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Progressive Reform in the New Constitution of Zimbabwe:

A BALANCE BETWEEN THE PRESERVATIVE AND TRANSFORMATIVE CONSTITUTION MAKING PROCESS

1. Introduction

The aim of the Lancaster House conference was to bring to an end the armed struggle that had raged for 2 decades between the colonialist settlers and the Indigenous Zimbabwean people. The nature of the conference was largely diplomatic, at least from the Britons side to such an extent that dialogue was open between every party in the then Rhodesia which explains Ian Smith's UDI being also present. Some of the issues discussed during the Conference included, the land issue, free and fair elections, composition of the army, judiciary, police and the position of the white minority, thus the resultant negotiated document from the Conference was to be known as the Lancaster House Constitution. The Lancaster House Agreement was signed between the parties in December 1979, ending the civil war and paving the way for independence. Within a year, independence was granted and elections were held. The Lancaster House Constitution maintained the Bi-cameral legislature that was in place before the coming of independence. The Lancaster House Constitution provided for a justiciable Bill of Rights and a number of provisions were entrenched effectively, with a clause ousting the power of the legislature to amend provisions for several years for instance property rights. The motive behind this restriction was of course to ensure that the negotiations of the Lancaster House conference are not overtaken by the inherent power of the newly independent sovereign Zimbabwe to alter and shape its founding documents which would render the deliberations and resolutions agreed upon nugatory. What is apparent is that the colonial regime was only ready to grant conditional independence and ironically imposed a constitution on the masses that had not involved the views of the people in the constitution making process.

A non-executive president was introduced with the executive power vesting in the Prime Minister and Cabinet Ministers. The 1980 constitution was a document established through an Act of the British Parliament and given to Zimbabwe rather than a product of an inclusive participatory process. As such, it naturally established the Westminster style system, whose hallmark was the supremacy of the parliament over the executive. Furthermore, the constitution, though designed to end the autocratic and undemocratic rule that prevailed under the Smith UDI regime, preserved two fundamental features of the colonial period: unequal distribution of land ownership between blacks and whites and white dominance. This configuration eventually provided the black majority government with the ammunition to challenge and initiate substantial amendments to the 1980 Charter. Up until its repeal there were 19 Constitutional amendments to the Lancaster House Constitution with the most notable being the amendments forming the Inclusive Government. Some of the amendments have been necessitated by the need to create a Constitution that reflects the values and opinions of the majority notably the Constitution of Zimbabwe Amendment (No.17) Act signed into law on September 12, 2005 which sought to redress the land imbalances of the

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past. Such imbalances created through legislation such as the Land Apportionment Act of 1930 and the Land Tenure Act of 1969, which prohibited blacks to own land in white areas. Other notable amendments were the removal of reserved white seats in senate, removal of the Prime Minister and non-executive Presidency forming an executive President. The most memorable amendment was one which ousted the jurisdiction of the courts to entertain matters pertaining to land that had been compulsorily acquired by the state

Other amendments have been criticised on the grounds that they were facilitated by the need for power or need to gain more political control as opposed to catering for the will of the people. The underlying factor is that the Lancaster House Constitution was imposed on the Zimbabweans by the British when it is a trite principle of constitutionalism that the document is supposed to be a manifestation of the will of the masses made by the masses for the masses, this amongst other factors being the reason why the document is regarded as the supreme law of the land. For the above reason the Lancaster House constitution was invariably going to be amended let alone repealed, it did not reflect the will of the sovereign and was a liability. It had chained down the precepts and tenets of law reform and had short-changed the hard won gains of the liberation struggle. The Lancaster House Constitution was simply a sugar coated abrogation of the principles of rule of law and constitutionalism, a tool for neo-colonialism.

