of a seat in Parliament and a cabinet post is not constitutionally prescribed but merely allowed, such as in Ghana and Malawi. In these countries, not all ministers have to be an MP upon appointment, although most ministers happen to be recruited from Parliament and retain their seat once appointed. The National Constitutional Assembly draft of the Zimbabwe constitution stipulates that the majority of ministers must be appointed from amongst the members of Parliament, while it allows for the appointment of not more than 3 ministers who have not been elected as MPs.

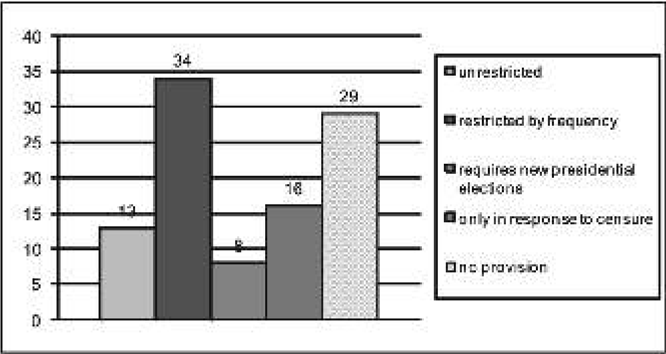
The full implications of these differences in fusion or separation of offices need further study but the pattern described here does suggest that in systems where offices are fused executive dominance over Parliament is certainly not less prevalent than in systems where offices are separated and incompatibility is constitutionally prescribed.

[243] H. Melber, 'People, Party, Politics and Parliament: Government and Governance in Namibia' in M. Salih, ed. *African Parliaments: Governance and Government* (Basingstoke: Palgrave/ Macmillan, 2005)

Another element of constitutional design that has an impact on the relation between President and Parliament is the terms of office of the two arms of government. Where the terms of the National Assembly and the President are concurrent and overlap there is less risk of the President having to work with a hostile National Assembly, i.e. a Parliament in which he, or his party or coalition of parties, does not have a majority. This would only happen in situations of extreme party fragmentation and volatility, such as the situation in Malawi prior to the 2009 elections when the incumbent president left his party and was subsequently faced with a hostile majority in Parliament.

In semi-presidential designs, a situation in which the President and Premier are from different political parties and have different electoral mandates is called 'cohabitation'. It is most likely to occur when the terms of office are not concurrent. A situation of cohabitation could severely limit the President's power over and influence in cabinet. However, it also leaves room for the President to assert himself vis-à-vis the National Assembly on the basis of his own electoral mandate, which, given the strong presidential powers over cabinet formation and dismissal in Africa, seems to be a more likely scenario.

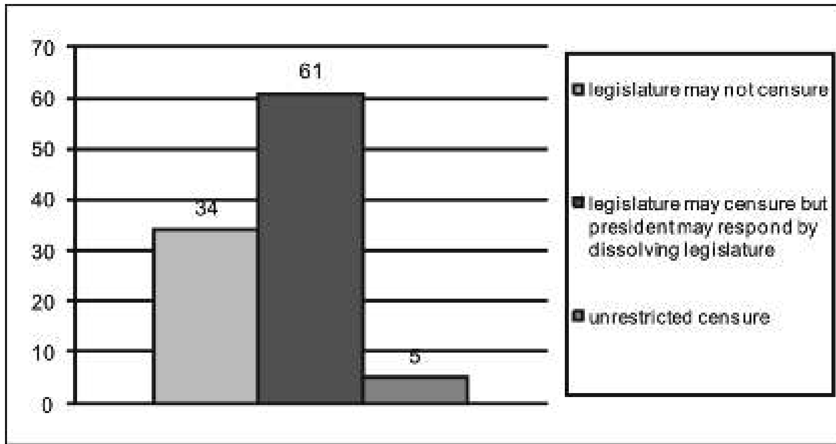
Figure 4 : Dissolution of the National Assembly



There is a final element of constitutional design that can considerably strengthen the position of the President vis-a-vis Parliament: his powers to dissolve the National Assembly. In 13% of our cases the power of the President to dissolve Parliament is unrestricted. In 34% of our cases the power to dissolve Parliament is restricted in terms of special circumstances, frequency or point in time. The President of Guinea Bissau for example can use the power to dissolve the National Assembly in case of a serious political crisis, after listening to the Speaker and the parties represented in the Assembly and respecting the Constitution. What exactly constitutes a serious political crisis is a matter of interpretation, leaving room for debate especially in the context of an emerging or fragile democracy like the Guinean. It could mean that the President's power to dissolve Parliament should only be used in exceptional circumstances but it remains to be seen how often the President deems it necessary to use this provision. The Guinean Constitution also places time restrictions on the President's dissolution powers. The other countries we also see restrictions in terms of special circumstances, frequency or point in time.

In 29% of our cases the constitution is silent about the dissolution of Parliament. Most presidents in our analysis can decide to dissolve Parliament without having to face new elections themselves. Only in 8% of our cases does the constitution explicitly stipulate that when Parliament is dissolved not only parliamentary but also new presidential elections are required. In 16% of our cases the President can only dissolve Parliament in response to a motion of censure being passed by the National Assembly. In other words, the president's power to dissolve Parliament in those cases is only reactive after Parliament has exercised its constitutional power to pass motions of censure or reject motions of confidence.

Figure 5: Censure



The opposite side of the coin are Parliament's powers of censure, in 34% of our cases does Parliament not have the constitutional power to pass motions of censure or reject motions of confidence. In 61% of cases, the power to censure is given to the National Assembly but the President may respond to such events by dissolving the National Assembly. Only in Ghana and Tanzania (5%) does Parliament have the unrestricted power to censure and dismiss cabinet (including individual cabinet members).

5. Quantifying Constitutional Powers and Classifying Regimes

In order to further classify African presidential and semi-presidential regimes, we have coded the constitutional powers discussed above using a framework developed in Shugart and Carey's seminal work Presidents and Assemblies: Constitutional Design and Electoral Dynamics (1992). Shugart and Carey's classification of regime types revolves around measuring the powers of elected presidents on two dimensions: (1) their power with regard to appointing and dismissing ministers and (2) their powers in the case of censure by and dissolution of the legislature. Using their framework to

measure regime types in Africa has pointed us to a number of interesting empirical findings and methodological issues.

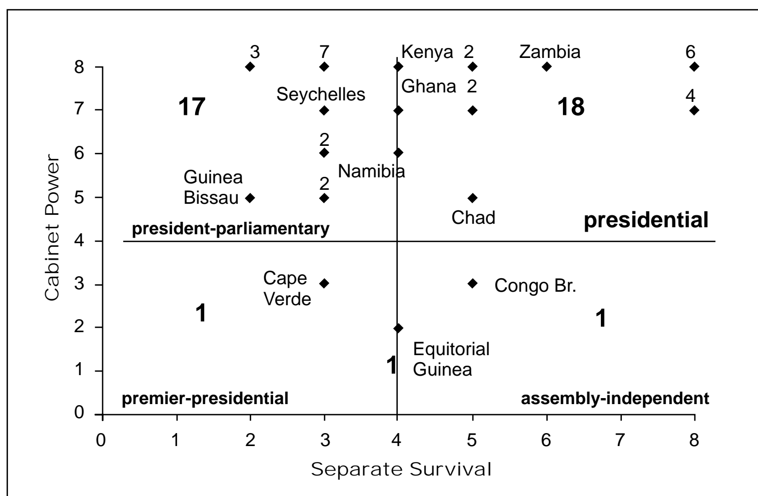
First, as we have seen above, there are important variations in Africa in the way cabinets are formed. For example, in the current Zimbabwean constitution the President has unrestricted powers to name the cabinet. There is no formal involvement of the legislature in the process of cabinet formation so for cabinet formation Zimbabwe together with 19 other countries gets the maximum score of 4. In the other 18 countries in our analysis, the president has the power to name the cabinet but needs some form of confirmation by the National Assembly or the president can only appoint the rest of the members of the cabinet on the proposal of the premier. We have taken this to mean that the president's powers in cabinet formation are restricted and have given these countries lower scores.

Second, when it comes to the power to dismiss cabinet our cases also show interesting variations. Again, Zimbabwe under the current constitution is one of the 20 countries in which the president can dismiss cabinet and individual ministers at will, thus receiving a score of 4. On the other end of the scale, we find Cape Verde, where the president can only dismiss the premier and his or her cabinet in a situation of censure. The Constitution of Cape Verde also states that the president can only dismiss individual ministers on the proposal of the premier. This means Cape Verde receives a score of 0 in terms of cabinet dismissal: the president has no independent power to dismiss cabinet. The other countries received scores in between these extremes.

Third, the variations between our cases on the dimension dealing with censure and dissolution are even more pronounced. When it comes to separate survival of the executive and legislative branches of government, 23 countries (including Zimbabwe) score a 2 on censure: they all have

constitutional provisions saying the legislature may censure but the president can respond by dissolving Parliament. Only in Ghana and Tanzania does Parliament have the unrestricted power to censure and dismiss cabinet, giving them a score of 0. In the remaining 13 countries Parliament has no constitutional power to censure thus scoring a 4. When it comes to presidential powers to dissolve Parliament we see a similar picture: in Zimbabwe and three other countries the President has full powers to dissolve Parliament giving them the highest score of 4. In another 13 countries the power to dissolve is restricted by frequency or point in term, giving them a score of 3. Where the constitution explicitly requires new presidential elections in the event that the President dissolves Parliament the score is 2. Where the President can only dissolve Parliament in response to a motion of

Figure 6 Classifying Regimes



Looking at the horizontal axis of figure 6, there are a number of interesting findings. We can see that 10 countries have the highest score of 8 in terms of separate survival, while Zimbabwe together with 2 other countries has the lowest score of 2 on this dimension. For the purposes of measuring the separation of survival of the executive and legislative branches of government we have reversed the codes for the dissolution powers. That means that where the powers of the president are strongest the score is the lowest because the two branches are the least separate. Where the presidential powers are non-existent or weak the score is higher signifying more independence between the executive and the legislature in terms of survival. The horizontal axis in figure 2 is thus based on a combination of the scores for censure and the reversed scores for dissolution. Shugart and Carey used the dimension of the separate survival to differentiate between pure presidential and hybrid systems. Our coding shows that amongst our 38 countries we have 18 countries that fall into the most presidential right hand corner of the figure. The other 20 clearly fall into the hybrid side of the figure. Zimbabwe, where the President has unrestricted powers to dissolve Parliament and Parliament may censure cabinet, has a low score in terms of separate survival and thus firmly identified as president-parliamentary regimes. Other scholars working outside the Shugart and Carey framework seem to prefer the term highly presidentialised semi-presidential systems for these countries thus signifying that the problem doesn't lie with the powers of the Parliament to censure but rather with the powers of the president to dissolve.

The vertical axis of figure 6 shows the combined scores for cabinet formation and cabinet dismissal. From the vertical axis we can see that in 20 countries including Zimbabwe presidents had the maximum score of 8 in terms of cabinet power. It also shows that in 35 of our countries presidents scored 5 or higher when it comes cabinet power, with Cape Verde, Equatorial Guinea and Congo Brazzaville being the only exceptions. Shugart

and Carey used this dimension to differentiate between the premier-presidential and president-parliamentary types of hybrid systems. The figure shows that of all the countries in our study only Cape Verde falls clearly into the premier-presidential corner, thus indicating that Cape Verde most closely resembles the classic semi-presidential system.

The next section will discuss how these different subtypes of semi-presidentialism compare to the constitutional designs of executive-legislative relations as proposed in the various drafts under discussion in Zimbabwe and comment on the implications for democracy and the future of Parliament. But before we turn to these matters we briefly want to note a number of methodological issues with the Shugart and Carey framework that became clear while coding the countries in our study.

Our findings on the relative cabinet powers and separation of survival in Africa suggest the need to reconsider and revise the way these two dimensions are operationalized in Shugart and Carey's coding scheme. Operationalization requires values of a variable to be exhaustive and mutually exclusive. The categories in Shugart and Carey's coding of cabinet powers seem to be mutually exclusive but not exhaustive. Some of our cases point us to the fact that there are possible values that are missing from the list of codes for cabinet formation. More specifically the situation in which the premier is named by the president after consultation with the represented political parties but the president can only appoint the remainder of the cabinet ministers on the proposal of the premier is not easy to fit into the existing codes. We have given the countries with this type of constitutional provision a score of 3 in terms of cabinet formation. Because the president only needs to consult with every party represented in Parliament and these consultations are not public (similar to the process of cabinet formation in Holland) the provision restricts him only in so far as the parties that are being consulted have the same preference in

terms of premier. If they have not it gives the president leeway to follow his own preference. In other words, this is much less restricting than the formal confirmation of the legislature or an investiture vote.

Thus, this example points us to two necessary revisions of Shugart and Carey's operationalization. 1. the values for the variable are not exhaustive, we need an additional code for the situation in some of our countries. 2. It also point to the fact the rank order of the codes needs to be revised. The original code of 3 needs to be 2 and our new category needs to be ranked as code 3. On the issue of the power to dismiss cabinet there are similar methodological problems related to first, the distinction between dismissing the entire cabinet and dismissing individual ministers and second, the role of the dual executive in this. We will further discuss these operationalisation issues and the broader questions of how best to quantify variations in constitutional powers or differences in regime types elsewhere. Here, we just want to highlight the fact that this study of African cases has pointed us to interesting methodological considerations that have a wider impact for the study of constitutional design and executive-legislative relations.

6. Proposed Constitutional Design for Zimbabwe

What lessons can be drawn from a comparison of the constitutional design of executive-legislative relations across Africa? We are now going to compare the patterns of executive-legislative relations across the continent with the designs as they are being proposed in the various draft constitutions that are currently under discussion in Zimbabwe.

The first question to address is to what extent the proposals create a separation of origin: do the executive and the legislature have shared or separate electoral mandates? And what are the relative powers of the president and Parliament over cabinet formation?

We have already observed that the current Zimbabwean constitution provides for a directly elected President, i.e. a separate electoral mandate for the President who has unrestricted powers when it comes to cabinet formation and dismissal. The position of Premier does not exist and the constitution does not provide for any involvement of Parliament in cabinet formation. The so-called Kariba draft contains the same constitutional design. The current Zimbabwean constitution also sets up a situation of a fusion of offices in the sense that all ministers have to be MP. We have already noted that theoretically, the requirement that ministers need to be MPs limits the choice of the president in cabinet formation. However, the current constitution also includes provisions for special seats in the Senate i.e. gives the President the right to appoint a number of MPs. This undermine any advantage Parliament might have gained from the fusion of offices in that it allows the President to appoint from outside the pool of elected representatives and simply choose his own appointed MPs for a cabinet post. These provisions for special seats, also included in the Kariba draft, seriously undermine the autonomy of Parliament because the executive can determine part of its composition simply by appointing a portion of its members.

The draft of the National Constitutional Assembly is radically different from this situation. First, it provides for a ceremonial non-executive President and seems to create a parliamentary system in that it creates the position of the Premier who is fully accountable to Parliament, is him/herself an MP and is required to appoint most of his cabinet from amongst MPs (with up to 3 cabinet ministers being allowed from outside Parliament). However, the NCA draft surprisingly demands that the Premier be directly elected. This is a fairly unique design that has only ever been implemented in one country in the world, Israel, and for only a few years. It creates the risk of major deadlock between Premier and Parliament because both have separate electoral mandates but the Premier still depends on Parliament for his continued survival. This brings us to the next question.

To what extent the proposals create a separation of survival of the two branches of government? In other words, to what extent do the two branches of government depend on each other to stay in office? And what are the relative powers of the president and Parliament over cabinet dismissal?

The current Zimbabwean Constitution leaves us with a very powerful President but without the benefit of a separation of survival as one sees in pure presidential systems. In the current situation the President dominates Parliament. Although Parliament has the power to pass a vote of no-confidence, the President may react by dissolving Parliament without having to face new elections himself. Together with the President's unrestricted powers over cabinet formation and dismissal these provisions have created what some call a president-parliamentary system. Others speak of a highly presidentialised hybrid system. The Kariba draft follows essentially the same design and even gives the President unrestricted powers to dissolve Parliament at any time.

Again, the draft of the National Constitutional Assembly is radically different. The power to dissolve lies in the hands of Parliament itself and requires a 2/3rds majority. The Premier has no power to dissolve Parliament. Parliament in turn has the power to pass a vote of no confidence in a minister and may remove the Premier from office with a qualified majority. Although this element of design seems to gives more power to Parliament over its own and the Premier's survival in office it also creates the danger of deadlock because of the two separate electoral mandates of Parliament and the Premier.

7. Conclusions

In our overview of the constitutional design of executive-legislative relations in Africa we have seen that although there are a lot of very strong presidents on the continent there are also a fair amount of hybrid regimes. However, most of these are highly presidentialised and therefore the problem of weak Parliaments and authoritarian tendencies persists on the continent.

According to Elgie (2005:99), semi-presidentialism of a highly presidentialised nature pose severe obstacles to the survival of democracy. Comparing evidence on 55 semi-presidential systems across the world Elgie concludes that 'democracy can and has survived in highly presidentialised semi-presidential systems but it is not the norm'. He argues that while highly presidentialised semi-presidential regimes do not necessarily prevent the consolidation of democracy they often create obstacles to it by encouraging the personalization of the political system. Because the premier cannot act as any sort of check on the president the system does little to prevent arbitrary presidential rule and alleviate authoritarian tendencies.

In order to assess whether less presidentialised hybrid regimes would indeed be better for the survival of democracy in Africa we need to know a lot more about how these systems have so far worked in practice.

- Turn-over of Premiers under 1 President
- Over-lapping functions between President and Premier
- Conflict between President and Premier
- Cohabitation (President and Premier from different parties/majorities)
- Who is the leader of the majority party: the president or the premier?

Theoretically, a dual executive can create the conditions for a strong Parliament but much depends on the detail of the constitutional design, the exact balance of power of between the Premier and the President and the party political context within which the design has to work in practice.

Looking at the various designs proposed in the draft constitutions for Zimbabwe it seems clear that it is not easy to strike the right balance. The current situation and the Kariba draft leave Zimbabwe with the current highly presidentialised hybrid which is not conducive to the emergence of a strong Parliament. In reaction to this the NCA draft moves away from a dual executive altogether and introduces a parliamentary system. Given the fact that it might indeed be very difficult to get the balance of power within a dual executive right this might be a wise choice. However the introduction of direct elections for the Premier introduces another problem: the danger of deadlock between parliament and premier with two separate electoral mandates. Thus it might be wise to rethink the NCA draft and take another look at the advantages a truly parliamentary system might have for Zimbabwe.

Alternatively Zimbabwe could follow the example of Cape Verde (the only truly semi-presidential system in Africa) and introduce a truly balanced dual executive but much depends on the party political context within which such a design needs to be implemented. Finally, it is good to note that the balance of power between the executive and the legislature is not just a matter of separate elections, separate origin, separate offices, separate survival but also involves other dimensions of parliamentary capacity:

General Capacity of Parliaments

- Constitutional design: constitutional powers of Parliament and president regarding cabinet formation, dissolution, censure.

- Institutional structure: number and experience of MPs, turn-over rates, internal rules and procedures.
- Resources: physical infrastructure, time, finance.

Lawmaking capacity

- The Constitutional design: powers of Parliament in legislative process, referendum.
- Institutional structure: number and powers of committees, experience of committee chairs, turn-over rates in committees, internal rules.
- Resources: legal drafters, committee support, relations between committees and House.

Oversight capacity

- Constitutional design: budget and investigative powers of Parliament.
- Institutional structure: role of public accounts committee, relations with other auditing bodies, rules around Parliamentary questioning.
- Resources: support staff, relations with ministerial departments, contacts with civil society and research institutes and the public.

Capacity for representation

- Constitutional design: electoral system.
- Institutional structure: constituency work, petitions process, public participation processes.
- Resources: support staff, public education mechanisms, public perceptions of Parliament, the role of political parties.

Is Zimbabwe moving towards a parliamentary system or a truly semi-presidential system? Or at least a less presidentialised hybrid system? Will this lead to a stronger Parliament?

Werner J. Patzelt:
Towards a Powerful Parliament in a Viable Constitution. Reflections on Zimbabwean Draft Constitutions.

1. General Remarks

Many political systems, in particular if they are stable and legitimate, effective and capable of learning, have at their core a strong Parliament or a powerful legislature. Such assemblies seem to disclose significant advantages to those regimes that make use of them. First, they can reliably link different sectors of society and manifold clientele groups both with the central decision-making system and with each other. For this end, however, there must be no exclusion of social groups from political representation, and there needs to exist a fair competition for parliamentary seats. Second, they can serve as efficient two-way channels of communication between the political class and civil society. Through them, political responsiveness can be requested bottom-up, and non-repressive political leadership can be exerted top-down. The preconditions for this are, of course, freedom of speech and practiced pluralism. Third (and only if the first two features are given), such assemblies can provide legislation that is reliably based on fair compromising and which, therefore, has significant chances to fit on the problems it is expected to solve. Fourth, the members of such an assembly can exert knowledgeable control over the government. This will be in particular the case if a sound electoral system makes sure (a) that the assembly is closely linked with all parts of society on which governance has its impact, and (b) that the authority of assembly members stems from those they represent and not from government or from a party leadership group. Fifth, even the formation of cabinet can be under the jurisdiction of such an assembly, in which case we use to call it a 'Parliament' and not only a 'legislature'. Formation of cabinet usually takes the form that a parliamentary majority either expressly elects a head of government, or that it supports, for the time being, a cabinet that, even though nominated by a head of state, can be overthrown at any time by Parliament at its own discretion. In this case, parliamentary power reaches its maximum, and a country is said to have a parliamentary system of government. This is by no

means equivalent to have a 'Westminster system', since this first and oldest form of parliamentary systems of government is rather an exception than the 'normal form' of this regime type. In particular its central idea of 'sovereignty of Parliament' makes it a deviation from truly constitutional government in which no institution has sovereign power.

It can easily be seen that no constitutional provisions per se will produce a central position of Parliament. Such a position is rather the result of a much more complex institutional arrangement, and it works only in combination with a political culture that desires, or at least accepts, Parliament to play such a role. In addition, there is no room for a strong Parliament as long as there is no truly accepted political pluralism and nor role for a really loyal opposition in a country, that is, for oppositional movements that can, and do, accept the regime structure because of its non-repressive and compromise-oriented character. As a consequence, many institutional measures need to be taken, and long-lasting investements in political education must be made, if a strong Parliament is to be established in a viable constitution.

It is true that political systems with non-parliamentary systems of government can provide good governance as well. The best and outstanding example is the presidential system of government in its original form, that is, as implemented in the USA. Attempts at copying this system of government in other institutional and cultural contexts than the North American one, have often ended in semi-authoritarian regimes (like in Latin America), or in overtly dictatorial regimes (like in many post-colonial countries). There is, as contemporary history shows, in fact a clear risk that the office and the actual role of a strong president become starting points for regime transformation towards autocracy. On the other hand, history shows as well that a presidential regime will entail no danger for political freedom as long as there is (a) an effective system of checks and balances, (b) undisputed rule of law, (c) free and critical public opinion, and (d) a fair and democratic electoral system.