The Lancaster House Constitution was repealed with the coming of the new constitution Amendment Act NO. 13 of 2013 on 9 May 2013. This was a result of the quantitative changes that had been occurring in Zimbabwean politics the first hint of such being the draft constitution of 2000, which saw a proposed constitution being abandoned after it failed to attain approval at a referendum. Seven years later in 2007, ZANU-PF and the two factions of the MDC party, came together and proposed another constitution christened the Kariba draft which was rejected for failing to accommodate public participation in the process and the fact that it was a secretive process and though the deficiencies of the Lancaster House Constitution were agitating for reform the people of Zimbabwe were not willing to repeat the same mistake of condoning a document which they had not authored to govern their rights and responsibilities.

With the coming into effect of the 2013 Constitution of Zimbabwe which had received 95% of the vote at a referendum held in 2012, a number of new provisions and rights were introduced, whilst some other provisions were immortalised and outlived the old Lancaster House Constitution to such an extent that they are mirror images of the provisions in the old constitution. This new constitution has brought about long awaited reform in the constitutional jurisprudence of the country, at least on paper. What still needs to be determined and reinforced is the implementation and enforcement framework of the provisions and the ideology of the courts in interpreting the law. As such this paper will set to seek out key elements of the new constitution and fundamental rights assessing their impact whilst comparing the new constitution regionally with that of Kenya, a country which shares more or less the same road to a new constitution with Zimbabwe, having adopted its new constitution in 2010.

2. Constitutions and transitional Justice

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Transitional justice has been defined as “justice associated with periods of political change” and is “characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹ Its aim is two-fold: to address the human rights violations committed by predecessor regimes (with a view to providing justice to victims of such violations and eradicating impunity) while building peace by reforming abusive state institutions and promoting reconciliation².

It is probable from the very nature of the concept of transitional justice that the best way to ensure justice would be to reform the supreme law of the country in question, only then can the essence and basic values of societal norms in the relations of people be redressed.

3. Critique of the New Constitution

The crafting of the new constitution of Zimbabwe was largely influenced by the transformative process which sort to change the quality of the constitution by providing for essential rights which had not been catered for in the old constitution and widening the scope of others. The GPA agreement between the principal political parties in the state is what culminated in the creation of a new constitution. The survival of some old provisions in the constitution is a result of the preservative nature of the political arrangements that were taking place during the constitution making process and is a tribute to the positive developments that took place in the shaping of Zimbabwean law since the Lancaster House Conference up to 2013 when the new constitution came into effect.

Article VI of the GPA explicitly indicated that the intention of the agreement is that a transformative constitution is to be drafted which “deepens” democratic values in Zimbabwe and this can be largely seen in the declaration of rights that encapsulates fundamental rights in a democratic society. The inclusion of these rights has sparked a general debate on the origins of some of these “alien” rights and the classification of first, second and third generation rights in order of importance and basis. First generation rights are those rights which protect the society from the State’s imminent police powers and its responsibility as the sovereign and are mainly centered on freedoms in the domain of civil and political liberties and are the oldest form of human rights having been developed in the 18th century.³ Second generation rights encompass state duties towards society including social, cultural and economic rights to work, education, health and food. Third generation rights are relatively young in international human rights law and regionally in Africa and encompass the rights to self-determination, equality and development an apt example being minority rights and protection thereof.

¹ Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69

² Aeyal M. Gross, “The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel,” *Stanford Journal of International Law* 40 (2004)

³ **Austrian Development Agency (ADA), the operational unit of Austrian Development Cooperation Human Rights Manual Guidelines for Implementing a Human Rights Based Approach in ADC** at pg 7 “Seen historically, human rights have developed in a dialectical process of various revolutions and ‘generations’. It began with the bourgeois revolutions against absolutism, feudalism and the power of the Roman Catholic Church, legitimated by the ideas of the Enlightenment, rationalistic natural law, the social contract, constitutionalism and liberalism in Europe and North America. These culminated in the establishment of civil and political rights to life, liberty, property and democratic participation in the constitutions of the nation-states of the 18th and 19th centuries.”