Unfortunately, at least some of these preconditions are often not given, and they are missing in particular in countries with an only short tradition of the rule of law and of self-government. In such cases, presidential systems of government will rarely lend themselves to good governance. First, they use to work as 'winner takes all systems'. As a consequence, there are strong incentives for any incumbent president and his supporters not to allow for any rival's ascent to power. Such attempts will inescapably lead (a) to the distortion of a previous system of checks and balances, if ever given, (b) to the removal of effective term limits for presidents, (c) to electoral fraud in its various forms, and (d) to suppression of political freedom. Things may turn out even worse if siding with the president and his political movement, or opposing both, is more a question of ethnic identification than of sound political judgment, since in such instances political conflicts will be fueled by ethnic clashes, and vice versa. If things have developed along this path, then – second – there are no longer any significant incentives for those in power to care for the common good, because their power is no longer based on public consent, but on the availability of a machinery of repression. In this machinery, however, loyalty will widely rely on guaranteed privileges of pay and prestige, of career and power, and of particular opportunities for personal enrichment. As a consequence, corruption will be entrenched on all levels of government, whereas personal and public support for the regime will be highly conditional. This will result in mutual distrust between the political class and the people, with fear being a central resource of governing. Many examples could be given for these 'perils of presidentialism' (J. Linz). They demonstrate that presidential systems of government are much more a risk for developing societies and their political systems, than they are a solution for the problems of a nation, or of a regime, on its way to democratic stability.

Nevertheless, presidentialism has a certain democratic appeal and 'natural plausibility'. The democratic appeal of presidentialism stems from the fact that in presidential systems not only the legislature, but even the head of state is directly elected by the people, which seems to convey much more democratic legitimacy to such a regime (even 'double legitimacy', as it may seem). But whereas legislatures and parliaments can accommodate different political currents quite easily, this is impossible for one-person-institutions like an elected president. As a consequence, a political culture either has to know, and to accept, the role of a party politician who, once elected as president, transforms himself or herself into a generally non-partisan office holder; or the very existence of presidential elections will turn out as a splitting feature in a democratic regime. Since many 'young democracies' have serious problems with the role of a non-partisan president, the very democratic appeal of presidentialism turns into a significant problem for such regimes. In some instances, the borderlines between democratic presidentialism, plebiscitary Caesarism, and electoral dictatorship, will be downright blurred.

The 'natural' plausibility of presidentialism stems from its successful US-American model in particular, and it is generally connected with conceptions of separation of powers that go back to the European 18th century and spread worldwide along with European imperialism. At their core lies the belief that there should be a strong and effective executive branch of government, as it was developed in order to end Europe's civil wars during the 16th and 17th centuries, connect with the conviction that the executive should be balanced by a strong legislative branch of government, whose basic institutions had been available in Europe for centuries, namely in the form of estate assemblies. As a matter of fact, such a system of separation of powers is no mechanical device that can be applied everywhere; it needs quite sophisticated cultural roots. Where these are missing or are insufficiently developed, such a system will not work properly, not even in spite of its theoretical plausibility.

Because both of the democratic appeal and plausibility of presidentialism on the on side and of the apparent perils of presidentialism on the other side, many constitution framers are inclined to look for a third way between presidential and parliamentary systems of government. In a certain sense, they aim at a 'combination of the best features of both'. This is why we find a large variety of semi-parliamentarian or semi-presidential regimes (M. Duverger), situated somewhere between president-parliamentary and premier-presidential forms of government (M.S.Shugart / J.M.Carey). Some of such systems turn out as instable transitional forms, ending in (the re-establishment of) authoritarian regimes, like in Belarus; others consume much political energy for maintaining proper functioning (like Poland in the 1990ies); many others oscillate between the presidential and the parliamentary form of their possible molding (like France of the 5th republic); a few get into deadlock situations between president and premier (like Ukraine); and others work steadily only because of contingent trustful personal relations between the president and the premier (like in present Russia). On balance, the record of these hybrid forms is not very satisfying. So there is no convincing reason why one should adopt such a hybrid system if there is any chance to avoid it. Under specific circumstances, it can certainly work; but there is never any guarantee that such conditions are given or will continue to be given in the future.

2. Two basic observations on draft constitutions for Zimbabwe

Seen against this background, it is highly recommendable that Zimbabwe establishes a really powerful parliament at the center of its political system. This would be a decisive step beyond the present constitution, and promises a political system with clearly better chances for good governance. Among the available draft constitutions, only the one by the National Constitutional Assembly and the 'model constitution' are willing to do this step, whereas the Kariba draft constitution leaves it basically at the not really satisfying status quo of contemporary Zimbabwe.

However, neither the NCA draft constitution nor the 'model constitution' do provide for a fully parliamentary system of government with a consistent and practicable design. It rather leads to a hybrid system with democratic election both of the parliament and the prime minister as chief executive, whereas the president is reduced to mostly symbolic functions, as it ought to be in a parliamentary system of government. This type of a hybrid system with a non-executive head of state, a responsible cabinet, and a directly elected Prime Minister has already been installed in Israel between 1996 and 2001. It was, however, abolished after very few years for quite sobering results. In particular, it could not guarantee cabinet stability and smooth working of the political institutions. Seen against this experience, there are no really good reasons for a second attempt with such a system in Zimbabwe. As it seems, the framers of the NCS draft constitution are fully aware of this fact. In note 1 to chapter 6, section 5, of the NCA draft constitution, they refer to “fundamental problems in constitutional practice because it is difficult to fit such a Prime Minister into a system of parliamentary executive.” Nevertheless they have bowed to “the people's wish for a directly elected Prime Minister”. This means nothing less than going into the trap of presidentialism's democratic appeal. But against the background of Zimbabwean experiences with directly elected individual top office holders, it cannot really be advised to make an – even modified – attempt with basically the same institutional mechanism that already gives shape to Zimbabwe's present constitution, that is, with bestowing direct democratic legitimacy on a single person, and with giving him or her thereby privileged access to the public or people. The probable outcome of the suggested provisions on the prime minister will be, first, “many fundamental problems in constitutional practice”, as the authors of the NCA draft constitution frankly acknowledge, and second, that the directly elected Prime Minister will claim that only strengthening his or her position will alleviate these problems. Doing so, the path is opened for a re-emergence of Zimbabwe's present constitutional design.

It may be useful to know that even in Germany, with its stable and legitimate political order, a relative – not absolute – majority of the people continues to request that either the president or the chancellor (that is, Germany's Prime Minister) should to be elected directly by the people. Behind this request, the 'natural plausibility of presidentialism' is as much at work as its 'democratic appeal'. But it was quite healthful for our German system of government not to have made a second attempt with the hybrid system of the interwar-period, but to have established a clearly parliamentary system of government even in spite of public discomfort with it. Obviously one has to make a choice: Either you follow present popular preferences – or you establish a constitutional design which will not entail "fundamental problems in constitutional practice" in the future. Although it is true that constitutions must fit on the society and political culture for which they are framed, it is certainly not true that any conceivable constitutional system will work equally well, or will really work at all. So the best of government should be established; and afterwards all concrete constitutional provisions should be set up exactly along the preferred systems 'logic of functioning'. To the same degree as citizens have difficulties to understand why some of their institutional preferences have not been incorporated into the constitution, efforts of political information and education have to be increased, and constitutional practice has to demonstrate that in fact a well-working regime has been established.

3. Some more detailed Observations on Parliamentary Issues[244]

- Basic intentions of the NCA draft constitution and the 'model constitution'
It is more than adequate to lay down that all legal and political authority stems from the people, articulating its will through a multi-party system in regular, free and fair elections (so ch. 1, section on the Republic of Zimbabwe), and it is equally adequate to stipulate the devolution of governmental functions and powers to the people in the provinces and other appropriate levels. All regulations on the power of parliament and on provincial or local assemblies as well, can be derived from these provisions. In this respect it is particularly important that ch. 4 says at its very beginning that legislative authority vests exclusively in Parliament, with no separate or additional legislative authority at the disposal of the president or the prime minister.

- Bicameralism
Among the many reasons for bicameral systems, one important is a Senate's capacity to integrate particular groups of citizens into the political process in a special way, that is, beyond being only represented in a National Assembly by elected members of parliament, or by elected parties. Instead many other forms of representation, in addition to establishing the usual electoral connection between the representatives and those represented, become available. Therefore, a strong bicameral parliament with Senators who are not elected along the 'one person, one vote'-rule can pass as acceptable.

[244] Because the NCA draft constitution is much closer than the Kariba draft constitution to what may pass as a viable constitution for Zimbabwe, the following observations will concentrate on it. For its purpose, this paper will widely focus on issues that seem to be not sufficiently clear, or worth of reconsideration, in the NCS draft constitution. In addition, the author of this paper fully agrees with the NCA's assessment of the Kariba draft constitution, as formulated in the preceding section of its own draft constitution.

- National Assembly

It is advantageous that the National Assembly consist of an odd number of members, because no specific tie breaking rules are required in this case. But this odd number should not be achieved by making the directly elected Prime Minister (on this highly dubious position see below) a member of the National Assembly, but should be fixed in the constitution expressly.

In addition, the reason for the elected speaker to lose his capacity of being member of the National Assembly is debatable (see ch4, section on 'Qualifications for membership of National Assembly'). The speaker certainly has to fulfill his or her duties in an impartial way. But in most countries this can be realized without the speaker losing the status of a member of parliament. In addition, such an imposed loss of mandate would make the position of speaker less attractive for politically ambitious persons. As a consequence, this position would become less influential. This can be no welcome effect, because fighting for a strong position of parliament vis-à-vis the executive branch of government will remain a continuous challenge for many years. Besides, there seems to be no regulation for the case that an elected speaker is removed from office by a resolution supported by at least half of the total membership of the National Assembly. Will, in this case, the former speaker return to his or her parliamentary seat? What will happen with the person that filled the vacancy after the elected speaker had lost his or her mandate? In order to avoid such lack of clarity, the whole provision that makes the speaker losing his or her mandate, might be reconsidered. If, however, the speaker's losing his status should be meant as a measure to ensure an odd number of MPs, certainly a more convincing regulation could be found.

With respect to the section on the 'Right to recall Members of National Assembly', there is one more lack of clarity. The recall will be effectuated by a petition of “at least 60% of the persons who cast their votes in the election of the Member in question”. This is clear in the case of a Member who has been elected in a voting district. But what does this regulation mean if a Member has been elected on a party list?

- Senate

The rules for the composition of the Senate reflect attempts at national integration beyond party politics. But certainly party politics will be the driving force behind all elections provided by section 148 of the NCA draft constitution: election of eight members from the five provinces, election of ten chiefs, and election of eight representatives of interest groups by the National Assembly itself. A Senate like this one is a very original chamber, combining the guiding ideas of federal representation (representatives of provinces) with those of Old-European estate assemblies (delegation of chiefs) and of corporate representative bodies (representatives of interest groups, like in the Economic and Social Councils of some national and international regimes). Although a constitutional experiment, it is worthwhile, and without risk, to undertake it.

However, the following features of the Senate should be reconsidered:
As suggested for the National Assembly, there should be an odd number of Senate Members, such that no need arises for special tie breaking rules.

The regulation that the President of the Senate might be no member of the Senate is as unconvincing as the suggested rule that the President of the National Assembly must be no member of the chamber over which he or she presides. Or is there an important, but hidden, background reason for both provisions? It is not really plausible that the Senate should have no

right to initiate legislation while having the right to approve, amend, or reject bills.

- Election of the National Assembly

According to the NCA draft constitution, a mixed member system shall be applied for the election of the National Assembly. Choosing an electoral system is highly consequential:

Single-member voting districts use to make MPs dependent on regional elites for re-election. Doing so, they produce close relations between members of parliament and local party organizations, local governments, local enterprises, and local NGOs of any kind. In such dense networks of communication and interaction between regionally rooted MPs and civil society, the latter one will become MPs' primary constituency. This good for stabilizing and fostering democratic representation. However, a direct member system often entails enormous differences between the distribution of political preferences among voters and among elected MPs.

Proportional allocation of parliamentary seats, depending on the election returns of competing parties, makes sure that parliamentary representation mirrors the distribution of political preferences among the voters. But if party lists are set up at national party conventions, MPs become dependent on those (national) party leaders that can command votes at the national party convention. As a consequence, they will cultivate intra-party networks while having little incentive to build up dense networks of communication and interaction across the country. As a result, such MPs will have party leaders and party activists as their primary constituency. This is not advantageous for stabilizing and fostering democracy:

The NCA draft constitution provides for two kinds of MPs: 'district MPs', elected directly to represent regional constituencies; and 'party MPs', elected in terms of a system of proportional representation. Although this split needs not to be a problem per se, it might happen that it will turn out awkward or inconvenient in practice. The risk that the split between 'district members' and 'party members' gets combined with MPs' preferences on district work vs. parliamentary work, or with MPs' career perspectives (with better ones for 'party MPs' who are active in parliament and on national level, and with lesser ones for 'district MPs' who are meant to engage constituency work). As a consequence, this split between two kinds of MPs might even translate into a two-rank-system of members of the National Assembly. Therefore on should reconsider the regulations that possibly lead to such highly undesirable consequences.

- One way to build up a mixed member system while avoiding such consequences has been opened by the German mixed member proportional electoral system (MMP). For its merits, it has been 'imported' by New Zealand in 1996, from where it has been re-exported to Scotland and Wales during the last years. The central features of this system are the following:
- Half of the seats in the assembly are given to MPs who have been directly elected in their single member voting districts (as is suggested by the NCA draft constitution).
- Half of the seats in the assembly are given to MPs running on party lists (as is suggested by the NCA draft constitution). They will, however, in no case lose their seat if they should leave the party to which they belonged when elected. This is an important rule, because otherwise MPs would lose bargaining power in conflicts with party leaders, and veto-power in conflicts within their parliamentary party groups. Since this cannot be desirable if parliament is to be a market place for fair

bargaining, there should be no possibility for kicking an MP out of parliament by forcing him to leave his or her party.

- All of the seats in the assembly are allocated to the competing parties in proportion to their electoral returns (which is not suggested by the NCA draft constitution). Exactly this rule combines a direct member system with proportional representation.
- Note: If there should be surplus seats for directly elected MPs, compensating seats may be given to parties without surplus seats, thereby making sure that the overall distribution of seats does not distort the distribution of votes. In addition, thresholds for a party's right to enter parliament may be fixed (e.g. at 5% of the valid votes). Additionally it may – and should – be regulated that parliament will have an odd number of seats anyway.
- In such a system, candidates can run both in a voting district and on a party list. For good reasons, they will usually even try to run both in the voting district and on the party list. The reasons can be easily seen: If a candidate is placed on a 'safe' position on the party list, he or she they can be assured of re-election even if running in a contested or even unsafe voting district; and his or her running in a contested, or even unsafe, voting district can be handled by a party as a precondition for having this candidate placed on a safe seat on the party list. Enacting such (informal) rules, there will never be any lack of candidates running even in unsafe voting districts, and parties have a good chance to 'cover' the whole country with their own candidates. This, in turn, provides for dense communication and interaction networks between the citizenry and the political elite.
- Embedding a single-member voting system in this way into a party list system, allows for benefits from the advantages of both systems, while no price needs to be paid for the

disadvantages of either system. In addition, German experience shows that under such circumstances be no split will occur between 'direct' members and 'list' members, neither in terms of MPs' role orientations nor with respect to role behavior in parliament or in the voting district.

For all these reasons, it might be advisable to reconsider the provisions on the electoral system along the experiences of Germany, and of New Zealand, with their mixed member proportional systems. If a MMP system is, however, introduced on national level, then it might be reasonable to introduce it for the election of the Provincial Assemblies as well. For them, a system of proportional representation is stipulated already now (see ch. 13, section on Provincial Assembly). However, the sound regulation that their total membership should be an odd number, is missing.

In the section on 'Qualifications for membership of National Assembly', a second thought should be given to the regulation that makes ineligible for MP those who are "in the service of the state and receive(s) remuneration for that service". It is true that this provision sounds convincing because it tries to prevent all informal interferences between parliamentary party politics and a civil service that is meant to work impartially. This is why similar provisions exist in various political systems. But there are countries that have made good experiences with civil servants running for a parliamentary mandate as well. On the one hand, many civil servants know from personal practice how laws work in practice, and this seems to improve their law-making capabilities. On the other hand, and certainly depending on cultural context, civil servants often have closer intrinsic ties to the state and its mission than many of their compatriots. This makes it more plausible to them to care for the common good if conflicts with group interests should arise. Since caring for the common good is a welcome virtue of members of parliament, it might be useful to reconsider the exclusion of civil servants from parliamentary office.

- Voting in Parliament

Some regulations seem not yet to be fully clear, in particular the following ones:

- In ch. 4, section on 'Quorum in Parliament', it might be clarified for which kinds of decisions on the floor one third of the total membership of the chamber is required. Shall this rule apply to any decision taken, including motions, or only to voting on bills or elective acts (if no higher quorum is required in such cases)? If there is lack of clarity, then recurring parliamentary debates on procedures, usually going along with hidden political objectives, may outrage the citizens who are interested in good governance and sound legislation.
- In ch. 4, section on 'Voting in Parliament', it is not clear whether there shall be secret ballot for really all voting in Parliament. Doing so, can be extremely time-consuming and lend itself to tactical misuse. Therefore, a regulation allowing for the usually wide variety of parliamentary voting procedures, with secret ballot as only one a special form for special occasions, might be advisable.

- Legislation

In ch. 4, section on 'Subsidiary legislation' it might be clarified that delegated powers must be expressly defined, and that they can reach only as far as is expressly defined in the delegating Act of Parliament. If handled otherwise, delegated legislation may become a source of unwelcome power increase on part of the prime minister as the chief executive.

-The Prime Minister

In a properly designed parliamentary system of government, the cabinet is formed by the leaders of those parties that manage to build a solid parliamentary majority. On the one side, this can be done in a self-arranging parliamentary process, usually ending in the formal election of

the prime minister by the national assembly, or in a vote of confidence. On the other side, the head of state may play a more active role in this process. The most common possibilities of having the head of state involved are to suggest, after informal talks, a candidate for being elected prime minister to the national assembly; to assign – at own discretion, but after informal talks – the formal task of coalition formation to a party leader; or to nominate a 'formateur', that is an experienced politician who will organize the necessary bargaining between possible coalition partners in informal ways before the formal process towards cabinet formation is launched. However this is handled in practice, usually the leading members of parliament will become chief executives, and they will do so without losing their status a member of parliament. Of course, parliamentary leaders forming the cabinet may include non-parliamentarians in the cabinet as well. But this will find natural limits in the office-seeking aspirations of fellow-parliamentarians.

It is quite against such suitable designs for parliamentary systems of government that the NCA draft constitution stipulates in ch. 6: “The prime minister will be elected directly by the voters in the same general election where other members of the National Assembly are elected”. This regulation is unnecessary in the best case, and dangerous in the worst:

In the best case, the leader of a major party is elected prime minister, while his or her party wins an absolute majority of seats in the national assembly. Then, the new prime minister will have a reliable majority in the national assembly. But same effect would have been realized if there had only been legislative elections, with the leader of the winning party being the natural candidate for the office of prime minister and in command of a stable majority in the national assembly.

Worse is the case that the leader of a (major) party is elected prime minister while his or her party wins no absolute majority of seats in the national assembly. In this case, there may possibly other parliamentary party groups be willing to enter a coalition cabinet under the elected prime minister. But the same effect would, again, have been reached if there had only been legislative elections, with the future prime minister being a party leader among others.

It may be the case that (a) the leader of a (major) party is elected prime minister, that (b) his or her party wins no absolute majority of seats in the national assembly, and that (c) not sufficiently many other parliamentary party groups accept to enter a coalition cabinet under the elected prime minister. In this case, the prime minister must try to govern without a parliamentary majority, which usually will not work well. It is true that such a situation can also happen in an orderly designed parliamentary system of government. But there, the office of prime minister itself becomes part of the package deal taking place before the formation of a cabinet, thereby reducing the risk of such a situation. In the suggested Zimbabwean system, however, this risk cannot be reduced, with bad governance and its de-legitimizing consequences as the probable result.

It may even be the case that a person is elected prime minister who from the outset has no chance to find a parliamentary majority. This can happen in particular, if voters think of the coinciding prime ministerial and legislative elections in terms of 'balance of power', and expressly vote for 'divided government'. In this case, the suggested constitutional provisions lead directly into a constitutional crisis. According to the NCA draft constitution, the prime minister could even advice the president, in such a crisis, to declare a state of emergency. After that, the apparently ill-working constitutional system could find itself deeply transformed. No reasonably designed parliamentary system of government would create such a risk.

The solution for these latter problems, as provided by the NCA draft constitution, is highly impractical und probably useless in practice: No less than a three-fifth majority of the total membership of the National Assembly is required to remove the prime minister from office, either by a resolution or by a vote of non-confidence (the usual majority would be the absolute majority). Only after such an improbable move, the National Assembly could act as a 'normal' parliament in the framework of a parliamentary system of government, that is, it could elect a prime minister who is really able to command a parliamentary majority of his or her own.

Against the background of African political experiences, it is overt brinkmanship to implement such constitutional regulations. Therefore, the provision that the prime minister is directly elected by the people should be abolished and replaced by one of the well-tested procedures for the creation of a parliament-supported cabinet. In this case, even a term limit for the office of prime minister might be unnecessary.

In addition, if the provincial governors are elected from among the members of the Provincial Assembly (according to ch. 13, section on 'provincial executive authority'), then good chances should exist to explain to the citizens that there is really no need for a quite different procedure to elect the prime minister on national level.

- President

Given the tendency towards presidentialism in all weak and stabilizing democracies, it is reasonable to underline in ch. 5 that the President will be a non-executive and titular head of state. His or her election by an electoral college, consisting of the members of the National Assembly and of the Senate, is fully adequate for this position. It is equally sound to grant

him no power whatsoever to initiate a referendum. But the constitution should even exclude expressly that such power could be given to the president by an Act of Parliament, because such powers would certainly be used, like in several South American instances, as a gateway towards the re-transformation of the constitutional order into a presidential system.

For the same concern, the president should not be given the title of Commander-in-Chief of the defense forces. Every power-seeking president will use this provision in order to get real influence on the military forces, and this will be a starting point for destabilizing the parliamentary system of government that the NCS draft constitution tries to establish. In addition, there is no real need to make the president the – even only titular – commander-in-chief. Under peace conditions, the minister of defense can exert this function, and under the conditions of war, or of the state of emergency, the prime minister should assume responsibility for the armed forces.

In case that the position of a definitively non-executive president should not be plausible for most citizens, the following constitutional provision might be considered: Have the chief-executive elected by parliament, but call him or her 'president' and not 'prime minister'. This way of combining the benefits of a parliamentary system of government with the position of an executive president is preferable to the risky alternative of introducing a semi-presidential system with a 'dual executive'.

4. Concluding Remarks

Some questions have been left open even by the NCA draft resolution. First, it is quite unclear how constitutional provisions can make for a truly responsible party system. Here, much institutional framing is left for Acts of Parliament. Second, it is unclear how a 'loyal opposition' can be formed.

Given Zimbabwe's political experience, some reference made in the constitution to the value and role of the opposition might be useful, even for political education. More important, however, is to establish a regime to which the opposition really can be loyal, because it is truly based on political pluralism and on treating opponents as competitors, not as enemies. Third, placing parliament in the center of the political system by constitutional regulations will not suffice. It is indispensable that parliament can decide freely on its own budget (which might be laid down in the constitution), and there is need for a sufficient parliamentary infrastructure (like assistants for parliamentary committees and parliamentary research services). Fourth, a stable government cannot be based only on a viable constitution, but must also rely on constitution-friendly 'habits of the heart'. Therefore, significant investment must be made in political education if a new constitution shall foster real democracy, and not only its façade.

Muna Ndulo:

Democratic governance and constitutional restraint of presidential and executive power

1. Introduction

A number of countries are in the process of negotiating new constitutions in response to demands for more democratic political systems or the resolution of institutional crises. In the last context constitution making is largely about re-building the political community as well as structures. Zimbabwe is engaged in the process of developing a new constitution in the context of both demands for a more democratic system and the need to rebuild the Zimbabwean political institutions which have been distorted by political manipulation and violence. All political parties and the civil society agree on the need for a new constitution but differ on the process to be employed in developing the new constitution and on the content of the constitution. Nevertheless it must be remembered that the need for the reform of the constitution was an agreed agenda at the time of the adoption of the 1980 constitution at Lancaster. It is generally accepted that the 1980 constitution was adopted to end a conflict. Nationalists negotiators accepted terms they might not have included under different circumstances. It was anticipated that the 1980 constitution would be replaced by a new document in a few years. This of course has not been the case.

The future of democracy in Zimbabwe is predicated on the development of constitutional arrangements that guarantee viable institutions in which to conduct the business of governance. This means developing a constitutional order that channels conflict into non violent settlement of differences, preserves the ability of individuals and groups to participate in a continuing dialogue about policy and politics, generate accountable governments, and focuses attention on the commonwealth or on shared aspirations. In this article I try to identify the issues that need to be addressed in relation to the executive. No doubt the South African constitution serves as one of the best models for a constitutional arrangement that provides important safeguards to ensure public

accountability, responsiveness to the electorate, and participation of the people in governance. The process followed in the elaboration of the South African Constitution also teaches us that in order for a people to feel a sense of ownership, the constitution-making process must ensure extensive consultations with the people and all the principal stakeholders in the country before any constitution is drawn up and adopted. The process must be inclusive, transparent, accessible, accountable, and empowering to civil society. However one has always to be mindful that any constitution process must be context driven and its product reflects the circumstances of a country. Important issues in constitution making are defined by the political context or period in which constitution building takes place.

This article examines the provisions relating to executive power in the three draft constitutions that are the basis of the discourse on a new constitution for Zimbabwe. In analyzing the issues that arise, I draw on lessons to be learnt from the South African and other African states constitutional approaches with respect to ensuring sufficient checks and balances on the executive. Concern about executive abuse of power and misuse of security forces is a common theme in most constitutional conversations today. As exemplified by recent crises in Guinea, Gabon, and Niger Presidential power is inadequately checked in many parts of Africa and is at the center of most constitutional crises in Africa. Presidents in Africa treat other organs of government, such as parliament and the judiciary, as subordinate to them and routinely undermine their powers and ignore the separation of powers. The actions of Zimbabwe's President Mugabe in 2001, dismissing judges and forcing parliament to pass legislation in violation of fundamental rights such as the right to free speech and assembly protected in the Zimbabwe Constitution, provide a

recent example of this problem. [245] As the African scholar B.O. Mwabueze has observed: “Presidentialism in Commonwealth Africa has tended towards dictatorship and tyranny not so much because of its great power as because of insufficient constitutional, political and social restraint upon that power. [246] Given the experiences of African states, a document that aggregates all power in the executive would be hard to countenance.

Constitutions all over the world typically provide for an executive arm of government with specific powers and responsibilities. Yet the necessity for government creates it own problems – in particular, the problem of limiting the arbitrariness inherent in government, and ensuring that its powers are used for the good of society. In any political system, whilst the executive is often the major initiator and executor of public policies, it also has the potential for operating as a super ordinate branch of the political system with tentacles that stultify the other branches. [247] The executive branch of government in most African states is headed by a president. The most striking feature of the presidency in African states is its tremendous power and consequent dominance of the political system. The presidency tends to expand and intensify personal rule, adopt authoritarian measures to repress systems of competitive politics and effective opposition, and restrict free political activity at all levels of society. [248] The president is largely free from limiting constitutional devises, particularly those of a rigid separation of powers. The separation or division of government authority is honored more in its breach than in its observance.

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[245] Africa Faith & Justice Network, *Around Africa*, *at http://afjn.cua.edu/AA%20October 01.cfm (Oct. 2001).*

[246] B.O. Nwabueze, Presidentialism in Commonwealth Africa 435 (1974)

[247] *Id.* At 2, 4.

[248] Mwabueze has observed that “[i]n Commonwealth Africa…all the presidential constitutions establish the paramouncy of the President in the executive field. Where a prime minister exists…he is completely under the president, with no independent executive power of his own.” *Id.* At 21. With respect of Kenya, Mugambi Kiai observes that

[a] striking historical feature that has emerged from post-colonial Kenya is the perpetuation of the presidency as an immensely powerful institution. Indeed, this office has been so powerful that the two successive Presidents in Kenya's post-independence era have been the alpha and omega of the social, political, economic and cultural life of the nation. Except in very few instances, it is impossible for any undertaking to take root in Kenya without the President's good will.

Mugambi Kiai, *Presidential Directives* vis-à-vis *Democracy. Human Rights and the Rule of Law: A paradox, in* Search of Freedom and Prosperity: Constitutional Reform in East Africa 267 (Kivutha Kibwana et. Al. eds., 1996)

On paper, the distribution of political power follows the general principle of making parliament the sole repository of the legislative power, and the courts the repository of judicial power. The executive typically has no independent legislative power under the constitution. [249] There is only one legislative authority – parliament; thus, whatever legislative power the executive possesses is a derivative or delegated one, and, therefore, subordinate to parliament's supreme authority. The reality in many African countries is different: the other branches of government, the legislature and the judiciary, end up being subordinate to the executive. [250] This occurs because the executive is involved in the operations and appointment of members of the legislature and judiciary in ways which undermine the separation of powers. Without adequate safeguards, the executive's involvement in these areas can lead to control of the subject institutions and the perception that the other organs of government are subordinate to the executive. [251] It follows that the composition of the powers of the various organs of government and their relationship to each other are critical to the operation of a democratic state. [252]In a

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[249]See e.g., Uganda Const. art. 79, (1)(2)(1995):

Subject to the provisions of this Constitution. Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda. Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of parliament.

Id. For judicial power, see *id.* At art. 126 (vesting all judicial power in the courts.)

[250]The South African approach strikes a good balance.

(3) The president as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the national Assembly, appoints the president and Deputy president of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.

(4) The other judges of the constitutional court are appointed by the president, as head of the national executive, after consulting the president of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure: (a) the Judicial Service Commission must prepare a list of nominees with three names more that the number of appointments to be made, and submit the list to the president; (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made; (c) The Judicial Service Commission must supplement the list with further nominees and the president must make the remaining appointments from the supplemented list.

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(6) The president must appoint the judges of all other courts on the advice of the Judicial Service Commission.

S. Afr. Const. art. 174, (3)(4)(6) (1996)

[251]"The Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal, and a Judge of the High Court shall be appointed by the president acting on the advice of the Judicial Service Commission and with the approval of Parliament." Uganda Const. art. 142, (1) (1995).

[252]See Nwabueze; *supra* note 3, at 12 (discussing the limited powers of the executive).

constitutional democracy, arrangements should be geared toward maximizing checks and balances among the governmental organs, and securing the independence of the institutions from each other so that they can act as effective checks on each other. This objective implies the need to relate the powers and functions of the executive branch to the other organs of the state.

The need to limit and control the powers of the executive has philosophical roots in the notions of democracy which emphasize that a government has no right to govern, save with the consent of the governed.[253] Historically, constitutions were developed as deals to ensure that the sovereign could not abuse those who have to pay for his or her adventures. Thus, as a necessary tenet of democratic governance, a government must be responsible to the people it governs. In turn, the people at all times retain the right and power to exercise control over their government. The executive must not be permitted too much power; otherwise, the executive is likely to either abuse its powers or misuse them based on a misunderstanding or inadequate comprehension of the executive role in the political system.

This article draws upon experiences in other African countries, in its examination of the nature of the articles that deal with presidential power in the draft versions of the Zimbabwean constitutions. It examines them in the context of whether there are sufficient checks and balances on presidential power in the proposed constitutional arrangements for Zimbabwe. The mere legislative vesting of executive power and its division in the constitution affords no conclusive indication of either its actual extent or the reality of its exercise. The extent of presidential power and restraint placed on it must be judged in relation to the entire constitutional system in which the executive operates.

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[253] *Id* at 30 (discussing the checks and balances system in the United States.

2. The Election and Tenure of Office of the President

In most African states the basic structure of the political system is neither parliamentary nor presidential; it is a hybrid system which provides for a directly elected president and an elected parliament. [254] Typically, the qualification for election to the office of president relate to age and nationality and registration as a voter. [255] The three draft constitutional texts in Zimbabwe, advocate an age requirement ranging from 35- 40 to for eligibility to stand as president. [256] The NCA draft proposes, a maximum age of 65 for candidates seeking the office of president. [257] All the four drafts agree that the tenure of the presidency should be for five years and correspond to that of parliaments i.e. five years[258.]

In any political system, after the choice of the electoral system, the second fundamental choice is whether to have a presidential or a parliamentary system. The Kariba and the current Constitution favor an executive president and one that is directly elected[259], while the NCA favors a non-executive President elected by Parliament and an executive Prime

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[254]Zambia Const. art 62, (1996). The President is not a member of Parliament but he or she may, at any time, attend and address the National Assembly. *Id* at art. 82, (1) (2).

[255]*Id.* The Constitution of Zimbabwe (as amended to No. 16 of 20 April 2000) article 28At art. 34(3). In recent times, some jurisdictions have added controversial requirements for eligibility. The Zambia Constitution, as amended in 1996, added a requirement that for one to stand as president, both his or her parents must be Zambians by birth or descent. *Id.* The amendment was aimed at Dr. Kenneth Kaunda and was opposed by the general population. *See* Steering Committee on the Mode of Adoption of the Constitution, Citizens “Green” Paper:” Summary of Resolutions by the Citizens' Convention on the Draft Constitution 5 (1996).

[256] Zimb. Const. art. 28 (1) (b) (1996).

[257]National Constitutional Assembly Proposed Draft Constitution for Zimbabwe, article, 154; *See also Uganda* Const. art. 102 (b)(1995) (“A person is not qualified for election as President unless that person is …not less that thirty-five years and not more than seventy-five years of age.”)

[258]National Constitutional Assembly Proposed Draft Constitution for Zimbabwe, article 154; Constitution of Zimbabwe (Kariba draft), article 84.

[259]The Constitution of Zimbabwe (as amended to No. 16 of 20 April 2000) article28. Constitution of Zimbabwe(Kariba draft), article 82

Minister[260]. The NCA advocates for a titular President and an executive Prime Minister. In a majority of African states, such as Zambia, Tanzania, and Kenya, the choice has been a presidential system. While actual arrangement for voting procedure may vary, [261] the president is directly elected in a national election. [262] The South African model is a hybrid of the two systems. It has an executive president elected by Parliament. The real significance of the direct election of a president by the people rather than by the legislature lies in the fact that it gives the president an independent right to govern. The right flows directly from the people who elect him or her, and, arguably, is greater than that of the legislators because it is more nationally based.

An executive President or Prime Minister drawn from the legislature owes his or her right to govern to the legislature. Because government by the entire membership of the legislature is neither practicable nor desirable under modern conditions, the legislature inevitably delegates its authority to one or more of its members, with one of their member elected as president. This is the central feature of the parliamentary system. In such a system, the only popular election is for members of the legislature, no separate election is held for the president. Thus, the only popular mandate for the government is that conferred by the votes of the elected members. Since the mandate is the only authority for government, it belongs to the legislature. An executive President or Prime Minister

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[260]National Constitutional Assembly Proposed Draft Constitution for Zimbabwe, article154 &148.

[261]For example, in Zambia, under the 1964 Constitution, every parliamentary candidate was required to declare which of the presidential candidates he or she supported. Every vote cast in favor of a parliamentary candidate was considered a vote for the presidential candidate which that parliamentary candidate had chosen.

[262]Some, like Kenya, moved away from the parliamentary system. At Kenya's independence, the President was an elected member of parliament and his term of office was tied to that of the parliament. Constitution of Kenya, 1963. Asian-African legal Consultative Comm., 1 Constitutions of African States 606-610 (1972); Pheroze Nowrojee, *Why the constitution Needs to be Changed, in* In Search of Freedom and Prosperity: Constitutional Reform in East Africa 386, 388 *Kivutha Kibwana, et al. eds. 1996). The Zambian Constitution provides for direct elections of the president, Zambia Const. art. 34, (1996); Uganda Const. art 103, (1) (1995).

elected in this system therefore owes his or her right to govern and tenure in office to the legislature. Good constitutional design for multiethnic divided societies would seem to dictate against directly elected presidents. Shugart and Carey have identified three key traits of presidentialism that often have negative consequences—temporal rigidity, majoritarian tendencies, and dual democratic legitimacy. [263] Temporal rigidity refers to the length of presidential terms as determinate and difficult to change. As Shugart and Carey point out,[a]although most presidential constitutions make provisions for impeachment, they are invariably unwieldy procedures, requiring extraordinary majorities, which formally can be used only when there is evidence of malfeasance or disregard for constitutional procedures on the part of the chief executive…The principal dilemma presented by the set presidential terms is what to do with a highly unpopular chief executive…"[264] Or, perhaps even more importantly, one who has become arbitrary and undemocratic.

The second negative trait of presidentialism, majoritarian tendencies, refers to the likelihood that a president may in fact represent the minority vote of the voters in an election, yet still win the election to office, thereby distorting representation. Arguably this distortion can be mitigated by insisting that election to the office of president require an absolute majority of votes. The third trait, dual democratic legitimacy, refers to the fact that because both parliament and the president are popularly elected, both can claim a unique popular mandate that might lead to conflict and a struggle for dominance. [265]

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[263]Matthew Shugart & John Carey, Presidents and Assemblies: Constitutional Design and Electoral Dynamics 28-36 (1999).

[264]*Id* at 28-29.

[265]Shugart & Carey, *supra* note 18, at 32

A further concern regarding directly-elected presidents or prime minister is that in a multiethnic society without a history of stable democracy, there is no assurance that the losers of a presidential race will accept defeat in what amounts to a zero-sum game. [266] The conflicts in Angola in 1994 and the Congo in 1992 highlight the potential consequences of such a zero-sum structure. In the case of Angola, Ann Reid blames the 1994 collapse of peace plans and the bloody conflict that ensued largely on the country's presidential system. She observes that because Jose Eduardo Dos Santos and Jonas Savimbi were vying for the presidency, which was "the only prize worth having," it was inevitable that Savimbi would resume his violent struggle after losing the election. [267] Similarly, in Congo in 1992, Sassou Nguesso succumbed to popular demand and permitted multi-party elections in which he stood as a candidate for president. After losing the election, he became obsessed with ousting his successor, Pascal Lissouba, and mounted a military campaign against Lissouba until he succeeded in regaining power in June 1998. [268] Such situations are unlikely to happen, however, when an executive president is elected by parliament. Directly elected presidents often interpret a "popular" mandate as distinct from that of a parliamentary mandate, with the former entitling them to supervise parliament in its work or at least prevail in the event of conflict between the two institutions. Another danger of a directly elected presidential system is that a directly elected president is more susceptible to be pressured into ethnic or regional exclusivity. Such presidents have a

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[266] A zero-sum game is a game in which the cumulative winnings equal the cumulative losses. Webster's Third New International dictionary 2658 (ed 1986).

[267] INR Foreign Affairs Brief, Ann Reid, conflict Resolution in Arica Lessons from Angola. (Bureau of Intelligence and Research, U.S. Dep't. of State. 1993). Ian Campbell notes that in Nigeria, the all-or-nothing structure of the 1993 presidential election made it easy for the military to succeed in annulling the election before the final results had been officially announced. Unsuccessful candidates had no immediate stake in the political outcome, and many readily acquiesced in the annulment of the election in the hop0e of being able to run again. *See* Ian Campbell, *Nigeria's Failed Transition: 1993 Presidential Elections*, 21 J. Contemp. Afr. Stud. 182 (1994)

[268] Douglas G. Anglin, *Conflict in Sub-Saharan Africa 1997-1998.* Available at Carleton University, Canada, http://www.ulaval.ca/iqhei/circa/cm96-97 (last visited Mar. 23, 2002).

great incentive to offer special privileges to their own ethnic or regional groups as a means of ensuring re-election through a simple majority or plurality of votes.[269]

In contrast, an arrangement in which the president is elected by parliament is more conducive to formal and informal power-sharing arrangements. In such an arrangement, even without grand coalition requirements, minority parties can influence the choice of president and the composition of the cabinet, particularly where no one party has a clear parliamentary majority.[270] Furthermore, given the factors discussed above, it would seem that a president elected by members of parliament would foster the feeling of greater participation in the election by all stakeholders in the country as represented in parliament. South Africa follows this arrangement.[271] "At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or man from among its members to be the President.[272] When, elected president, a person ceases to be a member of the National Assembly.[273] For countries that practice proportional representation as their electoral system, the adoption of the parliamentary system, for the election of a president, would be an extension of the proportional representation system to the presidential election.

[269]Nwabueze, *supra note* 3, at 17.

[270]Siri Gloppen, South Africa: The Battle Over the Constitution 217-18 (1997)

[271]S. Afr. Conts. Art 86. (1996).

[272]*Id.* At art. 86 (1).

[273]*Id.* At art. 87.

3. Exercise of Presidential Power

The key decisions that a President must make relates to the appointment of the Vice President, ministers and declaration of war. Except in the case of the declaration of war where parliamentary approval is provided for, the current constitution and the Kariba draft constitution provide for many unilateral powers such as the power to dissolve parliament[274.] In the case of declaration of war, the NCA draft provides for the president to act on the advice of the prime minister and subject to approval by two thirds majority of Parliament[275]. Other than that there are no other obvious restraints on presidential power. Most African constitutions vest broad executive power in the president.[276] This is a phenomenon that has been termed "presidentialism." It involves the centralization of state power in the hands of an executive president.[277] When most African states gained independence, attempts were made to blend Westminster-style cabinet government with an American version of presidential power. In the majority of cases the functions of head of state and chief executive were immediately fused in the office of president, while others soon thereafter adopted this approach. [278] In most states, soon after independence the constitutional president became uneasy with the demands and challenges of the position. The president began groping for absolute power and for a constitutional order that would increasingly allow him or her to operate outside the strictures of the constitution. [279]

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[274]The Constitution of Zimbabwe (as amended to No. 16 of 20 April 2000) article 31H ; The Constitution of Zimbabwe (Kariba draft) article 93 & 98.

[275]National Constitutional Assembly draft Constitution for Zimbabwe, aricle147

[276]Filip Reyntjens, *Authoritarianism in Francophone Africa from the Colonial to the Postcolonial State,* in Third World Legal Studies 60 (1988). A typical constitutional provision is like that found in the Constitution of Zambia. "the executive power of the Republic of Zambia shall vest in the President and, subject to the other provisions of this Constitution, shall be exercised by him either directly or through officer5s subordinates to him." Zambia Cosnt. Art 33, (2)(1996).

[277]Nwabueze, *supra note* 3, at 17. The Zambia constitution also provides broad powers to its president. Zambia Const. art. 33, (1)(1996); *see also,* Uganda Const., art 99 (1995).

[278]This is especially true with respect to countries such as Zambia that went straight into Republican status. Zambia Const. art 33, (1996).

[279]See Smokin Wanjala, *Presidential Ethnicity, Militarism, and Democracy in Africa: the Kenyan Example, in* Law and the Struggle for Democracy in East Africa, 86, 90-92 (Joseph Oloka-Onyango et al. eds. 1996).

This was achieved by the constant amendment of the constitution to remove any restraints on presidential power and give excessive power to the president. The result is that most African states' constitutions provided and continue to provide for a very strong executive president. The president typically has power over all the other branches of government. [280]

Some of this power concentration could be controlled by providing – in the constitution—the manner in which presidential power may be exercised. For instance, the South African Constitution attempts to circumscribe the power of the president by providing the manner in which executive authority is to be exercised as a way of providing meaningful checks and balances in the exercise of authority. [281] It provides:

> The President exercises the executive authority, together with the other members of the Cabinet, by (a) implementing national legislation except where the Constitution or an Art of parliament provides otherwise, (b) developing and implementing national policy; (c) co-coordinating the functions of state departments and administrations; (d) preparing and initiating legislation, and (e) performing any other executive function provided for in the Constitution or in national legislation. [282]

In a further attempt to provide more checks and balances on the executive, the manner in which executive decisions are taken is regulated by law. Article 101 of the South African Constitution provides that "[a] decision by the president must be in writing if it (a) is taken in terms of legislation; or (b)

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[280]The Uganda Constitution provides the "[t]here shall be a President of Uganda who shall be the Head of State. Head of Government and Commander in Chief of the Uganda Peoples' Defense Forces and the Fountain of Honor." The constitution also vests the executive power in the president. Uganda Const. art. 99, (1)(1995).

[281]S. Afr. Const. art 84, (1996).

[282]*Id.* At art 85, (2)(a)-(e).

has legal consequences."[283] In addition, "[a] written decision by the President must be countersigned by another cabinet member if that decision concerns a function assigned to that other Cabinet member." [284]

4. The Cabinet

In most African states, the president is assisted by a cabinet. Although the office of cabinet minister is usually formally established by the constitution, the appointment of ministers from among members of the national assembly is actually vested in the president, and ministers serve at the president's pleasure.[285] In the Kariba draft and the current constitution the president appoints ministers and chairs cabinet.[286] The NCA draft provides for the appointment of Ministers by the Prime Minister who is elected directly and is independent of the President[287]. The role of the cabinet minister and the cabinet is to advise the president on government policy and such matters as are referred to individual ministers or the cabinet by the president. In most African countries, the presidency has with time grown in stature at the expense of the other state branches. The cabinet appears particularly unable to influence the decisions of the president. Cabinet Ministers are constantly reshuffled thereby making it difficult for accountability for policy decisions in a given ministry when it would have been presided over by as many as three ministers in a five year period. Another problem in Africa is that persons who do not merit the positions of cabinet posts are appointed to the cabinet. In some jurisdictions this is addressed by providing a system of

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[283] *Id.* At art. 101(1).

[284] *Id.* At art. 101(2).

[285] "There shall be a Cabinet which shall consist of the president, the vice-president and such number of Ministers as may appear to the president to be reasonably necessary for the efficient running of the State." Uganda const. art. 111, (1)(1995). "Cabinet ministers shall be appointed by the president Cabinet with the approval of parliament from among members of parliament or persons qualified to be elected members of parliament." *Id.* at art. 113(1).

[286] The Constitution of Zimbabwe (Kariba) article, 93;The Constitution of Zimbabwe (As amended to No. 16 of 20 April 2000), article 31D.

[287] National Constitutional Assembly Draft Constitution for Zimbabwe, chapter six.

parliamentary confirmation before ministers take office. None of the Zimbabwe drafts advocate this approach. Properly structured this procedure can go a long way to reduce the number of people who are clearly not qualified to be appointed to the cabinet.

Moreover, the situation of ministers is made worse by attempts by the ruling party to micro manage government operations. This appears to be a hold over from the period of one party rule in Africa. Under one-party rule, one party was supreme over all other branches of the state, thereby stripping the cabinet of its policymaking powers. The highest forum for policy formulation became the party congress. Later, the central committee of the party would appropriate for itself the powers and prerogatives once traditionally enjoyed by the cabinet. Thus re-arranged, power meant that elected officials, especially ministers, were divorced from the direct formulation of policy. From a democratic perspective, this attribute essentially deprived the citizens of the right to influence the course of policy by way of lobbying elected officials. The role of the cabinet becomes one of merely advising the president on the implementation of policies made by the party. [288]

This also undermines parliament. It means that the government was no longer responsible to parliament, but to the party. The role of parliament was severely restricted, and its members were subject to political party disciplinary procedures. [289] Parliament becomes less crucial in debating national issues. It could only question government ministers on the implementation of policy; the policies once decided by the party were not

[288] John Mwanakatwe, The End of the Kaunda Era 103 (1994).