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The preservative elements of the constitution of Zimbabwe are evinced by the provisions on structure of government, presidential and executive power and the new constitution seems to be in the same boat with the previous Lancaster House Constitution which lacked a clear stance on the aspect of separation of powers. The shadow of the President looms everywhere, in the Executive, in the Judiciary and the Legislature. The transformative elements of the new constitution are shown from the onset by the whole of Chapter II which has been reserved for national objectives and particularly focuses on areas that had been left out by the previous Lancaster House Constitution. The inclusion of the labour court, Administrative Court and Constitutional Court in the constitution are a manifestation of the reform that was really needed in the institutional processes of the Government

The Reform Context

The drafting of the new constitution in Zimbabwe should be understood against the historical background of the inadequacies of the Lancaster House 1980 Constitution which had to be panel beat 18 times in order to make sure that it catered sufficiently for the political designs of the ruling party and to try and qualitatively move with the times so to speak. The inadequacy of the 1980 constitution in providing a supreme law that reflected the desires and wishes of the people of Zimbabwe and the sovereign itself are evinced by the proposal of the 2000 draft constitution and the rejected 2007 Kariba draft.

The 1980 Lancaster House Constitution was ultimately a peace treaty involving all the interested parties, the native blacks, the white settlers and co-opted sections of the black natives all being represented at the Lancaster House conference in Britain. The constitution as a supreme law of the land derives its supremacy from its endorsement by the people of that sovereign, at the Lancaster House Conference the document that was produced was not endorsed by the people of this sovereign but was merely imposed on them. There is no constitution making process worth talking about as regards the 1980 Constitution, it was a compromise to pave way for the ending of the liberation struggle and in anticipation of general elections.

A number of aspects from the old constitution needed reform and it is imperative to highlight which crucial areas have been addressed and the context in which the reform of constitutional policy has been undertaken as far as the 2013 constitution is concerned.

Absence of Principles for Dealing with Past Human Rights Violations

Citizenship

The aspect of citizenship encompasses the right of a person to belong to a certain sovereign thereby enjoying certain privileges which would not be available to a person who does not have such citizenship. Probably one of the major aspects of citizenship in most African regimes is that of voting and eligibility for public office, for indeed one cannot have such rights to suffrage if he is not a citizen of that nation. Citizenship is provided for in Chapter III *section 35* of the 2013 constitution of Zimbabwe which provides that Zimbabwe citizens are citizens by birth, descent or registration. In the previous Lancaster House Constitution citizenship was provided in Chapter II and the aspect of dual citizenship was repealed by *section 2* of Act 1 of 1983 - Amendment No. 3.

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Since the adoption of the new constitution of Zimbabwe the most topical issue has been that of dual citizenship and recently in a recent 2014 case between Farai Daniel Madzimbamuto and the principal Director of Immigration the Constitutional court of Zimbabwe upheld the unfettered right of the applicant to access to the privileges of dual citizenship. The applicant had acquired a South African passport by virtue of one of his parents being a South African citizen, he sought to renew his Zimbabwean passport which had expired while he was in the United Kingdom and was barred from doing so by immigration officers and was told to apply for residence permit as he was an alien holding a foreign passport, he managed to get a new Zimbabwean passport in 2012 and sought to have permanent resident status endorsed on his South African passport which he did not receive any reply from immigration office compelling him to approach the Constitutional court. In his application Mr Madzimbamuto cited derogations from the constitutionally entrenched rights to freedom of movement and birth right to be a citizen of Zimbabwe⁴. The Constitutional Court ordered the Registrar General, Minister of Home Affairs, Attorney General and the Principal Director of Immigration to comply with the law.

This aspect of dual citizenship is evidence of the transformative and progressive forces that shaped the content of the constitution. This is further magnified by the purposive interpretation of the constitution that has been undertaken by the Constitutional court in Zimbabwe. The preservative forces tried to choke down this fundamental right of citizens by denying potential applicants the right to reside in the nation of their birth but failed. The recognition of this right will open up doors for Zimbabwe citizens who have been unfairly deprived of their right to freedom of movement and participation in processes antecedent to citizens such as the right to vote.