[289] The Zambia Constitutional Review Commissions of 1995 observed: "The supremacy of the party was a veiled cover for a powerful and autonomous president who merged the mobilizational power of the party together with the instruments and material resources of government to near totalitarian proportions." Report of the Constitutional Review Commission 7 (1995).

subject to debate in parliament. [290] The concept of accountability, critical to democratic rule, is eclipsed as authoritarianism takes center stage. It is unfortunate that in most African jurisdictions the cabinet is not an effective check on the president. The formal establishment of the cabinet in the constitution is clearly intended to minimize, as much as practicable, the possibility of personal government and to operate as a check on the president.

5. Vice President

The Kariba draft and the current constitution provides for the appointment of a Vice President by the President[291]. The NCA draft does not provide for a vice president, it provides for a non executive President and an executive Prime Mister[292]. The constitutions of most African states empower the president to appoint a vice president from among the national assembly members.[293] The role of the vice president is often left vague, with the principal function of the office holder being to assist the president[294] and/or to exercise such functions as may be conferred upon him or her by the president, the constitution, or by an act or parliament.[295] Typically, the only expressed constitutional function conferred on the vice president is the right to act as president in the absences of the president.

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[290] *Id.* At 5.

[291] The Constitution of Zimbabwe (As amended to No. 16 of 20 April 2000) 31C; Constitution of Zimbabwe(Kariba) draft, article 88.

[292] National Constitutional Assembly Draft Constitution, 154, Chapter six.

[293] The 1996 Zambia Constitution, for instance, provides the "[t]he vice president shall be appointed by the president from among members of the National Assembly." Zambia Const. art. 45, (2)(1996). In Uganda, the appointment of a vice president requires ratification by Parliament. *See* Uganda Const. art. 108, (2)(1995).

[294] The Zambia Constitution states: "[i] addition to the powers and function of the Vice-President specified in this Constitution or under any other law, the Vice-president shall perform such functions as shall be assigned to him by the president." Zambia Const art. 45(4)(1996); *see also id.* At art. 38-39, (providing that the vice president will perform the duties of the president when the president is absent, ill, or the office of president is vacant.); Uganda Const., art 108, (1)-(3)(1995)(providing that the vice president performs functions assigned to him or her by the president).

[295] The constitution of Uganda, for instance, provides that "[t]he Vice President shall (a) deputize for the President as and when the need arises, and (b) perform such other functions as may be assigned to him or her by the President, or as may be conferred on him or her by this Constitution." Uganda Cons. Art 108 (3)(1995).

Sometimes the vice president is assigned ministerial responsibility and is thereby able to participate in the management of government in the same manner as cabinet ministers. Being a presidential appointee and holding office at the pleasure of the president, the vice president is constitutionally weak, thereby making it impossible for him or her to challenge the power of the president and thereby act as a check on him. Through this power to appoint the vice president, the president controls succession to the presidency in the event of death, disability, or removal. The recent situation in Zambia where President Mawawansa died and his Vice President was strategically placed to replace him illustrates the point. The perception in most African states is that often many of the vice presidents are appointed to their positions more for loyalty and not being a threat to the incumbent than for competence. The NCA approach that where the Prime Minister for any reason is unable to exercise his or her functions, a Deputy Prime minister or in his or her absence, a minister designated by the cabinet[296], is innovative and attempts to depersonalize power.

6. The Legislature

Although most African constitutions vest all legislative powers in parliament, the president has considerable power over what happens in parliament.[297] The extent of this subordination may perhaps be best perceived by considering how the legislature and executive share powers and functions involved with the legislative process. The legislative process comprises three main powers and functions, namely the formal legislative power, the legislative initiative, and the actual enactment of legislative proposals into law. The legislative power of parliament is exercised through bills passed by the national assembly and assented to

[296]National Constitutional Assembly Constitution for Zimbabwe, article, chapter six.

[297]As Nwabueze observes , the right of government to determine the business of the assembly has translated into a government monopoly of the legislative process. Nwabueze, *supra* note 3, at 268.

[298]ZambiaConst.. Art 78, (4)(1996).

by the president. In most circumstances the president has the power to withhold assent to a bill, in effect vetoing it.[298]

Presidential veto power over legislation is considerable.[299] Through the veto power, the president has the final say as to which legislation becomes law. Typically when the President withholds assent to a bill the bill can be returned to the national assembly and re-enacted, provided that is has the support of two-thirds of parliament.[300] If such bill is again presented to the President, the constitution requires the President to sign it or dissolve parliament. The situation is somewhat mitigated in Uganda, where upon second passage through parliament, the bill automatically becomes law.[301] The two draft constitutions and the current constitution advocate a bicameral set up. And all advocate five year term for parliament. Under the Kariba draft and the current constitution, the President controls sessions of parliament and a majority in parliament can give legislative powers to the President[302.] In the NCA drafts parliament is the center of power and has sole legislative authority[303]. In the current constitution the President may reject any bill for any reason until 2/3 vote demands his assent and then he can still dissolve parliament instead[304]. The NCA and Kariba draft advocate a situation where disagreements between two houses are resolved by a joint vote or on a budget by a National Assembly re vote[305]. The President must assent unless he or she has constitutional

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[298]ZambiaConst.. Art 78, (4)(1996).

[299]Id. At art 78, (4)(5).

[300]*d.* At art. 78, (1)(4)

[301]Uganda Const. art. 9L (1)-(5)(1995).

[302]The Constitution of Zimbabwe (as amended to No. 16 of 20 April 2000), article 63. Constitution of Zimbabwe (Kariba draft) article144.

[303]The National Constitutional Assembly Constitution for Zimbabwe, article 46.

[304]The Constitution of Zimbabwe (as amended to No. 16 of 20 April, 2000) article;

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concerns. Parliament then re-votes and can overrule the President by a 2/33 vote[306].

The South African Constitution appears to provide meaningful checks on this presidential power. Under the South African Constitution, when the national assembly passes a bill, the President must assent to the bill.[307] A presidential refusal to assent to a bill can only be on the grounds that it might be unconstitutional.[308] If the president has reservations about the constitutionality of the bill, he or she must refer it back to the national assembly for reconsideration.[309]If, after reconsideration, a bill fully accommodates the presidential concerns the president must either assent to and sign the bill or refer it to the Constitutional Court for a decision on its constitutionality.[310] If the Constitutional Court decides that the bill is constitutional, the president must assent to and sign the bill.[311] The President does not have the alternative of dissolving parliament as is the case in most African jurisdictions. As such, the South African approach tries to provide a check on the presidential power to block the passage of legislation. It ensures that the President does not unnecessarily block legislation passed by parliament, and thereby emphasizes the independence of parliament from the executive.

Under the current Zimbabwe constitution, the President may dissolve or prorogate parliament[312]. Under the Kariba draft sessions of parliament

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[307]S. Afr. Const. art 79, (1)(1996)

[308]Id.

[309]Id.

[310]Id. At art. 79 (4).

[311] *Id.* At art. 79, (5).

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must be held at the times and places fixed by the President by proclamation published in the Government Gazette[313]. After every general election, the President must summon parliament to sit within twenty-one days after the result of the election has been declared. The President may, at any time, summon Parliament to a special sitting in order to conduct special business. The President may at any time prorogue or dissolve parliament. Under the NCA and Kariba draft agree on the first sitting of parliament after elections. After that the NCA draft provides that parliament determines the time and duration of all its sittings provided that the President, on the advice of the Prime Minister, may summon Parliament at any time to conduct special business. It also provides that parliament may not be dissolved by the President before the expiration of its term unless the National Assembly has adopted a resolution to dissolve with the supporting voice of not less than two thirds of its total membership.

In most African constitutions, the timing and duration of parliamentary sittings is often determined by the president. Without safeguards, this can be used to manipulate parliament. For example, the Zambian President facing impeachment in May 2001 simply did not call parliament into session, and thereby prevented the tabling of an impeachment bill. [314] Under the South African Constitution, after an election, the first sitting of the National Assembly must take place at the time and on a date determined by the President of the Constitutional Court, but no more than fourteen days after declaration of the election result. [315] Once the first sitting has taken place, the National Assembly determines the time and duration of its other sittings and its recess periods.[316]

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[314] *MP's Petition Impeachment of Chiluba,* Post of Zambia, May 4, 2001, at 1.

[315] S. Afr. Const. art 51, (1)(1996)

[316] *Id.* At art. 51, (2).

7. The Executive and the Judiciary

Under the current constitution, the president appoints the Chief Justice, Deputy Chief Justice, Judge President and other Judges of the Supreme Court and High Court after consultation with the Judicial Service Commission. The Kariba draft seeks to continue the current practice with respect to the Chief Justice and Deputy Chief Justice except for the proviso that the President acts in consultation with the Judicial Service Commission. The other judges are to be appointed by the President either with approval of the Judicial Service Commission or from a list names submitted to him or her by the Judicial Service Commission. While the Current constitution and the Kariba draft advocate approval by Senate. The NCA seeks to drastically reduce presidential influence in judicial appointments. It provides that the Judicial Service Commission must prepare a list of 3 nominees for the post of Chief Justice and Judge President and must submit to the President. The President on advice of the Prime Minister and with the approval Senate shall appoint one of the nominees. All other judges are to be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of Senate. All the draft constitutions provide for the security of tenure. The Kariba and the NCA draft states that a judge must not be removed from office except by or with the approval of the judicial service committee, for gross incompetence, misbehavior or mental of physical disability. The NCA draft however guarantees that the removal of the judge must be after a full and fair inquiry. On the appointment of the Judicial Service Commission, while all drafts agree that it should be chaired by the Chief Justice, and seek to expand membership they diverge on the question of members. While the NCA draft seeks to expand membership to include a larger number of non judicial office holders, the Kariba draft seeks to preserve the balance of power in members of the judiciary. The drafts do not seem to provide for who appoints the Judicial Service Commission. In most African constitutions, the President has significant involvement in the appointment of the judiciary. In most states, the President appoints the

chief justice. [317] In as much as the role of the executive ought to be minimized, the doctrine of checks and balances requires the intervention of other branches of government in the appointment of the Chief Justice. In Zambia, for example, the President appoints all other judges on the recommendation of the Judicial Service Commission. [318] Generally, the Judicial Service Commission is chaired by the Chief Justice, who is thereby accorded a key role in the appointment process. Where the President makes the appointments to the Judicial Service Commission, it creates an opportunity for the President to appoint compliant members. [319]

Furthermore, in most African states, the President plays a role with respect to the removal of judges. The President, in consultation with the judicial service commission, may remove a judge from office for misbehavior or incompetence, but only after a majority of the members of the national assembly have voted for such removal. [320] The South African approach to judicial appointments ensures consultation with all stake-holders. The President appoints the Chief Justice and the Deputy Chief Justice after consultation with the Judicial Service Commission and the leaders of parties represented in the National Assembly. [321] The other judges of the Constitutional Court are appointed by the President, after

[317] "The Chief Justice, the Deputy Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament." Uganda Const. at. 142. (1)(1995). Without putting in place procedures of nomination and selection of would-be candidates, this kind of provision has proved inadequate to ensure that courts are not packed with judges of the government's political persuasion.

[318] Zambia Const. art. 95, (1)(2)(1996).

[319] *Id.* At art. 93 (1)(2).

[320] The Zambia constitution provides:
If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then (a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office; (b) the tribunal shall inquire into the matter and report on the facts thereof to the president and advise the president whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehavior.
Id. At art. 98, (3).

[321] S. Afr. Const. art. 174. (3) (1996).

consultation with the Judicial Service Commission, in accordance with the following procedure:

a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President;
b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made;
c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list. [322]

All other judges are appointed in consultation with the Judicial Service Commission. [323] Upholding the judicial oath of office to administer justice to all persons represents a considerable challenge for judges who are inevitably the product of their own social conditioning, education, gender and ethnicity. If they are to discharge fully their judicial oaths and to enjoy the broad confidence of the people, they must be drawn from a wide array of different backgrounds to ensure a better understanding of the experiences of those with whom they will be dealing. The judicial service to perform its task competently, it should be composed on men and women who poses legal knowledge and of high integrity. The consultation approach is an unsatisfactory formulation for the president or who ever is chief executive as he or she is not bound by the commissions' views. A better approach would be to require the President to act on the advice of or on the recommendation of the judicial serviced commission.

[322] *Id.* at art. 174, (4).

[323] *Id.* at art. 174, (6).

8. Other Appointments

Other areas in which the powers of the executive and the legislature intersect include the making of appointments to constitutional offices, such as Attorney General, the Director of Public Prosecutions, and the Auditor General. On the appointment of the Attorney General, the current constitution provides that the President appoints the Attorney General after consultation with the Judicial Service Commission. The Kariba draft wishes to continue that practice. NCA draft proposes that the Attorney General be appointed on the advice of the Judicial Service Commission and with the approval of Senate. In some African jurisdictions, in order to lessen the influence of the executive over such offices, a system of requiring parliamentary approval for appointments to such offices has been instituted. [324] The effectiveness of this attempt to make the national assembly the principal branch for checking and supervising the executive branch largely depends on the existence of an effective committee system in the national assembly. [325] In the African states where these procedures exist, they have been poorly structured. As a result, the process has not focused on the competence of the candidates for judicial appointments; it has instead focused on security clearance of candidates and is often taken as a formality.

Another crucial aspect of the presidential power relates to the control of the appointment, promotion, dismissal, and discipline of public servants. [326]The President typically appoints and dismisses most key public

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[324] *See, e.g.,* Zambia "Const. art. 93, (1)(2)(1996)(national assembly ratifies appointments of the chief justice, the deputy chief justice, and judges of the supreme court); Uganda Const. art 142, (1)(1995)(parliament approves appointments for judicial positions).

[325]The existence of the requirement for parliamentary approval in Zambia has not translated into a real check. This is largely because the committees established have not reflected the expertise required to discharge the functions of vetting. In the end, the committees have regarded their job as one of checking security credentials.

[326]In Zambia, the president has power to appoint individuals to offices for the Republic and the power to abolish any such office. Zambia Const. art 60, (1)-(3)(1996).

servants, such as, inter alia the police commissioner, and the army commander. This is a very important power because power over peoples' means of livelihood operates to render them amenable to the will of the person wielding the power. Under the current constitution the Police Commissioner and army commanders are appointed by the President after consultation with relevant agencies[327]. The appointments do not require parliamentary approval.The Kariba draft retains that approach. The NCA draft is silent on these issues. The object with regard to public appointments should be to remove the public service from political control. It should also be to ensure that merit rather than political considerations would serve as the criterion for appointment and promotion, that dismissals and disciplinary control are not used as instruments of political victimization and thereby jeopardizing the political neutrality of the public service.[328] It is also a part of the general scheme of institutional safeguard of political and tribal minorities. This system has largely failed, with the public service almost universally politicized and turned into what might be termed the "presidential" service. However, public service is the bedrock of the government, providing not only expert advice on the basis of which policy is determined but also the machinery for the execution of such policy. It is important, therefore, that is it representative of the various population groups in the country and that is functions efficiently and free from any political interference.

9. Relationship between the President and the Legislature

The presidential system, as adopted in most African states, is endowed with enormous powers, and is therefore often equated with

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[327]This led to the creation of public commissions with powers to appoint, promote, and exercise disciplinary control over persons holding office in the public service. *See, e.g.,*

[328]Uganda Const. art. 165, (1)(1995).

authoritarianism.[329] Thus armed with limitless powers, African presidents went on to act without any restraint whatsoever. Parliaments, initially intended to provide a check over executive powers, were made tools for serving president's whimsical interests by deliberately legislating – sometimes ex-post facto – for the purpose of giving formal legitimacy to even the most despicable actions and inclinations of presidents. For example, following Kenya's independence, the executive did not even attempt to implement the devolution provisions of the constitution, which were, in fact, subsequently amended to make Kenya a republic with a powerful executive president.[330] Justifications for the change argued that the demands of a developing nation are best served by the strong and effective leadership that an executive president seems to provide. It was further argued that the fusion of the role of chief executive and head of state into one person facilitated rapid response to any emergency. In many countries, soon after independence, a series of constitutional amendments were made which all went to strengthening the central executive at the expense of other branches of government, especially parliament. Many African parliaments were practically converted into tools for legislating at the respective executives' pleasure and convenience. In such cases, the presidency consequently exercised a dominant influence on the legislature; there were no sufficient countervailing safeguards to check the executive branch and thus balance the powers.

The distribution of political power in all the draft constitutions follows the

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[329]Upon gaining independence on October 24, 1964,Zambia became a republic. *See* Zambia Const. schedule 2 to the Zambia Independence Order, 2964, promulgated by Her Majesty in Council under the provisions of the Foreign Jurisdiction Act 1890.

[330]Kivutha Kibwana, *The People and the Constitution: Kenya's Experience, in* Search of Freedom and Prosperity: Constitutional Reform in East Africa 345 (Kivutha Kibwana et al. eds. 1996).

general principle of making parliament the sole repository of the legislative power. [331] The executive has no independent legislative power. There is only one legislative authority under the constitution, namely parliament[332]. It follows, then, that whatever power the executive possesses to make law is a derivative or delegated one. Therefore, pursuant to the constitution, any executive legislative power is subordinate to parliament's supreme legislative authority. However, the reality in most African states is that parliaments have always dutifully legislated in accordance with the wishes of the president. Most African parliaments do not exhibit much freedom to discuss, criticize, and reject government legislation. As a result, the President is no longer accountable to parliament, or to any other body or institution. The three drafts fail to provide any mechanisms to ensure accountability of the executive to the legislature. The South African Constitution is unique in Africa in that it requires the national assembly to provide for mechanisms "to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state." [333] These measures are designed to further strengthen the role of parliament and to give an added assurance to the people that ultimately all important matters will be subject to public scrutiny through their representatives. The legal sovereignty of the national assembly, as well as the political sovereignty of the people, are thereby underpinned and given concrete institutional mechanisms through which they are expressed.

[331] Uganda Const. art 79 (2)(1995) (providing that "[e]xcept as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under the authority conferred by an Act of Parliament").

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[333] S. Afr. Const. art. 55, (2)(1996)

The importance of a legislature that can act independently of the President, to ensure accountability of the President, needs no special emphasis. Unless parliament is in fact independent of the President, parliament's sovereignty simply means the sovereignty of the executive. The final process by which policy is legislated into law binding on the community must not only be separated from, but needs to be independent of, the executive.

Legislation in the governing process is important because it is the means by which the life of the nation is regulated, and from which the authority of the government to govern derives. In this light, the danger to liberty of a president that controls the legislature becomes apparent. It is not just that the executive can pass tyrannical laws and then execute them; it can also act arbitrarily in flagrant disregard of the limits of its powers and then proceed to legalize its action by retrospective legislation. Opposition under such circumstances becomes both futile and dangerous. The individual has virtually no rights against the government because governmental powers are, for all practical purposed, unlimited. The African scholar Nwabueze has observed:"Doubtless, an executive president who holds and exercise executive power in his discretion and who also controls the process of legislation arouses fear of dictatorship." [334] To secure liberties in an open, plural, and democratic society there ought to be an effective parliament which would not only be a focal point of policy, but one that is expected to play a crucial role in the checking and balancing of other powers. It is in this arrangement that the real essence of liberty lines and can be assured. Liberty is not secured by a constitutional guarantee of rights regime alone. No constitution, however strongly entrenched, can be guaranteed against the temptations

[334] Nwabueze, *supra* note 3, at 255.

of power on the part of the executive – unless there is an independent legislature to act as a counter poise against such temptation, and unless there is a strong national ethic against executive pretensions, the guaranteeing of rights is not worth the paper it is written on.

10. Executive Controls over the Legislative Process

On the face of it all the three drafts allow any member of parliament to initiate legislation. In most African countries, the executive controls the entire legislative process through several procedures. A member's right to initiate legislative measures is limited by the opportunities available for its exercise, and is severely constrained by a number of additional factors. For example, the executive determines how frequently parliament should meet, a matter that determines the time available for legislation. [335] For example in Zambia although the president is constitutionally bound to call a session once every year at intervals of less than twelve months, [336] it is the president who summons a session of parliament and brings it to an end by prorogue. [337] In practice, meetings of the assembly are often too few to provide the members ample opportunity to discharge their functions adequately and effectively. In the 45 years of parliamentary practice since independence, there has been no private members bill that has progressed into an act of parliament. In any case, it is not only that government business takes precedence; this monopoly has become so complete in practice that, in many African countries, most parliament members are unaware that they have a right to initiate legislation.

A second manner in which the executive controls parliament is through patronage. In most African states the proportion of parliament members

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[335]In Zambia's Constitution, for example, article 88, (1) provides "[s]ubject to the p[rovisions of clause (4) each session of Parliament shall be held at such place within Zambia and shall commence at such time as the President may appoint." Zambia Const. art. 88, (1)(1996).

[336]*Id.* at art. 88, (2).

[337] Zambia's Constitution provides that the president may summon a meeting of the National Assembly at any time and may prorogue Parliament at any time. *Id.* at art. 88, (1), (3), (5).

enjoying government patronage of some kind, through appointment to ministerial positions, maybe as high as half or more of the total membership of parliament. [338] In this regard it is it commendable that the NCA draft seeks to impose a constitutional limit on the size of the cabinet to 15 chosen by the Prime Minister. The Kariba draft seeks to maintain the current practice where the number of ministers is at the complete discretion of the President. Living the number of ministers to the discretion of the President has frequently been abused in Africa. The current Kenyan cabinet members of parliament holding ministerial positions numbered as high as forty percent of the members of parliament. Needless to say, a minister is bound by the obligations of collective responsibility not to oppose or criticize a government measure in the house. An assembly with a significant proportion of members serving as ministers or other government functionaries is a negation of the doctrine of separation of personnel of the two primary political branches.

Another area in which a President in African states holds considerable power concerns the declaration of a state of emergency and the use of emergency powers. Under the current constitution the President may declare a state of emergency but the emergency must be approved by 2/3 of total membership of Parliament. The Kariba draft retains the current position. The NCA draft is marginally different in that it states that the President may declare emergency on the advice of the Prime Minister but within 14 days must be approved by 2/3 of total membership of parliament. In practically all of the African states, the authority to declare an emergency belongs in the first instance to the President alone. Parliamentary approval comes only after the initial declaration by the President, and, in practice, is given as a matter of course. A useful

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[338] Nwabueze, *supra* note 3, at 276.

safeguard might be a declaration remaining in force only for a specified period of six months, unless extended by parliament.[339] The only different approach is that provided for in the South African Constitution, where deliberately placed checks minimize the chances of abuse. Under the South African Constitution, "[a] state of emergency may be declared only in terms of an Act of Parliament, and only when (a) the life of the nation is threatened by war…national disaster other public emergency; and (b) the declaration is necessary to restore peace and order."[340] South Africa's Constitution also provides that:

> A declaration of state of emergency, and any legislation enacted or other action taken in consequences of that declaration, may be effective only prospectively; and for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for not more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 percent of the members of the Assembly.[341]

The South African Constitution further provides for judicial oversight. It empowers any competent court to rule on the validity of "a declaration of a state of emergency; any extension of a declaration of a state of emergency;

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[339] *See e.g.,* Zambia Const. art 31, (2) (1991).

[340] S. Afr. Const. art 37, (1) (1996)

[341] *Id.* at art. 37 (2).

or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency."[342]

The South Africa approach has much to commend itself. In a democracy, courts play a key role as independent and impartial arbiters in promoting the rule of law. Constitutional democracy implies that all those who are entrusted with the exercise of public power should do so in a manner consistent with the principles of legality. It is the duty of the courts to ensure compliance with rules and procedures. In an emergency, a president is typically empowered to detain citizens without trial and to suspend the operation of certain aspects of the bill of rights. The president's powers during an emergency have great impact on the individual rights of citizens. While it is acceptable that a president should have power to declare an emergency, the exercise of that power should be counter-balanced by the legislature. It is true that the president is better placed to assess the objective and subjective circumstances that might invite the invocation of emergency powers. He or she offers a much more identifiable center for responding to a crisis as opposed to the national assembly. As the chief executive and commander-in-chief of the armed forces, the president enjoys advantages of information, authority and influence. However, without effective checks and balances and without judicial supervision of emergency powers, gross abuses of executive are bound to occur.

11. Additional Measures to Promote Accountability of the President and the Weaknesses of the Measures

The colonial legacy was not a good foundation for democracy in African

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[342] *Id.* at art. 37, (3). In Article 34, (4), the South African Constitution specifies that "any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that (a) the derogation is strictly required by the emergency; and (b) the legislation (i) is consistent with the Republic's obligation under international law applicable to states of emergency." *Id.* at art. 37, (4).

states. The authoritarian president accords with the colonial experience in which the governor was the dominant political figure, epitomizing the sort of strong, authoritarian, and irresponsible executive incarnated by the medieval European monarch.

Filip Reyntjens has observed that the attitude of most leaders after independence was not so much a departure from the constitutional past they rejected, but rather its continuation under another label.[343] D.J. Lavroff has also stressed that "one of the reasons for the emergence of authoritarian regimes after independence was the fact that the colonial powers not only developed an administrative system which required a strong central executive branch, but also exercised power in a manner that could bear only very few institutional checks.[344] Indeed, under no colonial system throughout Africa was the political organization based on such principles of constitutionalism as the separation of the branches of government or checks and balances. More specifically, three attributes of legislatures in liberal-democratic constitutional theory were absent in colonial legislative councils. First, the executive was in no way responsible to the legislature. Second, the legislature was not even formally representative of the people for who it was making laws. Third, the legislative council was neither a supreme nor a sovereign body.[345] Further, the social and legal relations of a president in a typical African country with his of her fellow citizens are not characterized by anything like equality. In particular, entirely absent is any concept of the incumbent being the elected servant of the people in whom they have resided responsibility for managing their affairs for a specific period of time. To

[343] Reyntjens, *supra* note 30, at 60.

[344] D.G. Lavroff, Les Partis Politiques En Afrique Noire 55 (1970).

[345] Reyntjens, *supra* note 30, at 74.

begin with, there is no question of his or her being personally amendable to the judicial process while in office, [346] that question is settled by the constitution itself. Under the Constitution, an incumbent president typically enjoys immunity from both criminal and civil suit or other process. However, the immunity prevails only during his or her incumbency. It is thus a procedural immunity only, and in no way removes his or her liability, which becomes enforceable again in the ordinary mode of proceedings at the end of the term of office, without any limitation as to the time for the period covered by his or her incumbency. [347] Although necessary to enable the president to fulfill his or her constitutional obligations, this protection makes it more difficult to hold the president accountable for his or her actions. Furthermore, presidential immunity from suit or legal process is different from being protected by law from insult or abuse beyond the protection offered by the ordinary law of libel and sedition. In some African states it is a criminal offence to publish by writing, word of mouth or in any other manner any defamatory or insulting matter concerning the president with intent to bring him or her into hatred, ridicule or contempt.[348] The justification for this is questionable. Often this law is used to harass members of the opposition and stifle dissent. Verbal attacks, sometimes of a very derogatory kind, are inseparable from political competition.

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[346] Article 43 of the Constitution of Zambia provides that
(1) No civil proceedings shall be instituted or continued against the person holding the office of President or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.
(2) A person holding the office of President or performing the functions of that office shall not be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act done or omitted to be done during his tenure of that office or, as the case may be, during his performance of the functions of that office.
Zambia Const. art 43, (1996). The immunity may extend to a retired president unless the National Assembly determines "that such proceedings would not be contrary to the interests of the State." *Id.* at art. 43, (3).

[347] *See e.g., is* at art. 43 (4).

[348] The Zambian Penal Code includes a typical provision: "Any person who, with intent to bring the President into hatred, ridicule or contempt publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years." Penal Code, ch. 87, § 69, *available at* http://www.parliament.gov.zm/constitution.htm.

Nwabueze has observed that when the executive presidency is blended with features of the parliamentary system without adequate constitutional and other safeguards on the resultant power structure, the result might be dictatorship. [349] Under the Westminster model, where the party with a majority in parliament forms a government headed by a prime minister, the government and the cabinet ministers, in their separate portfolios and collectively, are accountable to parliament for their conduct in office. [350] Where the government fails to secure a parliamentary majority in support of a major policy initiative, it can be forced to resign. Individual ministers can be censured for unwarranted conduct. In addition, the presence of effective minority parties in parliament, the vigilance of a free press, and the fear of electoral defeat all help ensure that the government will act reasonably and for the good of the nation. In an undemocratic state, these elements are lacking. The media is either owned and controlled by the state or is closely circumscribed. The government is not accountable to parliament – it is accountable to itself. The constitution and other laws make the president an all-powerful institution with power to appoint personnel to virtually all important government and public institutions. He or she has power to appoint and dismiss the cabinet and all senior public servants. He or she appoints heads of government institutions and public corporations. [351]

In most African constitutions, the president is subject to any one or a combination of two, three, or four constitutional constraints: (a)

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[349]B.O. Nwabueze, Constitutionalism in the Emergent States 55-6 (1973).

[350]Id.

[351] *See* Mwanakatwe, *supra* note 41, at 84 (discussing the operations of one party rule and its pervasive nature); Cherry Gertzel, *Dissent and Authority in the Zambian One-Party State 1973-80, in* The Dynamics of the One-Party State in Zambia 102 (Cherry Gertzel, ed., 1984).

presidential power and the cabinet; [352] (b) parliamentary vote of no confidence; (c) removal of the president through the impeachment process; [353] and (d) codes of conduct. [354] Under the first constraint, the constitution typically provides that the president must act on the advice of the cabinet. In theory the president is bound to follow the advice of the cabinet. The current Zimbabwe Constitution, for instance, provides "[i[n the exercise of his functions the President shall act on the advice of the Cabinet, except in cases where he is required by this Constitution or any other law to act on the advice of any other person or authority." [355] The Zambian Constitution provides that the cabinet "shall formulate the policy of the Government and shall be responsible for advising the president with respect to the policy of the Government and with respect to such other matters as may be referred to it by the president. [356] This is the least effective measure in practice. Typically, the president determines the scope of the cabinet's advice. Since ministers serve at the president's discretion, ministers are unable to assert themselves in matters in which they hold different views from those of the president.

The second constitutional constraint on presidential power relates to a parliamentary vote of "no confidence." This is the power of parliament to pass a vote of no confidence on a government that, due to its performance, no longer has the support of parliament. Under the Kariba draft, Parliament may pass a vote of no confidence by two thirds of all its members at the joint sitting of Senate and the National Assembly. Where

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[352] *See e.g.,* Zambia Const. art 50 (1996)

[353] S. Afr. Const. art 89, (1996); Zambia Const. art 37, (1996)

[354] S. Afr. Const. art 96, (1)(1996); Zambia Const. art 52, (1996)

[355] Zimb. Const. art 31, (H)(5)(1996).

[356] Zambia Const. art 50, (1996). In article 51, the constitution makes all ministers and Deputy Ministers accountable collectively to the National Assembly. *Id.* at art. 51.

Parliament passes a vote of no confidence in the Government, the president must within fourteen days either remove every vice president and minister from office and appoint new persons in their place or dissolve parliament. The NCA approach is that where a vote of no confidence is passed the Prime Minster. Under the NCA approach it is competent for the National Assembly, by a majority vote to pass a vote of no confidence in the cabinet excluding the prime mister, in which event the Prime minister is obliged to reconstitute the cabinet. A vote of no confidence should lead to the resignation of the government, although this would not be applicable where the president is elected through direct elections. In a direct election system, the legislature has no power to pass a vote of no confidence on the president because the latter derives his or he mandate directly from the people, and thus only the people can remove him or her from office. [357] A vote of no confidence in this case would, however, make it difficult for a president to run a country as he or she would not be able to enact the government's legislative agenda. Even if the no confidence vote were available against a directly –elected president, its effectiveness would be doubtful since, in most African states, the president has power to dissolve parliament at any time and thereby avoid a vote of no confidence. [358] This situation is made more difficult by the fact that it is quite common to find anti-floor-crossing provisions. [359] This means that members of parliament face the dilemma that should they vote against the president of the party, they are likely to be expelled from the party and lose their parliamentary seat.

[357] *See e.g., id.* at art. 34, (1).

[358] *See e.g., id* at art. 88, (6)©.

[359] A typical provision found in most African constitutions reads: "A member of the National Assembly shall vacate his seat in the Assembly…in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorized candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party…" *Id.* at art. 71 (2)(c).

In contrast, the South African constitution provides that cabinet members are collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions. [360] "If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet. [361] However, "[i]f the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the president, the president and the other members of the Cabinet and any Deputy Ministers must resign."[362]

The third constitutional constraint is impeachment proceedings against an erring president. Under the current constitution, the President can be impeached but he or she can stop the process by dissolving Parliament. Under the Kariba draft impeachment would require the Senate to sit as a court at the request of 2/3 of members of National Assembly[363]. The NCA draft seeks to remove the power of the President to stop the process of impeachment by making it a purely a political process[364]. It provides that the National Assembly and Senate may, by a resolution adopted with the support of not less than two thirds of their total membership, remove the President from office on the grounds of gross misconduct rendering the President unfit to continue in office or inability to perform the functions of his or her office by reason of infirmity of body or mind or a violation of the constitution. Most African constitutions provide that a president can be impeached on the grounds of misconduct, abuse of office, violation of the

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[360] S. Afr. Const. art 92, (2)(1996).

[361] *Id.* at art. 102, (1).

[362] *Id.* at art. 102, (2).

[363] ibid

[364] ibid

constitution and other laws of the country, and willful violation of the oath of office. [365] In the abstract, one might question whether an impeachment process is required at all. There is some merit in the argument – at least in the case of a directly-elected president – that such a process unnecessarily inhibits presidential freedom of action. Thus, because it is the electorate to whom the incumbent is answerable, it is for them to decide whether or not the incumbent repaints their confidence at the next presidential election. In reality, given that there are cases where the allegations against a president are too urgent or serious to leave until the next presidential election, it seems justified to have the impeachment process as an option for dealing with such situations.

The starting point is the presidential oath of office. When assuming office, the president solemnly swears to well and truly perform the functions of the office, and to preserve, protect and defend the constitution. [366] A president should be impeached when he or she breaches the oath of office. Under the provisions of most African constitutions, the process of impeachment is initiated by a notice to the speaker of the national assembly signed by at least one-third of the national assembly members. The notice details the grounds of the allegation of misconduct. The motion requires the support of a minimum of two-thirds of the national assembly before it proceeds to the next stage. If this is achieved, the chief justice them empanels a tribunal to investigate the allegations. The

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[365]The English roots of impeachment have been described as follows: Impeachment proceedings originated in 14th century England. However, they really came to prominence in the 17th century, when used by Parliament to bring to heel corrupt and oppressive nobles, ministers, and crown officials who could not be dealt with by the ordinary criminal process. In doing so it emphasized the fact of parliamentary supremacy over the absolutist pretensions of the crown….The impeachment proceedings were later included by the founding fathers of the United States Constitution.
John Hatchard, Presidential Removal: Unzipping the Constitutional Provisions, 44 J. Afr. L. 1, 1 (2000).

[366]The oath of office in Uganda reads as follows:
[1] swear in the name of the Almighty God/solemnly affirm/that I shall faithfully exercise the functions of the president of Uganda and shall uphold, preserve, protect, and defend the Constitution and observe the laws of Uganda and that I shall promote the welfare of the people of Uganda. Do help me God.
See Uganda Const. 4th sched. (1995).

tribunal them submits a report to the national assembly. If the tribunal is of the view that the allegations have been substantiated, the president may be removed from office if the motion is supported by the votes of at least three-quarters of the national assembly. In this scheme, the tribunal is not a court of law; it merely performs an investigative role.

Most African states provide for a procedure to establish a special tribunal to investigate allegations against the president. Arguably, the establishment of such a tribunal is a key safeguard against the abuse of the process insofar as it provides for an independent, transparent, and non-partisan investigation into the allegations. However, referral to a tribunal unduly complicates the procedure. The decision to remove the president should lie with the people's representatives in the national assembly. Since the allegations are made in parliament, the hearing of the matter should be in parliament. Where a president is elected by parliament, it is difficult to justify an arrangement that would deny parliament the right to dismiss an erring president whom it appointed. Moreover, impeachment is both politically and legally sensible. Politicians judge other politicians and impose political punishments such as removal from office and disqualification from future office holding. The standard of conduct is not only narrowly legal, it is also political. It is not a matter of applying criminal law statutes and criminal standards. A president might be unfit to govern even if his or her misconduct was not an ordinary crime.

The weakness of the impeachment procedures in African states lies in the requirement of majorities that are far too high. There is also the problem, as observed earlier, that members of parliament who are opposed to the president are likely to lose their party membership and effectively lose their seats in parliament because of the anti-crossing provisions that exist in most African constitutions. This is complicated by the presence of

presidentially nominated members of parliament in most African jurisdictions. [367] These factors tend to give the executive leverage to influence voting in parliament. A recent attempt to impeach President Frederick Chiluba in Zambia illustrates the difficulties of this procedure.

President Chiluba prepared to change the constitution to permit a third term. His efforts met great resistance from his Cabinet and Member of Parliament. He was accused of using unconstitutional means, including corruption, to obtain a change in the constitution. Those opposing his plans managed to secure the signatures of one-third of parliament members on a petition for the impeachment of the president. [368] The ruling party, the Movement for Multiparty Democracy (MMD), used its disciplinary procedures to expel from the party twenty-two members of Parliament who had signed the petition. Pursuant to the Constitution, once expelled, a Member of Parliament loses his or her seat. The speaker of the National Assembly did not help matters. He declined to call Parliament into session, although it was mandatory for him to do so. When notice of impeachment is given by the requisite number of Parliament members, yet Parliament is not in session, the Zambia Constitution requires the speaker to convene parliament within twenty-one days. [369] The South African procedure avoids the setting up of a tribunal and leaves the matter entirely to parliament. The South African Constitution provides that "[t]he National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the president from office only on the

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[367]For example, in Zambia the constitution provides that
The president may, at any time after a general election to the National Assembly and before the National Assembly is next dissolved, appoint such number of person as he considers necessary to enhance the representation of the National Assembly as regards special interests or skills, to be nominated members of the National Assembly, so, however, that there are not more than eight such members at any one time.
Zambia Const. art 68, (1)(1996).

[368]MPs Petition Speaker to Impeach Chiluba, Post of Zambia, May 4, 2001, at 1.
Zambia Const. art 37, (1)(b)(1996).

grounds of (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office."[370]

The current constitution and the drafts do not lay down any detailed procedures for conducting the impeachment proceedings. [371]This omission creates a recipe for unnecessary delays and confusion. It is imperative that clear procedures relating to the manner in which the impeachment process is to be conducted are clearly laid down. Procedures could include (a) laying out in detail the allegations and serving a notice of them on the president, (b) supporting all the allegations with any "necessary documentation," (c) providing the president with an opportunity to respond orally or in writing to the national assembly on the allegations, (d) providing that the proceedings are held in public, and (e) fixing a specific time frame to allow all parties involved time to prepare their cases. The existence of procedures would help to regularize the impeachment process and over time allow the development of policies, procedures, proposals and precedent that can be applied consistently regardless of which party is in power.[372]

A related and necessary impeachment method is the procedure for removing a president who refuses to resign although, owing to illness or old age, he or she has become incapable of performing the functions of the office. The prospect of an ailing and incapacitated president hanging on to the office for a long time is not a remote one. Again, there is a conspicuous absence of procedure to deal with such a situation in many African states.

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[370]S. Afr. Const. art 89, (1)(1996). "Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office." *Id.* at art.89 (2).

[371]Hatchard, *supra* note 110. At 4.

[372]*See* Akhil Reed Amar. *On Impeaching Presidents*, 28 Hofstra L. Rev. 291, 300-11 (1999). (discussing what qualifies as impeachable offences in the American system and the procedures established for the impeachment process).

The procedure in those countries where it exists (Uganda, Kenya, and Zambia) is at the initiative of the cabinet who, by a majority of its members, may resolve that the mental or physical capacity of the president to discharge the function of his or her office should be investigated.

[373]Upon the cabinet's information or request to the president, the chief justice appoints an investigating board or tribunal of five qualified medical practitioners. This body conducts an investigation and reports whether, in its opinion, the president is, by reason of infirmity of body or mind, incapable of discharging the function of the office. [374] If the report confirms the president[s incapacity, the chief justice certifies accordingly. The Chief Justice's certificate has the effect of causing the president to automatically vacate the office of president in Zambia and Gambia. In Kenya, however, the vacation takes effect at the end of three months only if, within that period, the chief justice has not again certified following another report of the medical board or tribunal, that the president has recovered his capacity. [375] The chief justice's certificate in Uganda is only a basis for action by the national assembly which, unless the president has resigned upon notification of the adverse medial report, might remove him by resolution. The cabinet could act in a like manner, if the president dissolves parliament. In Tanzania, incapacity to discharge the functions of the executive office on the ground of physical or mental infirmity, certified by the chief justice in his or her own discretion after request by a cabinet resolution and after consideration of medical evidence, does not vacate the presidential office, but only suspends the president until such time as he or she recovers capacity. Arguably the NCA draft in setting an upper age limit for the office of president deals with this matter.

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[373] *See e.g.,* Zambia Const. art 36, (1)(1996).

[374]Id.

[375]Kenya Const. art 12, (4)(1998).

An increasingly common method of executive accountability is the adoption in several African jurisdictions of ministerial codes of conduct to govern the conduct of ministers and members of parliament. In Zambian, for instance, under the Parliamentary and Ministerial Code of Conduct, an allegation that a member of parliament or minister has breached a code of conduct may be made to the Chief Justice. [376] On receipt of the complaint, the Chief Justice appoints a tribunal to investigate the allegation. A tribunal consists of three persons appointed by the Chief Justice from amongst persons who hold or have held the office of judge of the Supreme Court or High Court. [377] The tribunal makes it findings and submits a recommendation to the president. This avenue has been used in Zambia to investigate ministers who have abused their authority or have engaged in corrupt practices. Hence, investigative organs play a useful role in democratic curative institutions. Defects in governmental operations may be detected and remedial measures taken. However, these entities can only play a useful role where they are independent and impartial. They should not appear to be instruments of the president. Notably, a major shortcoming of the Zambian system is that the tribunal reports to the president and its findings are not binding on the president. [378] In contrast, the South African Constitution provides that members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation. [379] A variation to the codes of conduct is Uganda's procedure which censures individual members of the executive. Article 118(1) of the Ugandan Constitution provides that:

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[376] *See* Act No. 35 of 1994, Ch. 16 of the Laws of Zambia, Parliament and Ministerial Code of conduct, [Code of Conduct], pt. IV (Administration and Enforcement §§ 13, 14, *at* http://www.parliament.gov.zm/constitution.htm. (describing the process for administering allegations of breach of conduct received by the Chief Justice).

[377] *Id.* at § 14 (1).

[378] Id.

[379] S. Afr. Const. art 96, (1)(1996).

Parliament may, be a resolution supported by more than half of all its parliament members, pass a vote of censure against a Minister on any of the following grounds:
a) abuse of office or willful violation of the oath of allegiance or oath of office; (b) misconduct or misbehavior; (c) physical or mental incapacity…; (d) mismanagement; or (e) incompetence."[380]

Upon a vote of censure passed against a minister, the president must, unless the minister resigns from office, take appropriate action in the matter.[381] The censure of a minister is

> Initiated by a petition to the president through the Speaker signed by not less than one-third of all members of Parliament giving notice [that] they are dissatisfied with the conduct or performance of the Minister and intend to move a motion for resolution of censure and setting out particulars of the grounds in support of the motion.[382] With this procedure, individual ministers that abuse their authority can be targeted without involving the whole Cabinet.

12. Term Limits

An increasingly popular form of control over the executive is in relation to the term of office.[383] A number of African constitutions now contain

[380] Uganda Const. art 118, (1)(1995).

[381] *Id.* at art. 118 (2).

[382] *Id.* at art. 118 (3).

[383] *See e.g.,* S. Afr. Const. art 88, (2)(1996) ("[n]o person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a president is not regarded as a term"); Zambia Const. art 35, (1996) ("every President shall hold office for a period of five years…[n]otwithstanding anything to the contrary contained in this Constitution or any other Law no person who has twice been elected as president shall be eligible for re-election to that office").

contain provisions limiting the number of terms any one person may serve as president to two. This provision ensures regular change in the top leadership. It is further designed to ensure that oligarchy does not develop in a democracy. Undoubtedly, the office of president is an important position in any country and should not be monopolized by any one individual. An executive who holds power at his or her sole discretion is a dictator. Term limits also force a nation to focus on institutions rather than individuals as the source of stability and good governance. The current constitution provides for a five year term without limitation, while both the NCA draft and the ZCC draft provide for two 5 year terms limited to two terms. The Kariba draft acknowledges the need for a two term limit but clearly does not want it to apply to the current president and therefore provides that the term limits should commence only when a new constitution comes into force.

13. Transitional Arrangements

In addition, there is a need to develop procedures for the transition of power after elections. This matter is not dealt with in all the three drafts. The transition of power is in itself a learning process—a deliberate ritual in installing democratic values and a culture of tolerance and orderliness in the conduct of public affairs. During this period, the incumbent and president-elect would learn to consult and cooperate with each other. In the final analysis this would prove a divided to democracy as the administrative system would not suffer the cataclysm and convulsions accompanying abrupt changes of power. For example, a thirty-day transition period could help facilitate a smooth transfer of power. During this period the incumbent and president-elect would learn to consult and cooperate with each other. In the final analysis this would prove a divided to democracy as the administrative system would not suffer the cataclysm and convulsions accompanying abrupt changes of power. For example, a thirty-day transition period could help facilitate a smooth

transfer of power. During this period the incumbent president would be responsible for the day-to-day administrative duties of the presidency, but would make decisions on important matters only with the consent of the president-elect. In particular, the outgoing president should neither initiate serious policy measures nor make important appointments to public offices. In addition, provisions relating to war, state of public emergency, and threatened emergency should be invoked only with the consent of the president-elect. There is also need to provide for the retirement of heads of states in the constitution to provide them with some guarantee of permanency. Most states now make specific provision for terminal benefits, a pension, and other benefits for former presidents. Such provisions are welcome insofar as they provide an incentive for leaders to withdraw gracefully from the political scene secure in the knowledge that they and their immediate family have life-long financial security.