There has been an influx of applications for Zimbabwean passports due to the import of the Chapter III of the Zimbabwe constitution which allows dual citizenship. The major problem being that there hasn't been an alignment of national legislation with the new constitution. This is further exacerbated by the fact that there is really no limit on citizenship by descent and hence the Registrar-General's office has been bombarded by potential applicants seeking Zimbabwean passports though they hold passports of other sovereigns

National Values and Principles of Governance

The constitution of Zimbabwe sets out in its preamble the need to "entrench democracy, good, transparent and accountable governance and the rule of law". This characterises the spirit of the 2013 constitution and it is by far a manifestation of the transformative forces of the constitution making process which sought to institutionalise fundamental principles such as accountability and transparency.

The new constitution of Zimbabwe reiterates the principles on good governance for the first time explicitly in Chapter 2 which includes topics such as Good governance, National unity peace and stability, fostering of fundamental rights and freedoms and foreign policy. *Section 8* connotes Objectives to guide State and all institutions and agencies of government. Of all these provisions probably the most significant one is *section 9*⁵ which dictates principles on accountability and transparency.

⁴ *Section 66 of the Constitution ; Freedom of movement and residence*

⁵ *Section 9 (1) The state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution and in particular (a) appointments to public offices must be made primarily on the basis of merit (b) measures must be taken to expose, combat and eradicate all forms of corruption and abuse of power by those holding political and public offices*

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In recent developments in the Zimbabwe, both these entities have been a major outcry of the public particularly in relation to the way government institutions are run, abuse of public funds, and access to information such as salaries of public servants, corruption and decadence.

In ensuring good governance the ambit of *section 56* which speaks of equality and non-discrimination is also worth noting as it reiterates that the state must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination. The duty imposed on the state dictates that there be good governance and the state should go as far as to create legislation that promotes the achievement of equality.

The constitution complements this accountability and transparency principle with that of answerability and enforcement by the creation of the Anti-Corruption Commission as envisaged in *section 254* and *section 255* of the Zimbabwean constitution⁶. This evinces the fact that there is a strong and proper framework policy for the real realization of principles that be accountability and transparency, what remains to be achieved is practically and the removal of such cancerous practices as corruption, decadence and impropriety in the government and its agencies. Without the proper functioning of the principles of answerability and enforcement the principles on good governance and National values remain just words on paper.

Reform of the Electoral System

The recent developments in the Zimbabwe Electoral process have mainly centered on the issue of Diaspora voting and special voting. It is trite law in a democracy that every citizen of a country or in this case Zimbabwe has a say in the governance of his affair a scenario antecedent to the social contract theory. The right to suffrage is a manifestation of quintessential principles such as self-determination, democracy and arguably rule of law. To deny one the right to vote is tantamount to a human rights violation and on the other hand a country which recognizes every person's right to suffrage is in a better position to prevail economically and in development.

The right to vote is enshrined in *section 67* of Zimbabwe's 2013 constitution⁷ and nowhere in this provision is it stated on the difference in voting rights between citizens within the country's borders and those living abroad. In the run up to the 2013 Presidential elections various Zimbabwean citizens living abroad made approaches to the relevant authorities in Zimbabwe (Zimbabwe Electoral Commission and the Ministry of Justice) to provide a framework for Diaspora voting through postal voting or alternatively for the Electoral commission to set up polling stations abroad. Their arguments were mainly that the Government was already providing postal voting for officials abroad on state duty and therefore should extend this right to other ordinary civilians.

⁶ **Section 254** Establishment and composition of Zimbabwe Anti-Corruption Commission; **section255** Functions of Zimbabwe Anti-corruption commission

⁷ **Section 67 (3)** subject to this Constitution, every Zimbabwean citizen who is of, or over the age of eighteen has the right to vote in all elections and referendums to which this constitution or any other law applies and to do so in secret.

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The other arguments included that these citizens living abroad were equally citizens of the country who enjoyed rights of suffrage and therefore the government had an obligation to provide a voting apparatus for those living abroad. The other argument was that the Electoral Act which provided for postal voting to government officials was tantamount to *ad hominem* legislation and was an abrogation to *section 56* of the constitution⁸.