Apart from the role of the legislature and the judiciary, effective control of government powers requires a number of outside institutions, some of which are often taken for granted in the well-established liberal democracies. Non-state institutions include a diversity of pressure groups and civil associations, in various kinds of organizations both formal and informal. [384] These institutions largely shape public opinion. An opposition party does indeed work to keep the government in check, but an opposition party could easily overlook or disregard some of the weaknesses or excesses of the government for the sake of political expediency. Thus, the duty of civil society and interest groups is to ensure that the government properly governs. These groups must make known their interests and insist that the government take them into account at all times. Such interest groups and civil association only thrive in an atmosphere that guarantees freedom of association and information.

[384] *See* Phiroshaw Camay & Anne J. Gordon, Advocacy in Southern Africa: Lessons for the Future 1 (1998).

14. Conclusion

The constitution is only one source of presidential power, albeit a supremely important one. The reality of power depends on other factors besides its formal structures as defined in the constitution. Two such factors of overwhelming importance are the character of the individual president and the circumstances of the country concerned. These include social and political forces, conditions, and events. It may even be said that the conditions in Africa encourage the development of an authoritarian presidency. To begin with, there is little importance attached to constitutional sanctions against the abuse of power, and no embedded democratic ethic. As Mwabueze has written,

The social values of the advanced democracies enshrine a national ethic which defines the limits of permissible action by the wielders of power. This national ethic is sanctified in deeply entrenched conventions operating as part of the rules of the game of politics. Thus, although an action may be well within the powers of the President under the constitution, still he cannot do it if it violates the moral sense of the nation, for he would risk calling down upon himself the wrath of the public censure. The force of public opinion is sufficiently developed to act as a watchdog of the nation's ethic, and no action that seriously violates this ethic can hope to escape public condemnation. More than any constitutional restraints, perhaps, it is the ethic of the nation, its sense of right and wrong, and the capacity of the people to defend it, which provides the ultimate bulwark against tyranny. [385]

The traditional African attitude towards power is not much assistance in this regard. Nwabueze argues that authority in African traditional society is conceived as being personal, permanent, mystical, and pervasive. The

[385] Nwabueze, *supra* note 3, at 106.
[386] *Id.* at 107

chief is a personal ruler whose office is held for life. Serving as a legislator, executive, judge, priest, medium, father, and more, the chief's role pervades all relations in the community.[386] Nwabueze further argues that the modern African presidency reflects these characteristics.[387] Tradition has inculcated in the people a certain amount of deference towards authority.[388] The chief's authority is sanctioned in religion, and it is a sacrilege to flout it except in cases of blatant and systematic oppression, when the whole community might rise in revolt to de-throne, banish, or even kill a tyrannical chief. Thus, while customary sanctions against extreme cases of abuse of power exist, there is also considerable toleration of arbitrariness by the chief. This attitude towards authority tends to be transferred to the modern political leader. The vast majority of the population, which is still illiterate, is not disposed to question the leader's authority and indeed disapproves of those who are inclined to do so.

There is yet another respect in which the conditions in African societies militate against effective restraint on presidential power. In a developing country where there is grinding poverty and mass unemployment, where the state is the principal employer of labor and almost the sole provider of social amenities, and where personal ambition for power, wealth, and influence—rather than principle—determines political affiliations and alliances, power to dispense jobs and patronage are very potent weapons in the hands of the president.[389] These weapons enable him or her to gain political advantage. Moreover, loyalty of the type secured by patronage can often border on subservience. It produces an attitude of dependence, a willingness to accept without question the wishes and dictates of the person dispensing the patronage. Therefore, patronage has been one of the crucial means by which African leaders have secured

[387] Id.
[388] *Id.* at 65
[389] For a discussion of Africa's economic situation, see generally Adebayo Adedeji, *The African Economy: Overview and Prospects for Recovery and sustained Development, in* Africa Leadership Forum. The leadership Challenge for Improving the Economic and Social Situation of Africa 1 (Adebayo Adedji & Tariq Husain eds., 1998).

the subordination of the legislature, the bureaucracy, the police, and the army. This means that if presidential power in the African states is to be held accountable, special attention should be paid to the development of electoral processes that are able to ensure that qualified individuals are elected to the office of president. It also means that civil education must be intensified so that the values that underpin democracy take root in those states. In addition, it means that poverty — a major factor undermining democracy — must be addressed. In the end the major obstacle to constitution making in Africa are the politicians and the intellectuals that back them, the elite. Good governance is not a straight forward function of auspicious conditions and clever choice of procedures suited to the context. Some procedures work well in the hands of people with particular talents, but far less well when such people are absent. African elites have let down Africa as they generally pursue short-term self interests, whether self interest is defined in individual terms or as partisan political advantage. In well governed successful societies the elites set an appropriate tone. They take a long term view and rise above the fray. African elites must play a similar role and be the bedrock of democratic governance. In the end we are talking about the need to transform African societies into societies where democratic values are ingrained in the psychic of the people. The beginning is no doubt a constitutional framework that promotes these values.

Hans-Peter Schneider:
Rule of Law or Rule of Judges? Problems of an Independent Judiciary

1. Defining Judicial Independence

Judicial independence is widely considered to be a foundation for the rule of law and establishing judicial independence in developing and transition economies has become a major goal of donor-supported legal and judicial reform programs. This lecture will address three questions related to judicial independence. First, what exactly does "judicial independence" mean and how can it be measured? Second, what is the relationship between judicial independence and economic development? Third, and perhaps most important for policy makers and reformers, under what conditions will those with political power act to preserve, rather than undermine, judicial independence? Stated differently, how can an independent judiciary be achieved? In this regard I will refer to the German constitutional system and to the respective safeguards in the Basic Law.

The independence of the judiciary can be defined in many ways. Some scholars have produced long lists of criteria the judiciary must meet; others focus on more narrow aspects of judicial institutions But most agree that a truly independent judiciary has three characteristics. First, it is impartial. Judicial decisions are not influenced by the judge's personal interest in the outcome of the case. Some analysts incorporate into "impartiality" the idea that judges are not selected primarily because of their political views but on merit. Second, judicial decisions, once rendered, are respected. Either the parties to the case must comply voluntarily with the decision, or those with the power to coerce compliance must be willing to use this power if compliance is not forthcoming. (While this aspect is not inherent in judicial "independence" per se, it is often assumed implicitly.) The third characteristic of judicial independence is that the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision. In practice, protecting judges from private persons with an interest in the case means preventing judicial corruption and coercion. Insulating judges from officials of other branches of government is often taken to be the

most important aspect of judicial independence. Government poses perhaps the most serious threat to judicial independence for two reasons: it has a potential interest in the outcome of myriad cases, and it has so much potential power over judges. Therefore, the great French philosopher Montesquieu, establishing the doctrine of the separation of powers in his famous book "The Spirit of Laws", stated:

"There is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with all the violence of an oppressor".

2. Measuring Judicial Independence

Although many attempts have been made to assess how "independent" the judiciary is in different countries, most have not been terribly successful. Part of this failure is due to the difficulties of gathering comparative data on this topic. But there are inherent problems with measuring the concept as well. Not only is judicial inde-pendence a continuous ("more-or-less") rather than a dichotomous ("yes-or-no") variable, but assessing a country's "judicial independence" requires combining different elements into a composite index. Yet the constituent elements of judicial independence do not necessarily all move together. Nor is it clear how to weight them. How would a country with highly politicised judicial appointments but minimal post-appointment interference compare with a country that selects judges on merit but promotes them on the basis of the political ramifications of their decisions? The degree of judicial independence within a single country may also vary depending on the type of case. One author contends that during the Franco era Spain's general civil courts were quite independent, while politically-sensitive cases were always handled by special, non-

independent tribunals. The same fits to South Africa during the apartheid regime.

Although most attempts to measure judicial independence focus on formal or technical provisions -issues like the judicial budget, the selection process, tenure, and the like - this approach is often inadequate. Formal provisions and institutional structure are important, but they do not in and of themselves ensure true inde-pendence. In many countries, formal guarantees of independence are routinely ignored or manipulated. In other countries politicians actually refrain from using controls that they could legally employ to discipline judges. Hence formal protections are not sufficient to evaluate the true independence of the judiciary.

An analysis of judicial independence in Japan was able to obtain detailed records on the promotions and postings of all judges hired between 1961 and 1965 to test a series of hypotheses about the impact on a judge's career of issuing rulings un-favourable to the ruling party. But in developing countries this type of data is rarely available. To measure judicial independence in common-law Africa, one researcher resorted to lawyer surveys: asking attorneys in each nation whether, in their judge-ment, the judiciary was more or less independent than it was five years ago. Although this approach overcomes both the problem with weighting and that of missing data, it does not permit cross-country comparisons.

3. Accounting for the Link with Economic Growth

Measurement problems notwithstanding, judicial independence is thought to be important for developing and transition economies not only because of its inherent contribution to human rights and justice, but because it may facilitate economic progress. This argument turns on the idea that a major impediment to economic development is the inability of the government to credibly commit itself to appropriate economic

policies. It runs as follows: for growth to occur, potentially productive workers and investors must be confident that they will be able to retain a substantial portion of the wealth they create. But though governments may have a long-term interest in national economic growth, they always face short-term political incentives to redistribute newly-created wealth to themselves or their supporters. Thus, unless the government can make its promise not to engage in such redistribution credible, the potentially productive agents have no incentive to produce, and therefore won't.

An independent judiciary can help the government make its commitments more credible, as long as it is difficult or costly to change the law. If the judiciary is not independent, the government can change its policy without changing the law, simply by engaging in illegal redistribution and manipulating (or ignoring) the courts. If the judiciary is independent, however, the government can only change its policy by changing the law. If this is difficult to do - which is often the case, especially at the constitutional level -the government will not be able to deviate from its existing policy. Thus, when a government does enact a law - say, one that protects property rights -private actors can be more confident that the law will remain in effect even when the government finds itself faced with political pressure to break that law. If the previous argument that economic growth depends on credible commitments to sound economic policies is correct, and if it is also correct that an independent judiciary makes policy commitments (that is, law) more credible, then it follows that an independent judiciary enhances economic growth.

Of course, since the mechanism by which judicial independence enhances growth in this formulation is the reduction of government discretion, there can be cases when it can impede growth. An independent judiciary may also make it harder for the government to respond quickly and flexibly to changing circumstances or national crises. Most observers consider this to be a less important problem in developing countries. Two reasons are cited. First, many argue that the greatest impediment to growth in developing countries is persistent inability to commit to not redistributing

wealth to the politically powerful, rather than inability to respond to changing circum-stances. Second, while an independent judiciary does make changing policy more difficult, it does not make it impossible. Policy can change, but only when the costs of the status quo exceed the costs of enacting a new law. Thus, in times of crisis, change would still be possible. Nonetheless, it is important to bear in mind that an independent judiciary's ability to block policy change can be a double-edged sword. There are numerous examples of judiciaries that block the attempts of executives to institute economic reform – from the U.S. Supreme Court blocking President Roosevelt's New Deal legislation to the efforts of some of the recently – created Eastern European constitutional courts to block the adoption of IMF – sponsored stabilisation packages.

Yet, even if one accepts that, in general, an independent judiciary facilitates economic growth by enhancing the credibility of government commitments, the logic of this argument faces a serious difficulty. If the government faces political pressures to change policy, why don't these same pressures lead it to undermine judicial independence? After all, judicial independence is something created by the government, and there's no obvious reason the government couldn't simply remove it when it becomes politically inconvenient - which, by assumption in the preceding argument, it does. No amount of formal protection solves this problem what the politically powerful grant, they can just as easily take away.

4. Explaining Judicial Independence

The political foundation of judicial independence thus remains a puzzle in the literature. A number of solutions have been offered, and while all are plausible in some respects, none are completely satisfactory. First, there is the straightforward explanation that violations of judicial independence would be too costly. The most popular variant of this basic notion is that

encroachments would not be tolerated by the general public, and any attempt by the government to illegally interfere with the judiciary would meet with overwhelming political opposition. While superficially plausible and supported by a number of anecdotes, this argument has several difficulties. Most importantly, the source of this public attitude – and, more importantly, why some countries exhibit it – is unexplained. Besides, the public has strong interests in policy, especially policy with distributive implications. Is it believable that public concern with abstract principles will trump people's interest in material well- being? Also, since public political opposition generally requires an obvious and flagrant violation of the rules, it should be possible for the government to slowly erode judicial independence over time, through incremental encroachments on judicial territory.

There are other variants of this theme. Some scholars assert that in some countries, the political power of the bar, which has a vested interest in an independent judiciary, makes violating judicial independence too costly. But this explanation is problematic as well. Lawyers have a vested interest in preserving the system in which their expertise is valuable. This may be the independent judiciary, but it could just as well be the opposite. Moreover, it seems implausible that lawyers alone are politically potent enough to keep the executive in line. A second explanation holds that an independent judiciary allows politicians to shift the blame for unpopular decisions from themselves to the judges. Therefore, they want to establish, and publicise as much as possible, the independence of the judiciary from their control, Then, when faced with a problem described above – e.g. where the long-term interest of the country is served by protecting property rights, but the government is under pressure from its supporters to redistribute – the government can claim the judiciary is responsible for the restrictions on policy change. But, of course, for this explanation to work, the government's supporters must either be ignorant

of the fact that the government could manipulate the judiciary if it chose to, or must be politically unable to demand that the government violate judicial independence in pursuit of policy goals. The former condition seems implausible, and the latter begs the question.

Another explanation offered is that an independent judiciary is politically attractive because this kind of judicial order, by making policy harder to change, makes legislative bargains between politicians and interest groups more durable and hence more valuable to politicians. Because legislation is worth more when the judiciary is independent, interest groups are willing to pay politicians more for desired legislation. The amount that interest groups are willing to pay to enact durable legislation is presumed to be larger than the amount other interests groups would be willing to pay to undo previous legislation, and therefore preserving an independent judiciary is also in the interests of politicians. The biggest problem with this argument, however, is that it doesn't really deal with the basic time-inconsistency problem that causes commitments to be non-credible in the first place. All politicians might prefer a system in which legislation, once passed, is enforced by an independent judiciary. But any given politician can potentially gain more by deviating from this strategy – this is a classic "free-rider" problem. If all future legislatures will protect judicial independence, the current legislature is better off if it interferes with judicial independence. Similarly, if no other legislature is expected to respect judicial independence, the current legislature is certainly better off violating judicial independence. In this model, judicial independence can only be sustained under what seem like implausible enforcement conditions. In addition, this explanation requires not only an independent judiciary, but one committed to a jurisprudence of "original legislative intent". But there is no necessary connection between a particular jurisprudence and judicial independence per se.

Finally, it has been suggested that judicial independence arises from the desire of politicians to avoid the risks inherent in sustained political competition. Governments that expect to be in power indefinitely, that don't care much about the future, or that don't expect to ever compete for power again once they lose office, have little incentive to preserve judicial independence. On the other hand, forward-looking political actors that anticipate alternating in power over a sustained period of time have a different perspective. Though judicial independence reduces the benefits a party can accrue while in power, it also reduces the costs of being out of power, since its opponents are also constrained. This perspective is similar, in some respects, to the third explanation, but has a much more plausible enforcement mechanism, since parties continue to "play" the political game even when they're not in power, and since they have the opportunity to punish violators of judicial independence once they return to power. However, though judicial independence is both possible and plausible in this set-up, it is not the only possibility. How political competitors can achieve mutual respect for judicial independence, rather than getting stuck with mutual violation of judicial independence, is an unanswered question.

All four of these explanations have their weaknesses. All require making strong, perhaps overly strong and simplistic, assumptions about motivations. All also explain judicial independence solely in terms of the forces at work within a country, ignoring the impact of such external factors as trade, the world-wide spread of ideas, and the actions of international and non-national actors. Though each explanation suggests only a part of the story, each also carries with it some implicit policy options for fostering judicial independence. If, for example, the most important safeguard of judicial independence is public opinion, resources ought to be devoted to education, consciousness – raising, cultivating watchdog groups, etc. Alternatively, if the judicial independence is due to

the durability it adds to interest-group bargains, then it is important to inculcate a jurisprudence deferential to original legislative intent, and to facilitate the access of organised groups to the legislative process. If the basis for judicial independence is believed to be political competition, then efforts to institute judicial independence without first (or simultaneously) establishing sustained political competition between repeat-players will be for naught. If one takes this view, resources should be concentrated on establishing strong, sustainable political parties, genuine electoral competition, and so forth. The sources of judicial independence are complex and do not conform to any single simple model. Nonetheless, it should be clear that developing an effective strategy to foster judicial independence requires a careful and critical examination of the incentives of politicians to support judicial independence. Unless these incentives are in place, no policy can hope to be successful.

5. Securing Judicial Independence in the German Constitution

With respect to the courts, the general separation of powers principle of Article 20(2) is reinforced by the flat statement in Article 92, that judicial authority is vested in judges of the various courts and by the unequivocal command of Article 97(1) that the judges be independent and subject only to law. The requirement that judges follow the law forbids them to play favourites or to impose their own personal preferences. The requirement of impartiality protects them against outside influence, especially by other branches of government. Perhaps the most fundamental dimension of judicial independence is the organisational command of Article 20(2) that legislative, executive, and judicial functions be vested in distinct bodies. This not only means that no legislative or executive agency may exercise judicial functions as such; it also limits the ability of the same individual to serve as both legislator or administrator and judge. Article 94(1) makes this incompatibility principle explicit as to members of the Constitutional Court; as to other judges the Court has found its core implicit in the

general requirement of separate judicial institutions in Article 20. Emphasising the obvious inherent conflicts of interest, for example, the Constitutional Court held in 1959 that mayors, municipal administrators, and members of municipal councils could not constitutionally act as judges in criminal matters that might also affect their other official duties. Three years later, however, the Court gave notice that the incompatibility principle was not so absolute as one might have expected by permitting municipal officials to serve as judges in small claims controversies between private parties in which the local government itself had no interest. Apart from the specific provision regarding the Constitutional Court, the constitutional incompatibility doctrine thus appears to be one largely of neutrality rather than of separation.

No less obvious is the conclusion that Article 97(1) affords the judges what the Germans call substantive independence: They are subject to no one else's orders. Article 101(1) contains two further provisions designed to preclude either the legislature or the executive from affecting judicial decisions by determining which judges will hear a particular ease. Ad hoc courts are flatly prohibited, and no one may be removed from the jurisdiction of his lawful judge. The latter provision, though hardly self-explanatory, requires among other things that both jurisdiction and the assignment of judges within a multimember tribunal be fixed in advance as nearly as practicable – all in the interest of reducing the risk of outside influence on judicial decisions.

To make the guarantee of substantive independence a reality, however, the judges must be personally independent as well. Other provisions of the Basic Law help to specify just what this means. Not surprisingly, the judges are not free from political influence with respect to their appointment. In a country in which all power emanates from the people, the judges like other public servants require democratic legitimation. In

recognition of the political significance of the Constitutional Court's decisions, half of its members are chosen by the Federal Diet and half by the Federal Council, which represents the state governments. Judges of the five Supreme Courts are selected by the federal minister with responsibility over the subject matter in conjunction with a committee on which the respective state ministers and the Federal Diet have an equal voice. The appointment of state-court judges is regulated by the provinces ("Länder"), subject to more or less general principles that may be laid down in federal framework legislation and to the Article 28 requirement that they respect the principles of "republican, democratic, and social government based on the rule of law.”

Once appointed, however, the judges enjoy a significant measure of job security. In contrast to federal judges in the United States, who can be removed under extraordinary but unreviewable circumstances by the Senate, most German judges can be removed, suspended, transferred, or retired during their term of office only pursuant to the decision of other judges. By confining this protection to judges with full-time regular appointments, however, Article 97(2) implies that not all judges enjoy this protection. Indeed the perceived need for training positions, for non-legal expertise, and for community participation has generated a long-standing assortment of probationary, part-time, and lay judges who fall outside the express limitations on premature removal. Acutely aware that abuse of this practice might undermine the more comprehensive requirement of substantive independence set forth in Article 97(1), the Constitutional Court has insisted that the use of non-tenured judges be kept to a minimum and that absent extraordinary circumstances not more than one probationary judge at a time pass judgement on any particular case.

With respect to the grounds on which judges may be removed or retired, the German constitution is plainly less protective. The permissible grounds are not specified in the Basic Law itself. Article 97(2) requires that they be determined by statute, but they may also be altered by statute – subject once again, one assumes, to the fundamental requirement that they not be such as to impair the independence of the judge. Somewhat less satisfactory in terms of judicial independence are the provisions respecting the term of office itself. The Basic Law does not prescribe life tenure expressly, and the explicit provision of Article 97(2) authorising the legislature to fix a retirement age for those judges who are appointed for life forbids the conclusion that it does so by implication. The current statute provides that members of the Constitutional Court – unlike most federal judges, who serve until they reach the age of sixty-five – be appointed for a term of twelve years, with no possibility of reappointment. The abbreviated term is designed (at some cost in terms of lost experience) to avoid too great a gap between the Court and the country, the ban on a second appointment to eliminate the incentive to curry popular favour. If these prescriptions were written into the constitution, they might be entirely adequate; there is more than one way to achieve judicial autonomy. Yet the legislature may revise the criteria at any time, and it has done so more than once. To shorten the terms much further, or to permit reappointment, as was done at one time, might significantly impair the independence of the judges.

Nor does the Basic Law expressly regulate either the number of judges or the amount of their compensation. It also gives the legislatures authority over both the composition of the courts and the legal status of their judges. The German parliament has from time to time altered the number of Justices, presumably on neutral grounds. Decisions of the Constitutional Court, however, have made clear that the general guarantee of judicial independence places strict limits on legislative power to tamper with

judicial salaries. Compensation may not be left to executive discretion, lest it be manipulated to influence judicial decisions. Most significantly, the judge's salary must be adequate to assure an appropriate standard of living, though reductions are not per se prohibited. These decisions seem to afford a sound basis for predicting that the Court would be equally vigilant to invoke the general guarantee of Article 97 against any effort to undermine judicial independence by such devices as altering the term or number of Justices or the grounds for their removal.

Finally, judicial autonomy cannot be side-stepped in Germany by the creation of "legislative courts" or quasi-judicial administrative agencies. The basic German provision (Art. 92) is very clear and simple: "The judicial power shall be vested in the judges". It is common ground that, in light of its unmistakable purpose of assuring an independent arbiter, this provision means that judicial power may be exercised only by judges. Just what the judicial power in this context means, however, is disputed. At a minimum, Article 92 has been described as reaffirming that specific provisions such as Article 104(2), which requires that a "judge" pass upon the legality and length of incarceration, mean exactly what they say. The Constitutional Court, however, has held that Article 92 has an independent scope of its own. In an important 1967 decision the Court concluded that this provision reserved to the courts alone the decision of "at least the core of those duties traditionally entrusted" to their jurisdiction – specifically including the imposition of criminal fines, which fell outside the command of Article 104(2).

At the same time, however, the Court made clear that not everything the courts did was an exercise of "judicial power" reserved by Article 92 to the judges alone. What made criminal fines such a serious matter as to require that they be entrusted from the start to independent judges was above all the stigma of moral blame-worthiness attached to them; once the criminal

label was removed, administrative agencies could be empowered to impose money penalties for traffic violations and other civil offences not generally perceived to involve moral turpitude, and similarly to suspend driving privileges temporarily in order to bring home to particular offenders the importance of future compliance with the law. Thus, the Constitutional Court has divided the business of the courts into that which is inherently judicial and that which may be entrusted either to judges or to administrators at legislative discretion. Whatever may be the case in this country, however, the inalienable core of judicial power in the Federal Republic is not limited to serious criminal eases. Not only does it embrace a wide panoply of matters specifically assigned to the courts by other provisions of the Basic Law; the Court has twice flatly stated in dictum that it also includes the entire field of civil law.