The state through ZEC and the Ministry of Justice responded by arguing that there was a limitation to the right to vote as envisaged under *section 86* which reiterates the Limitation of rights and freedoms set out in the constitution. They also argued that sanctions were a stumbling block in creating a framework for diaspora voting to take place owing to the reality that the ruling ZANU-PF party's representatives would be barred from observing the diaspora, a situation which would discredit the voting process all together. ZEC even cited financial constraints as a major barricade in providing polling stations for those abroad, arguing that it had barely managed to come up with the funds necessary for elections to take place in the country and it urged all Zimbabwean citizens living abroad who had an interest in the elections to return home and vote as no one was stopping them from doing so.

This was contrary to the decision upheld by the African Commission on Human and Peoples Rights in the case of Gabriel Shumba and Ors (Represented by Zimbabwe lawyers for Human Rights v Republic of Zimbabwe⁹ in which Gabriel Shumba and the other victims working in the Republic of South Africa, who were unable to travel back to Zimbabwe on polling day for the referendum on the Draft Constitution and general elections thereafter. The victims claimed to have participated in the constitution drafting policy for the referendum and general elections thereafter through participation in public consultations and attendances of diaspora meetings held by the select Committee of Parliament in Johannesburg in 2010.

It is *section 3 of schedule 3* of the Lancaster House Constitution which connotes, " subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral law for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who is a citizen of Zimbabwe shall be disqualified for registration as a voter on the common roll.", read together with *section 72¹⁰* of the electoral Act of Zimbabwe which restricted the rights of these victims.

In its decision in this case the African Commission and Human and Peoples Rights in accordance with *rule 98(1)* of its Rules of Procedure ordered provisionally that

- (1) *The Respondent State allows Zimbabweans living abroad to vote in the referendum of 16 March 2013 and the general elections thereafter, whether or not they are in the service of the Government*
- (2) *That the respondent State provides all eligible voters, including Gabriel Shumba and friends, the same voting facilities it affords Zimbabweans working abroad in the service of the Government and*

⁸ *Section 56 (1) of the Constitution reads, "all persons are equal before the law and have the right to equal protection and benefit of the law"*

⁹ *Communication 430/2012*

¹⁰ *Section 72 of the Electoral Act reads, "where an election is to be held in a constituency, a person who is registered as a voter on the roll for that constituency shall be entitled to vote by post in terms of this part if, on all polling days in the election, he or she will be outside Zimbabwe-*

(a) on duty in service of the Government or

(b) as the spouse of a person referred to in paragraph (a)

And so unable to vote at a polling station in their constituency

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(3) *That the Respondent State takes measures to give effect to its obligations under the African Charter in accordance with Article of the African Charter, including areas of free participation in Government.*

Zimbabwe did not abide by this ruling in anyway and stuck to its Arguments in the case of Tawengwa Bukaibenyu v ZEC, Registrar-General of Voters, Ministers of Constitutional and Parliamentary Affairs and of Justice and Legal Affairs citing sanction and lack of funds to facilitate the so called "diaspora voting".

The other major concern for reform in the Electoral system of Zimbabwe is that of special voting as provided under *section 81*¹¹ of the Electoral Act. In the run up to the 2013 elections on 14 July the MDC-T instituted a high court petition to nullify the early special voting exercise for members of the uniformed forces, scheduled for 14th and 15th July. The MDC-T argued that the figure of 69,222 police officers which had been presented by the police, and accepted by ZEC, was inflated when compared to the 44,113 confirmed by the Ministry of Finance as being on the official police payroll. In addition to seeking an order to have the special voting process nullified, MDC-T also, once the hearing was delayed, wanted ZEC to provide them with a list of all the officers who had cast their vote during the special voting exercise, and a copy of the voters roll for the special voting.