Moreover, even in those eases that may be decided by an administrative agency in the first instance, the litigant has a constitutional right to unrestricted judicial review. "Should any person's rights be violated by public authority," says Article 19(4), "recourse to the courts shall be open to him." The Constitutional Court has made clear both that this provision guarantees access to judges who satisfy all the criteria of judicial independence prescribed by the Basic Law and that the reviewing court is free to take new evidence and to re-examine de novo any administrative conclusions of fact or of law. Under these circumstances the requirement of initial resort to the administration is not likely seriously to impair the right to an ultimate decision by an independent judge. In short, although the Basic Law is not as explicit as one might wish with respect to the number and terms of the Justices, their compensation, or the grounds for their premature removal, the unequivocal guarantee that judicial power be wielded by independent judges and the express provision that they can be displaced only by other judges may be construed to afford more comprehensive protection against attacks by other branches of government than – for example – the Constitution of the United States.

6. Concluding Lessons

According to the "Basic Principles on the Independence of the Judiciary", adopted by the United Nations in 1985, I will conclude with some lessons and devices:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures according to the rule of law. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.
8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.
10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.
11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity
15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.
17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings

Brian D. Crozier:
Courts and Judiciary Under a New Zimbabwean Constitution

1. Introduction

In this paper I shall put forward some suggestions regarding the system of courts to be established in a new Constitution and the appointment of judicial officers to those courts.

First, however, I should set out some of the considerations that underlie my suggestions:

- Zimbabwe is not a rich country, and the economic collapse we have witnessed over the past eight or nine years has reduced us to the ranks of heavily indebted poor countries. In our current economic straits we simply cannot afford an elaborate hierarchy of courts staffed and equipped at public expense. If judicial officers are to remain honest, upright and diligent they need to be paid adequate salaries, and if the new constitution requires us to appoint more judicial officers than we can afford to pay properly, we shall end up with a venal, corrupt and ineffective judiciary. So the new constitution should keep to a minimum the number of courts which it mandates; it should require the establishment only of those courts that are essential to adjudicate upon constitutional disputes and to uphold fundamental human rights. There is no harm in the constitution encouraging the establishment of additional courts — labour courts, family courts and so on — provided their establishment is not made mandatory.
- A constitution must be sufficiently detailed to ensure that its basic principles are upheld — respect for fundamental human rights, for example, and the maintenance of a plural democracy — but at the same time it should be flexible enough to allow institutions to develop and adapt when circumstances change. Put differently, a constitution must allow governments proper scope to govern effectively. In the context of the court system, the constitution

should not prevent a government from amalgamating two or more different courts or creating new courts: for example, while the constitution might well encourage the creation of a family court it should not prevent the government doing so by establishing a family division of the High Court.

- Lawyers are generally conservative and resistant to change. They prefer to adapt existing institutions rather than replace them entirely. In the context of the courts, constitution-makers should bear this in mind and refrain from changing the existing court system unless there are compelling reasons to do so.
- Politics have bedevilled this country for the past 50 years and more. We have been so consumed by our politics that we have exported them, involving neighbouring states first in our pre-Independence civil war and, more recently, in the political problems occasioned by our economic collapse. From Independence in 1980 until earlier this year, the ruling political party has been a liberation movement that regarded itself as the natural, indeed the only possible, party of government, and whose members regarded other political groupings with hostility, believing them to be agents of outside forces bent on depriving the country of its hard-won independence. Today Zimbabwe is a politically polarised society, where each of the major political groups distrusts the integrity and bona fides of the others. This political background is important in the context of judicial appointments because, as I shall suggest later, it is impossible to keep such appointments wholly divorced from politics. The new constitution must find a way of ensuring that even when political tensions run high the courts are staffed by judicial officers whose integrity and impartiality are generally respected.

2. Historical Survey

Before dealing with the courts that are proposed under a new constitution I think it will be instructive to outline the current court system and how it has developed.[390]

For most of the country's history the court system was constituted by the High Court, magistrates courts and courts administering customary law, together with special courts such as a Water Court, a Town Planning Court, a Fiscal Court and a Special Court for Income Tax Appeals.

Magistrates Courts

Magistrates courts were established in this country in 1891 and reconstituted in 1894, 1898, 1911 and 1931. Then as now magistrates courts comprise the bulk of our courts, dealing with most of the cases that pass through the system. Magistrates have both civil and criminal jurisdiction, though in both classes of case their jurisdiction is limited.[391] Appeals from magistrates courts lie to the High Court.[392]

For most of the period before Independence in 1980, the appointment of magistrates was governed by the Magistrates Court Act; they were not mentioned in any of the pre-Independence constitutions before 1979. Under the Magistrates Court Act as it was immediately before Independence, magistrates were public servants (i.e. civil servants) appointed by the Minister of Justice. Their appointment was entirely at the discretion of the Executive, and they enjoyed no greater security of tenure than other civil servants. Since Independence, however, they have been

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[390] In what follows I have relied extensively on Claire Palley's *Constitutional History and Law of Southern Rhodesia 1888 –1965* (Oxford, 1966) pp 493 ff.

[391] See sections 11 and 49 of the Magistrates Court Act [*Chapter 7:10*].

[392] Sections 40 and 60-62 of the Magistrates Court Act [*Chapter 7:10*].

appointed and promoted by the Public Service Commission, and the Commission is also responsible for their discharge. [393] Though they are less directly under the control of the Executive (in that their appointment and discharge are effected by a constitutional commission rather than by a Minister) they still have no more security than other civil servants. I should point out that a Judicial Service Act will bring magistrates under the control of the Judicial Service Commission, but the Act has not yet been brought into operation.

The High Court

A High Court of Matabeleland was established in 1894, and it became the High Court of Southern Rhodesia in 1898; since then there has been a High Court in this country exercising full original jurisdiction over all persons and all matters throughout the country. Initially the court was staffed by judges drawn from outside the country but over the years more and more appointments were made from the local Bar. Until Independence, it should be noted, only white males were considered eligible for the Bench, though there was no law to that effect.

Two features of the system may be noted. The first was that there was little attempt to keep politics out of judicial appointments: four of the pre-Independence Chief Justices were appointed to the Bench immediately after they had resigned their offices as Minister of Justice, and many more judges had served as Members of Parliament before going on to the Bench. [394] This continued even after Independence, [395] but it should be

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[393]Section 7 of the Magistrates Court Act [*Chapter 7:10*] and Part VIII of the Public Service Regulations, 2000. By virtue of section 12(9) of the regulations, the Public Service Commission is required to consult the Judicial Service Commission over the promotion of magistrates, but there is no such requirement for their appointment (though there was in the original Lancaster House Constitution — see section 75(4) of that Constitution.

[394]See Palley *op cit* p. 549. The Chief Justices concerned are Hudson CJ, Lewis CJ, Tredgold CJ and Beadle CJ.

[395]Dumbutshena CJ was a member of Parliament before Independence, and the present Chief Justice served as Deputy Minister of Justice before becoming Attorney-General and then being appointed to the Bench. Others who were appointed as judges after having been members of Parliament are Pittman, Blackie, Mubako and Chinengundu JJ.

pointed out that it did not result in a politically pliant Bench — at least until 2000. The second feature was the readiness to appoint foreigners as judges. Before Independence most of them came from South Africa, and all were white. After Independence the scope widened and judges from other African countries and elsewhere were appointed, some on a temporary basis.[396]

The appointment of judges was dealt with cursorily in the 1923 Constitution and more fully in the subsequent pre-Independence constitutions of 1961, 1965 and 1969. In those latter constitutions the Chief Justice was appointed by the Governor (subsequently the President) acting on the advice of the Prime Minister. Other judges were appointed in the same way, though the Prime Minister was required to consult the Chief Justice before recommending a person for appointment.[397]

Judges' tenure of office was protected in the pre-Independence constitutions by provisions that prevented their remuneration from being reduced and prescribed a strict procedure to be followed before they could be removed. There was no provision in the constitutions or in any other enactment regulating how judges were to behave while in office. Generally they were expected to behave in the same way as judges in the United Kingdom and South Africa, but there was no written code of conduct for them to follow. There is still no such code.

The grounds for removal were limited to inability to discharge the functions of their office or misbehaviour, and before they could be removed the Governor or President had to set up a tribunal to investigate the matter. If

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[396]Appointees included Georges CJ (from the Caribbean), Korsah JA (from Ghana), Samatta J and Mfalila J (both from Tanzania).

[397]See for example section 64 of the 1969 Constitution.

the judge concerned was the Chief Justice, the Governor or President could set up a tribunal at his own discretion; in the case of any other judge, however, the Governor or President had to act on the advice of the Chief Justice. And when it came to deciding whether or not to remove the judge, the Governor or President had to act on the tribunal's advice. [398]

The position under the present Constitution is much the same, but there is now a Judicial Service Commission which plays a part in the appointment and dismissal of judges. Judges are appointed by the President after consultation with the Judicial Service Commission, and if he appoints a judge contrary to advice tendered by the Commission the Senate must be informed “as soon as practicable”. [399]

Appeals

From 1896 appeals from the High Court of Southern Rhodesia lay to the Cape Supreme Court, and after 1910 most appeals lay to the Appellate Division of the Supreme Court of South Africa. [400] In 1938 the Rhodesia Court of Appeal was established to deal with criminal appeals from the High Court, while civil appeals continued to go to the South African Appellate Division.

In 1955, with the establishment of the Federal Supreme Court, appeals went to that court and the ties with the South African courts were severed.

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[398]See for example section 67 of the 1969 Constitution. Under the 1923 Constitution, on the other hand, a judge could be removed on the recommendation of the Legislative Assembly.

[399]Section 84 of the present Constitution. In the original Lancaster House Constitution, the Chief Justice was appointed by the President on advice from the Prime Minister, but before tendering advice the Prime Minister had to consult the Judicial Service Commission. If the Prime Minister proposed to give the President advice that was inconsistent with the Commission's recommendation, he had to inform Parliament before the appointment was made. In the case of judges other than the Chief Justice, the President had to act on advice from the Commission.

[400]This latter appeal was provided for by section 103 of the South Africa Act 1909; see Palley *op cit* p. 542.

Finally in 1964 the Appellate Division of the Rhodesian High Court was established and appeals from the General Division of the High Court went to a domestic rather than a foreign court.

Throughout this period, until 1965, appeals in certain cases lay to the Judicial Committee of the Privy Council in England. An appeal to the Privy Council was granted to people who were aggrieved by a determination of the Appellate Division in respect of an alleged contravention of the Declaration of Rights in the 1961 Constitution. [401] This right of appeal ended de facto in 1965 and de jure in 1980.

Customary Law Courts

I do not intend to dwell on customary-law courts because for the purposes of constitutional reform it is only necessary to say that customary law has always been accepted as a parallel system of law in this country, and courts presided over by chiefs and headmen have been recognised since at least 1937. [402] These courts, and the law they administer, must be accorded their due recognition in any new constitution. "Due recognition" does not necessarily mean complete recognition, however: customary law must give way to statute law and to the common law in so far as it is inconsistent with the principles embodied in the Declaration of Rights of the constitution.

Special Courts and Tribunals

There is an extensive system of special courts and tribunals in this country. In 1979 most of them were amalgamated into a new Administrative Court, which deals with a great number of different

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[401] Section 71 of the 1961 Constitution.

[402] See Palley *op cit* pp 538 ff.

appeals, reviews and applications under many statutes. In addition, there is the Labour Court, which has jurisdiction equivalent to that of the High Court in labour matters, the Special Court for Income Tax Appeals, whose jurisdiction is indicated by its name, the Fiscal Appeal Court, which deals principally with customs and excise matters, and disciplinary tribunals such as courts martial which have jurisdiction over members of the security services.

These courts and tribunals should be touched on in a new constitution, if only to prevent the Executive from establishing pliant tribunals to which it can confer exclusive jurisdiction to hear matters that would otherwise be dealt with by the ordinary courts. In particular, the new constitution should contain a provision equivalent to section 81(4) of the present Constitution, which prohibits the establishment of new courts with criminal jurisdiction: the Executive must not be permitted, in the interests of "public security", to set up kangaroo courts to preserve public order.

Several points emerge from this brief historical survey:

- For most of this country's history our ultimate court of appeal has been a foreign court, situated either in South Africa or England. During the subsistence of the Federation of Rhodesia and Nyasaland our main court of appeal was the multi-national Federal Supreme Court.
- Many of our distinguished judges have come from outside the country.
- There has always been political involvement in the appointment of our judges, even if the appointments themselves have not been made on a partisan basis.
- These points should be borne in mind when formulating constitutional provisions relating to the courts and the judiciary.

2. The System of Courts in a new Constitution

None of the constitutional drafts that have been put forward since 1999 — the Constitutional Commission draft, the National Constitutional Assembly draft, the so-called Kariba draft and the Law Society's remodelling of the NCA draft — have proposed radical changes to Zimbabwe's court structure. The drafts have differed mainly on the composition of the courts, the way in which judicial officers are to be appointed, and the establishment of additional courts such as family courts and labour courts. All the drafts concur that there should be a Constitutional Court, an appeal court to hear civil and criminal appeals, a High Court, as well as magistrates courts and customary law courts and a greater or lesser number of specialised courts such as a Labour Court and a Family Court; but there have been no suggestions for far-reaching changes such as an abolition of the distinction between the High Court and magistrates courts or for the amalgamation of the customary-law and common-law courts. This probably reflects the inherent conservatism of the lawyers who prepared the drafts, but it may also stem from an appreciation of the practical problems that will arise if the legal system is changed suddenly when the new constitution comes into force. Changes to an established court system should be incremental rather than sudden and drastic, and for that reason the conservatism of the drafts is entirely sensible.

Dealing with the different courts in turn:

Constitutional Court

All the drafts, as I have said, propose a Constitutional Court with ultimate jurisdiction to decide questions arising from the interpretation of the Constitution and in particular the Declaration of Rights. Under the Constitutional Commission draft and the Kariba draft, the court would have power to determine most constitutional matters, but this jurisdiction

would not apparently be exclusive — certainly not in regard to infringements of the Declaration of Rights;[404] the NCA draft on the other hand suggests that the court should have exclusive jurisdiction to decide on the constitutionality of laws and proposed laws, and to adjudicate on disputes between different organs of State.[405] Clearly this is wrong, both conceptually and from a practical point of view: if a law contravenes the Constitution it is void ab initio and does not need a court decision to make it so; and it is likely to cause hardship to litigants if they are compelled to approach the Constitutional Court in order to determine even simple issues of statutory interpretation.

The proposed composition of the Constitutional Court varies between the different drafts. The Constitutional Commission draft would have the court made up of the judges of the Supreme Court together with the senior judge of the High Court and other judges appointed under an Act of Parliament;[406] the Kariba draft contains much the same provision[407] and so does the NCA draft, though it adds "two teachers of law" to the court's complement. The Law Society's draft (which re-works the NCA draft), however, would have judges appointed exclusively to the court. If there is to be a separate Constitutional Court then it is probably better for its membership to be different from that of the other courts, to avoid having the same judges deciding the same matters while wearing different hats. On the other hand, economic constraints may oblige us to adopt one of the other models to avoid having to pay a full bench of new judges.

There are, however, two other possible models that should be considered.

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[404] See clauses 67 + 151 of the Constitutional Commission draft and clauses 67 +157 of the Kariba draft.

[405] The provision is contained in the 2001 version of the NCA draft as well as in earlier versions. I cannot refer the reader more specifically to the provision concerned, because the numbering of the draft's clauses is so obscure that I cannot fathom it.

[406] Clause 151 of the Constitutional Commission draft.

The first is to retain the present system, under which the Supreme Court is the ultimate court in constitutional matters. As I pointed out at the beginning of this paper, Zimbabwe cannot afford an elaborate hierarchy of courts, and to add an extra court to the apex of the existing structure is hardly an economic use of skilled personnel. It is not essential to have a separate court to deal with constitutional issues: if the judges of the Supreme Court are sufficiently learned and upright to deal with ordinary appeals, surely they can be trusted to deal with constitutional issues as well? And if they cannot be trusted to deal with those issues, where will we find judges who can?

That brings me to the second possible model: to hand responsibility for deciding constitutional cases to a court outside Zimbabwe, as we have done in the past. Foreign judges would be free from the partisan passions that afflict many Zimbabweans, so even if their judgments were unpopular most people would probably accept them as impartial. Using a foreign court as our ultimate appeal court in constitutional matters would also have the advantage of being relatively cheap since the Zimbabwean government would not have to employ the judges full-time. My suggestion is that, with the consent of the South African government, we should adopt the South African Supreme Court of Appeal as our constitutional court. [408] This need not be permanent; it could be a temporary arrangement reviewable in, say, 10 years. By that time current passions may have cooled and our economy may have prospered to such an extent that we can consider establishing our own constitutional court.

Supreme Court and High Court

There is little real difference between the draft constitutions as to the composition and jurisdiction of the Supreme Court and High Court. All the drafts would have the Supreme Court as the ultimate court of appeal in all

matters except constitutional ones, and the High Court as a court of full original jurisdiction. The composition of the courts would be left to legislation, but while the Constitutional Commission draft envisages the Supreme Court consisting of a minimum of two judges apart from the Chief Justice, the Kariba draft fixes the minimum at five and the NCA and Law Society drafts at four. [409]

None of the drafts, it may be noted, suggests creating separate High Courts for different provinces or regions of Zimbabwe. This is probably wise. In practice we do have two High Courts, one based in Harare and one in Bulawayo, but the division is purely administrative and judges can be moved from one centre to the other without any legal complications.

Magistrates Courts

Again the various draft constitutions deal in very much the same way with magistrates courts, leaving it to an Act of Parliament to establish them and define their jurisdiction. There is no need to say more: magistrates courts work reasonably well and there is no pressing need to change them.

Customary-Law Courts

The Constitutional Commission draft leaves the establishment and composition of customary-law courts entirely to Parliament, though the draft makes it clear that Parliament must establish them. [410] The Kariba draft is similar, though Parliament would not be obliged to establish any such courts. [411]The NCA draft is the same as the Constitutional Commission draft, while the Law Society draft does not mention customary-law courts specifically.

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[409]See clause 152 of the Constitutional Commission draft, clause 158 of the Kariba draft and clause 95 of the Law Society draft. The number of the relevant clause in the NCA draft is undeterminable.

[410]Clause 155 of the Constitutional Commission draft.

[411]Clause 160(d) of the Kariba draft.

The Law Society draft probably takes the best course. It is to be hoped that in time customary law and the common law will converge, and this process will be hindered if the Constitution obliges Parliament to establish special courts to administer customary law.

Special Courts

When it comes to special courts, there is considerable divergence between the draft constitutions. The Constitutional Commission draft would simply allow Acts of Parliament to provide for other courts in addition to those mentioned above. [412] The Kariba draft is effectively the same. [413] The NCA draft, on the other hand, would oblige Parliament to establish an Administrative Court, a Labour Court, a Labour Appeal Court and a Family Court; the jurisdiction of the Administrative Court and the Family Court is not specified but the Labour Courts are to have "original and exclusive jurisdiction in labour matters". The Law Society draft, which is based on the NCA draft, leaves out the Labour Appeal Court and the Family Court, and would give the Labour Court original but not exclusive jurisdiction in labour matters. [414]

In the interests of flexibility the approach of the Constitutional Commission draft is to be preferred since it would allow Parliament to establish new courts as and when needed. The NCA's proposal has not been properly thought through: to give a special court exclusive jurisdiction in so vaguely-defined a field as "labour matters" would make it very difficult to determine the correct court in which to bring cases which touch peripherally on labour and employment.

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[412] Clause 156 of the Constitutional Commission draft.

[413] See clause 160 of the Kariba draft.

[414] Clauses 97 and 98 of the Law Society draft.

As I said earlier, the various draft constitutions do not propose fundamental changes in the nature and jurisdiction of our courts; where they differ is in the number of courts. For the reasons which, again, I have stated earlier it is my view that a new constitution should mandate as few courts as possible, no more than are necessary to ensure the proper working of the constitution and to maintain the rights and freedoms which it guarantees. The establishment of other courts should be left to the discretion of Parliament.

3. Appointment of Judicial Officers

There is always some political dimension in the appointment of senior judicial officers; nowhere in the world have politicians been completely excluded from the process. [415] The more power judges are given to set aside laws and policies on constitutional grounds, the more politicians will insist on becoming involved in their appointment. The best we can do is ensure that their involvement does not lead to partisan appointments. Some political involvement is indeed desirable, to make the judiciary accountable to the people by ensuring that it reflects the interests of ordinary people. If the appointment of judicial officers is left exclusively to the legal profession, there is a danger of creating a self-perpetuating elite who are accountable only to themselves.

The present Zimbabwean constitution gives politicians — one politician, at least — an overwhelming say in the appointment of judges. As indicated earlier, under section 84, judges are appointed by the President after consultation with the Judicial Service Commission; there is no need for the President to act on the Commission's recommendation, though if he does not do so he must inform the Senate.

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[415] See K. Malleson & P.H. Russell (ed) *Appointing Judges in an Age of Judicial Power* (2006) University of Toronto Press, particularly at pp 420 ff.

To what extent will the draft constitutions change this position?

Judges

Under the Constitutional Commission draft, the Chief Justice would be appointed by the President after consultation with the Judicial Service Commission, while other judges would be selected by the President from lists submitted by the Commission. All judicial appointments would be subject to approval by the Senate. [416] The Kariba draft has similar provisions but appointments would not be approved by the Senate. Another significant difference between the two drafts is that when appointing judicial officers under the Constitutional Commission draft, the President would — at least in theory — be acting on the advice of his Cabinet; under the Kariba draft he would be free to act as he pleased. [417] The NCA draft by contrast reduces the President's discretion considerably. The Chief Justice and the Judge President would be appointed by the President on the advice of the Prime Minister, from a list of three names submitted by the Judicial Service Commission. Other judges would be appointed on the recommendation of the Commission. All appointments would have to be approved by the Senate.

Obviously the composition of the Judicial Service Commission is crucial to the appointment process in all these drafts. Under the Constitutional Commission draft the Commission would consist of Chief Justice, the Judge President, the Attorney-General, a member of the Public Service Commission and five other members appointed by the President with the approval of the Senate; only four of the members would be non-lawyers. [418] The Kariba draft has much the same provision, but the Minister of

[416]Clause 159 of the Constitutional Commission draft.

[417]See clause 100 of the Constitutional Commission draft and clause 98(2)(b) of the Kariba draft.

[418]Clause 169 of the Constitutional Commission draft.

Justice would also be a member and only two of the members would be non-lawyers. [419] The NCA draft would add five members of Parliament including at least two opposition members, as well as two customary-law judicial officers.

Clearly all the drafts recognise and allow for some political involvement in the appointment of judges. The Kariba draft vests power almost exclusively in the President while the NCA draft allows members of Parliament to participate through the Judicial Service Commission.

Other Judicial Officers

The Constitutional Commission draft and the Kariba draft would leave the appointment of judicial officers other than judges to be prescribed in an Act of Parliament, so long as the appointments are made without favour or prejudice; the Commission draft would also require all such appointments to be made subject to Senate approval unless the Act concerned provided otherwise. [420] Under the NCA draft, the Judicial Service Commission would be responsible for appointing magistrates while the appointment of other officers would be provided for in legislation.

4. Tenure and Conduct of Judicial Officers

All the draft constitutions contain provisions protecting members of the judiciary against abolition of their offices and reduction of their remuneration; these provisions are standard in most constitutions. None of the drafts, however, deal directly with the conduct of judges while in office. There is no provision, for example, allowing the Judicial Service

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[419] Clause 172 of the Kariba draft.

[420] Clauses 163 and 164 of the Constitutional Commission draft and clause 167 of the Kariba draft.

Commission to draw up a code of conduct for the judiciary and to enforce its provisions. This is a serious omission. Zimbabwean judges and magistrates have been faced with serious ethical dilemmas in recent years, and there is no reason to suppose that the dilemmas will lessen in future. A clear and enforceable code of conduct would go some way towards maintaining the integrity and reputation of the Bench.

Dismissal of Judicial Officers

Security of tenure is obviously vital for an independent judiciary, hence the importance of constitutional provisions protecting judicial officers against arbitrary dismissal and the general disapproval of provisions that allow temporary appointments to the Bench.

How far do the draft constitutions protect the judiciary in this respect?

Judges

The Constitutional Commission draft would allow judges to be dismissed only for misbehaviour or disability (mental or physical) that prevents them from carrying out their duties. [421] The Kariba draft and the NCA draft would add gross incompetence to these grounds. [422] All three drafts would require an investigation before a judge could be removed from office; in the case of the Constitutional Commission draft and the Kariba draft the investigation would be conducted by a tribunal appointed by the President on the recommendation of the Judicial Service Commission, while in the case of the NCA draft it would be conducted by the Commission itself. [423]

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[421] Clause 162 of the Constitutional Commission draft. In this regard the draft is the same as the present Constitution.422

[422] See clause 166 of the Kariba draft.

[423] See clause 162 of the Constitutional Commission draft and clause 166 of the Kariba draft.

Other Judicial Officers

The Constitutional Commission draft and the NCA draft are both silent about the dismissal of judicial officers other than judges. The Kariba draft, on the other hand, states that they cannot be removed except by or with the approval of the Judicial Service Commission, on the same grounds as those applicable to judges, and that the procedure for their removal must be fair and open. [424]

[424] Clause 170 of the Kariba draft.

Raymond Atuguba:

Customary Law: Some Critical Perspectives in Aid of the Constitution Making Process in Zimbabwe

1. Introduction

It is clear that Customary Law is not that important. All over the world, Customary Law, however it is called, is always considered as peripheral, dispensable, even a distraction. Other times it is representated as a retrogressive set of rules that need to be done away with as soon as practicable. In our constitutional and legislative experience in Africa, Customary Law is almost always assigned to an adorned footnote or endnote when it is lucky enough not to suffer serious legislative deprecation and depreciation. In instances where there is a brave attempt to reinstate customary law, as was the case in the 1993 Courts Act of Ghana, the attempts looks too good to be true and is ignored in practice.

Yet, in most of Africa, Customary Law reigns. It is the law that accords with people's lived reality. It is the law that the majority of the citizenry use, revere, adore, celebrate and keep close to their hearts. It is the only law that prevails even in the absence of policemen and soldiers to enforce them. It is the law. Everyone, from the President to the lowest of the low perform customary rights at birth, marriage, and at death, submissively and without prompting.

What accounts for this huge divergence between our lived reality as Africans and our constitutional and legislative experience? In this short paper, i attempt to do three simple things. First, I provide a summary of the place of Customay Law in the various drafts of the Zimbabwean Constitution and establish the subsidiary role that has been foistered on it by those constitutions. Next, I propose a number of considerations for improving the strategy and the content of what has been included on the Zimbabwean Constitutions by way of Customary Law, and finally, I draw on recent experiences in Ghana to hint that Customary Law in Africa, especially in relatively stable African Countries, has a way of making a resurgence, and so Zimbabwe should brace herself for that day and should perhaps sow some seeds in the Constitution now so that they will germinate to coincide with that day.

Customary Law and the Zimbabwean Constitutions

The various Law Constitutions and Draft Constitutions of Zimbabwe accord Customary Law some role in the scheme of governance, especially the aspect of governance that deals with the resolution of disputes according to law.

In article 89 of the 2000 Constitution as amended, the following bold provision on Customary Law appears: “Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.” The same Constitution provides that there shall be Chiefs appointed by the President, which is very strange. It goes on to provide in the same article 111 “that an Act of Parliament shall provide that in appointing a Chief the President shall give due consideration to the customary principles of succession of the tribespeople over which the Chief will preside and may provide for the appointment of deputy Chiefs and acting Chiefs.” And article 113 provides that “law” includes “any unwritten law in force in Zimbabwe, including African customary law”.

The Kariba Draft Constitution in its article 154 provides that the judicial authority of Zimbabwe vests in the courts which include “customary-law courts”. The Judiciary is defined in that same article to include “traditional leaders and other persons presiding over customary-law courts” and article 160 provides that the jurisdiction of Customary Courts “consists primarily in the application of customary law”. In a move that is quite exceptional in Africa, the Kariba Draft Constitition gives criminal jurisdiction to Customary Courts in its artice 161. In articles 252 to 253, the Draft Constitution recognises traditional authority, especialy Chiefs, and Chiefs Councils. The constitution also defines law in its article 270 to include "any unwritten law in force in Zimbabwe, including customary law".

The National Constitutional Assembly (NCA) Draft Constitution provides emphatically that "Customary law will, subject to this Constitution, be recognized". It further provides in its Chapter 8 for the establishment of Customary Law Courts "whose jurisdiction consists in the application of customary law".

In the light of all the above cited examples of how Customary Law never dies, there is a definite and deep voice calling for its complete abrogation. The voice is so loud that I cannot but quote it in extenso:

> "The overall spirit and indeed the letter of the NCA Draft is to create an open, democratic and accountable (and just) society where differences, be they based on race, ethnicity, gender, social and other status, disability, etc do not and should not curtail enjoyment of rights and freedoms. The so called traditional customary law in Zimbabwe has for very many years been used as a tool to curtail the enjoyment of rights by women. Examples abound- perpetual minority status of women, unfair laws of inheritance and succession, inequitable tax laws and property ownership rights. Some of these inequalities of the past have been addressed by statutory interventions. Some of the statutory interventions have been bold, yet others have not been far reaching.
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> However, one thing is clear, there is virtually nothing like customary law, in terms of substantive and procedural content, to talk of now.
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> The NCA Draft has attempted to create nostalgia for the very system that has, for many years, derailed the progress towards a universal enjoyment of all fundamental rights by the common Zimbabwean citizenry. "Let Zimbabwe", as section 1 proudly proclaims, be "one sovereign and democratic state" founded on

the stated principles and values including equal status of all persons. Cultural norms must not perpetuate the stereotype that women are second class citizens. It is not enough that there is a section that invalidates any custom, practice or tradition that offends the Constitution. The courts may still try to do a balancing act and thus perpetuate the existence of a customary law so fraught with inequalities.

There is need to have a bold constitution that does away with a customary law whose abusive content has always allowed men to have many wives, yet does not allow women to have more than one husband at a time. There is needed an effective break away from the old and abusive traditions. In fact, most medieval nations had similar institutions but they got rid of them as they mordenised. What may remain are cultural practices and norms that do not offend the letter and spirit of the constitution. What is in existence today is a historically constructed and deeply entrenched practices that weak men still cling to in the name of tradition. Even undemocratic political systems like historical kingdoms were defended in the name of "good old tradition" until they were swept away by popular revolutions that ushered in democracy in most parts on the world. A peaceful constitutional cum cultural revolution is possible and the opportunity comes with a new constitution in Zimbabwe. Polygamy already in existence may, by an Act of Parliament, be allowed to continue and no further such marriages should take place from the date of the coming into force of the new constitution.

The Model Constitution has amended section 96 of the NCA Draft to be in line with the amendments made to section 95 of the NCA Draft. The Model Constitution has also removed traditional

> leaders from presiding over customary Courts and from the Judiciary. Reason tells us they do not belong there. There is no institution that they are accountable to. In any event, it is common knowledge that any adjudicatory role played by traditional leaders invariably involves determination of purely statutory and common law matters - petty theft, aquilian actions and even defamation. This has largely been a result of lack of knowledge on the part of "customary law'' litigants and lack of access to proper courts.[425]"

This is frightening. It is frightening because it is too definite and prescriptive. It is frightening because it does not allow any room for a dissenting voice, for experimentation, for change, for learning. It is frightening because it carries the tone of the colonial masters. It is frightening because it takes the lived reality of the majority of African and jettisons it out of te window in one felt swoop. It is frightening because it does not realise the huge potential of Customary Law in today's global world, where States and Companies invest millions of dollars paying for imagination, creativity and innovation for craft alchemies of everything, including alchemies of laws. It is frightening because it uses one example of how Customary Law, supposedly, works against the interests of women, and extrapolates from that to the conclusion that all Customary Law is bad everywhere, anyhow, and forever. It is frightening because it says "there is virtually nothing like customary law, in terms of substantive and procedural content, to talk of now'', and so i should stop my thinking and writing about Customary Law and get some sleep.

Frighten aside, it is understandable why the learned author, follwoing many other authors, is so dismissive of Customary Law. In the second part of this paper, i will propose a number of faultlines that students of Customary Law regularly run into and suggest ways in which Zimbabwe may not only avoid them, but rework the faultlines for the good.

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[425] Mkhululi Nyathi, Background to the Model Constitution: A Summary of the Constitutional History of Zimbabwe from the Colonial Period to the Present (2009).

2. The Remaking of Customary Law

The first faultline in any consideration of Customary Law is the rush to assess it even before we have ascertained it. Customary Law is very complex, not least in the way in which it exists and is nurtured-not in writing but in various representational forms and in oral traditions. In Ghana, a particular set of ethnic groups are often ridiculed for selling their daughters into marriage because of the huge bride price that is demanded of prospective husbands. Digging deeper into that custom, I realized that the entire bride price, according to the custom is never to be paid in its entirety. Indeed, paying the entire bride price is a very wrong signal to the family of the bride. Only a portion of it is paid and the family of the groom is at custom forever indebted to the family of the bride. This acts as a check on the groom and the family of the groom in the way in which they treat the bride. I also found out that a person who was demonstrably not capable of paying the bride price, could use some livestock belonging to anyone to pay. It is not smart at all to commence an assessment of rules of custom before we have determined exactly what those rules are, what they mean, when they are applicable, what the exceptions are, etc, etc, etc. I implore all of us to reconsider our stance on Customary Law and provide a constitutional avenue for interrogating principles of Zimbabwean Customary Law in order to unearth as close as possible the real Customary Law on various issues as they apply to the lives of the majority of the citizens of Zimbabwe.

A second faultline is the way in which we assume that Customary Law is virtually the same across ethnic groups. Although we formally acknowledge differences in the customary laws of various ethnic groups, we tend to collapse them in order to make life easier. This happens especially in adjudication where judges try to avoid the cost of discovering the Customary Law on a particular subject by assuming that it is basically the same as some other Customary Law they are familiar with. This is compounded by the huge, sometimes overbearing, influence

of larger and more powerful ethnic communities and information deficits in the courts regarding the customary laws of smaller ethnic communities. Thus, the law has privileged some rules of customary law for general application in most African countries. This is at the expense of the variety that makes Customary Law so beautiful.

It is also important to note that Customary Law has been severely influenced by various other forces. The mutilation of pristine Customary Law by the forces of religion, Colonialism, Neo-colonialism, and now Globalisation has meant that different narratives of Customary Law exist. Shifting through the various narratives, some authentic and genuine, others not, can raise many contradictions and create a lot of confusion. This is, however, not a reason to raise our hands in the air and give up. It is an opportunity to track the enhancement and/or mutilation of Customary Law across time and to learn from the experiences of the various transmutations what we should keep and what we should

jettison. It is particularly disheartening when we point to a mutilated rule of Customary Law in all its ugliness and then conclude that it is so ugly we should abrogate it. For example, the current Zimbabwean Constitution provides in its article 111 that Chiefs shall be appointed by the President. This is a most radical departure from the traditional African source of legitimacy for a Chief. It is not Customary for a President to appoint a Chief. When such Chiefs are beholden to the President and the formal structures of State and do not work for the supreme interest of their citizenry, it is hypocritical to point to that fact as a reason for the malfunctioning of Customary Law.

Another crucial aspect of Customary Law that should not be disregarded in this exercise is that Customary Law is not static, it changes. The current Zimbabwean Constitution provides against discrimination in its article 23. It them outlines various exceptions to the anti-discrimination clause to include “the application of African customary law”. There is an

assumption here that African Customary Law is inherently discriminatory and that it is static and incapable of changing. This bias against African Customary Law is common in many statutory and case laws in Africa. Customary Law changes and so there is the question of what constitutes the Customary Law on particular issues at different points in time. It is important to periodize Customary Law in order to resolve some conflicting rules of customary law that are due to different periodizations. Additionally, it is important to note for each community how a rule of Customary Law gets established, changed, or abrogated.

Another cause for the fear and unease that many have about Customary Law is because it introduces a legal pluralism that they assume is bad because it increases the transaction costs of social relations and dispute resolution. They believe that uniformization and commonality are necessarily good things. It is important that the Zimbabwean constitutional experience does not proceed with such a bias. Customary Law in its diversity and the legal pluralism that it imports can be great strengths if they affords communities the opportunity to deal with their issues according to the Customary Laws of their particular domain, that . are presumably fashioned to address those issues in context and in their specificity and particularity.

Despite the continued denigration of Customary Law, including its unenviable position in the hierarchy of norms in many African constitutions, including the Constitutions of Zimbabwe, it is still the dominant law in family life and social relations in Africa. In Family life for example, births, family membership, marriages, matrimonial causes, children, deaths are predominantly governed by Customary Law. It is safe to say that without Customary Law, many African countries cannot retain the fabric, the spine of their socio-cultural lives and sometimes, their livelihoods.

3. The Resurgence of Customary Law

It appears that in African countries that are making some process in terms of political and economic stability, there is resurgence of Customary Law. In Ghana, the Law Reform Commission and the National House of Chiefs, with the support of the German Technical Cooperation (GTZ), is embarking upon an ambitious project of ascertaining Customary Law.

Ghana is slowly realizing that the many problems that she faces in the area of Chieftaincy disputes, land disputes and the breakdown of the family as the unit of society are traceable to the neglect of her Customary Law. She is now engaging in remedial action by trying to rediscover Customary Law and put it to the service of national development.

At this time of crises, it may be too much to ask this of Zimbabwe. What I ask is for Zimbabwe not to dismiss Customary Law completely and assign it to the dustbin. What I ask is for Zimbabwe to leave a number of constitutional openings so that it can easily allow for a resurgence of Customary Law when she is ripe for it. That day, I promise you, will come.

1. Introduction

The formation of the inclusive government (IG) in Zimbabwe in February 2009 marked a historical development in this country's history. During the tenure of the inclusive government, also called the Government of National Unity (GNU), several activities will be undertaken, including the writing of a new and democratic constitution. Although this process is already underway, it is fraught with numerous problems, some of which threaten to derail the national effort, if not the whole GNU prematurely. Assuming however, that the constitution making process will be carried out to its logical conclusion, this paper outlines and discusses some of the transitional arrangements that will need to be implemented before a new government can be installed. The paper proceeds from the premise that most of the current and future disagreements and problems among the concerned parties will eventually be resolved and a new, democratic constitution will, indeed, be written and enforced in Zimbabwe.

2. Global Political Agreement Provisions

The Global Political Agreement (GPA) signed by the three political parties in September 2008 makes provision in Article VI (iv) to (x) for the transitional arrangements that will need to be implemented once the drafting of the new constitution has been completed. Three months after the completion of the public consultations, the draft constitution will have to be tabled at a Second All-Stakeholders' Conference. The conference will debate the draft constitution and determine whether it accurately reflects the views and preferences of the majority of the people of Zimbabwe. The experience of the First All-Stakeholders', where elements from the Zimbabwe African National Union – Patriotic Front (ZanuPF) attempted to disrupt proceedings, could be repeated given that party's opposition to the drafting of a new and democratic constitution for Zimbabwe. It is, however, unlikely that such action could succeed in derailing the constitution making process.

Section 6 (v) of the GPA states:
…the draft Constitution and the accompanying Report shall be tabled before Parliament within 1 month of the second All Stakeholders Conference.

Parliament will obviously debate both the Report and the draft constitution, and there is the possibility that some changes may be made to both these documents. The time limit for this stage is one month. Section 52 (3) and (4) of the current Constitution of Zimbabwe makes provision for Parliament to amend the constitution without hindrance, and it is unlikely that the legislature will easily give up that power at this critical stage. There is therefore the fear that whatever changes Parliament may make to the draft constitution could turn out to be unacceptable to the majority of the people of this country. The vigilance of civil society during all these stages will therefore be crucial if a legitimately democratic constitution is to emerge. Before the holding of a referendum, the draft constitution emerging from Parliament shall be gazetted, and the referendum shall be held within three months of the parliamentary debate. It is at this stage that the people will once again have the opportunity to accept or reject the draft constitution. It is, however, unlikely that the experience of the government sponsored draft of 2000 will be repeated.

Within one month from the holding of the referendum, and providing that the result of the exercise is an acceptance of the new foundation law, the draft constitution shall be gazetted once again, and then introduced to Parliament after the expiration of 30 days from the day it will have been gazetted. It is unlikely that there will be any debate on the content of the draft constitution, and Parliament is likely to pass it into law without amendment. Although, as stated earlier, Parliament has a constitutional right to amend the constitution, politically, it will not be prudent for the legislature to exercise this responsibility or right. Any serious amendment

to the draft constitution at this stage could result in the majority of the people viewing the new foundation in bad light. The need for the accommodation of the interests of all the stakeholders cannot be over-emphasized.

3. Other Transitional Arrangements

In the amended current Constitution of Zimbabwe Section 115, several terms that have been used in Constitutional Amendment Number 19 are explained as follows:

(1) In this section and section 118 and Schedule 8

"after consultation" means that the person required to consult before arriving at a decision makes the consultation but is not bound by the advice or opinion given by the person so consulted;

"in consultation" means that the person required to consult before arriving at a decision arrives at the decision after securing the agreement or consent of the person so consulted;

"Interparty Political Agreement" means the agreement between the Presidents of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two formationsof the Movement for Democratic Change (MDC), on resolving the challenges facing Zimbabwe, as set in Schedule 11, which was signed at Harare on the 15th September, 2008, and witnessed by the President of the Republic of South Africa as facilitator mandated [by] the Southern African Development Community (SADC), as subsequently amended;

"Prime Minister" means the Prime Minister whose appointment is referred to in Article 20.1.4 of the Interparty Political Agreement.

The assumption is clearly that some of these terms may have been used differently in other parts of the un-amended Constitution of Zimbabwe than they are used in the amended parts. The several months since the inauguration of the GNU have witnessed considerable disputes and disagreements between the three political parties in relation to the correct meaning and interpretation of some of these terms. Indeed, some of the outstanding issues that have currently remained unresolved are a result of different interpretations of some of these terms. It is hoped that part of the transitional arrangements will be to ensure that the new foundation law will not cause such confusion among the people and the legislators of this country.

Critical to the management of transitional arrangements is Schedule 8, which the current constitution notes,

(2) Schedule 8 shall have effect from the date of commencement of the Constitution of Zimbabwe Amendment (No. 19) Act, 2008, and continue in force during the subsistence of the Interparty Political Agreement.

(3) The provisions of this Constitution shall, for the period specified in subsection (2), operate as amended or modified to the extent or in the manner specified in Schedule 8.

The only real significance of Schedule 8 is that it is basically a summary of the GPA, and its legal purpose is to formalise the inclusive government within the amended Constitution of Zimbabwe. This necessarily means that the transitional arrangements that will need to be considered in this paper will have to take into account some of the formal arrangements of the GNU during the run-up to the finalisation of the new, democratic constitution. In this regard, therefore, we need to make the following

pertinent observations and postulations that may impinge on the transitional arrangements.

First, we note that there is considerable controversy regarding the use of the Kariba draft as the basis of the proposed new constitution. The controversy has the potential to derail the constitution making process since the three political parties that form the GNU are not agreed on this matter. Zanu PF currently insists that the Kariba draft be the basis of the new foundation law, while both formations of the Movement for Democratic Change (MDC) disagree. In fact, the MDC-T has since drawn up its own draft constitution, which it is distributing among the people for consideration as a reference document in the constitution making process. What is most worrying in this regard is the fact that ZanuPF has been known to make use of political violence as a tool for achieving its political ends. Should this unfortunate situation develop, the implications for whatever transitional arrangements the law may provide could be dire indeed.

The main reason why ZanuPF and President Mugabe prefer the Kariba draft is that it leaves the current presidential powers largely intact. One of the reasons for the national demand for a new and democratic constitution has always been the need to reduce the powers of the national chief executive. This cannot happen if the Kariba draft is adopted as the basis of the new constitution. A further reason for ZanuPF's preference for the Kariba draft is that, like the current constitution, it accords the president immunity from prosecution while he is in office. This essentially places Mugabe above the law, and he is anxious not to give up on that privilege, especially given the numerous allegations that have generally been levelled against him, including accusations of alleged crimes against humanity.

There is also the possibility that the referendum could be mired in violence, especially if the proposed new constitution will be viewed as threatening to result in the loss of political power by ZanuPF. Indeed, at the time of writing this paper, there are numerous reports of the setting up of illegal “military” or militia bases in various parts of the country purportedly to ensure that the rural people are intimidated into complying with the dictates of ZanuPF. Whether these fears are real or imagined remains to be seen. It is, however, the contention of this paper that unless strong measures are taken to enforce the rule of law and administer justice during the constitution making process, the transitional arrangements discussed in this paper could quite easily be disrupted and the nation thrown back to a period akin to June 2008. Media reports indicate that at least 200 supporters of the MDC were murdered during the run-up to the run-off presidential election in June 2008.

Further, in accordance with the provisions of the GPA, a new Zimbabwe Electoral Commission (ZEC) is being appointed, and it is this body which will conduct the referendum. There has been considerable controversy regarding the composition of the new ZEC, given the partisan nature of the disbanded one in favour of ZanuPF. There is therefore the fear that the ZEC may manipulate the results of the referendum in favour of certain political interests and at the expense of those of the people. Should this happen, Zimbabwe will be stuck with the current constitution, which has been amended some nineteen times since Independence.

Finally, there will also be need for adequate arrangements to be made to ensure that international and regional observers get invited to observe and monitor both the referendum and the subsequent general elections. In the past, the ZanuPF government has deliberately discriminated against observers and monitors from Western countries arguing that their governments were hostile (or unfriendly) to Zimbabwe. It will be crucial,

for meaningful legitimacy to be achieved, that international observers be invited from all over the world without any discrimination whatsoever. This will also provide the constitution making process and the subsequent elections credibility in the view of the family of democratic nations. At the time of writing this paper, this issue has not yet been dealt with by the relevant authorities within the inclusive government.

4. Conclusion

The various transitional arrangements discussed in this paper clearly indicate the fragility of the constitution making process in Zimbabwe. The process is clearly controversial, and there is ample opportunity for derailment unless all the forces concerned agree to work together harmoniously to complete the task. Indeed, at the time of writing this paper, the MDC has disengaged itself from ZanuPF alleging the latter's reluctance to fully implement and abide by the provisions of the GPA. For its part, ZanuPF argues that it has implemented the GPA while the MDC has failed to fulfil its part, that of ensuring that Western powers lift the targeted sanctions against Mugabe and his business and political associates. There is, however, the possibility that the Southern African Development Community (SADC) may intervene and mediate between the two political parties in order to resolve the outstanding issues in time to allow the constitution making process to proceed and reach its logical conclusion. All of the transitional arrangements outlined in this paper will require the co-operation of all the political players if Zimbabwe is to successfully write and adopt a new and democratic constitution.

ONE WORLD