MDC-T's petition was dismissed by High Court Judge Chiweshe on July 19 2013 and ZEC went on to carry out the special voting exercise. ZEC turned out to be inadequately prepared for it and as a result over 40% of the authorized special voters were unable to vote on the two special voting days. The Constitutional Court hastily granted ZEC's application for it to allow frustrated special voters to vote with other voters on 31st July. This was however contrary to *section 81B (2)* which provides that, "A voter who has been authorized to cast a special vote shall not be entitled to vote in any other manner than by casting a special vote in terms of this Part". This also raises the concern whether or not there would arise a situation where double voting happens, this discredits the whole election process and is out of touch with accepted practice in the Electoral process.

There was again an issue that arose on whether or not privileges of special voting could be extended to persons who are not electoral officers or member of the disciplined forces but will inevitably be away from their constituencies due to activities antecedent to the election itself. This was raised in the case of Michael Kudakwashe Chideme, Zvamaida Murwira and Zimbabwe Union of Journalists v ZEC, the President, the Minister of Justice and the Attorney General, The application was filed in the Constitutional Court on 19th July, twelve days before polling day. The applicants argued that their right to vote in terms of section 175 of the Lancaster House Constitution would be breached if they were not granted an opportunity to cast their vote before 31st July 2013 under a special voting procedure. The individual applicants claimed that they and other members of the Zimbabwe Union of Journalists, who were registered voters, would be deployed in various areas on polling day and as a result would not be able to vote in their own constituencies. They accordingly requested the court to grant an order compelling ZEC to grant the applicants, and all ZUJ members, a special vote in terms of *section 81* of the Electoral Act by allowing them to vote on the 30th July, a day before the proclaimed polling day¹². This was dismissed and the reasons are quite evident in the letter and spirit of section 81 of the Electoral Act, to allow these journalists a special

¹¹ **Section 81** of the Electoral Act reads, "A registered voter shall be entitled to cast a special vote in terms of this Part before the polling day or first polling day in an election if he or she will be unable to vote at a polling station in his or her constituency because he or she—
(a) is or will be an electoral officer; or
(b) is a member of a disciplined force who will be performing security duties during the election.

¹² COURT WATCH 14/2013

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voting privilege would open up the floodgates as it were for other interested people alleging that they will be away from their constituencies on the Election Day. On the other hand perhaps the time has now come to give meaning to the provisions in the constitution, to have an inclusive approach which practically gives people the enjoyment of rights stated therein

Chapter 7 of the 2013 Constitution of Zimbabwe governs the Electoral Systems and processes and *section 155* reiterates the principles that apply to all elections and referendums and states that they must be free and fair, conducted by secret ballot, based on Universal suffrage and equality of voters and free from violence and other electoral malpractices. These principles on paper seem to be very democratic and fair; however it is no secret that elections in Zimbabwe have been marred by intimidation, rigging and unfair practices such as discrimination against diaspora voters. There is a lot to be reformed in the Zimbabwean Electoral system. The aspects of accountability and separation of powers should be given more importance even when it comes to the Zimbabwe Electoral Commission and the election into office of its board members, the *section 238* provides that, "there is a commission to be known as Zimbabwe Electoral Commission consisting of a chairperson appointed by the President after consultation with the Judicial Services Commission and the Committee on Standing Rules and Orders". This is quite unsatisfactory in the consideration of the principles of separation of powers considering that the President is the same person who appoints judicial officers who constitute the Judicial Services Commission.

Article 82 of the Kenyan Constitution 2010 establishes an Independent Electoral and Boundaries Commission that will oversee the delimitation of electoral units, a process which has been manipulated by successive political regimes to favour their parties or candidates. In Zimbabwe *section 160* of the 2013 Constitution demands that, "for the purposes of electing members of Parliament the Zimbabwe Electoral Commission must divide Zimbabwe into two hundred and ten constituencies

Devolution

Devolution of power reiterates the passing of power from a central government to local, regional or provincial governments. The principle of devolution is therefore about decentralisation of powers of the government. Decentralisation is usually referred to as the transfer of powers from central government to lower levels in a political-administrative and territorial hierarchy¹³.

Devolution refers to a situation where central government transfers administrative and financial decision making authority to local governments that have clear and legally recognised jurisdictions within which they provide public services to constituents they are accountable to¹⁴. Devolution in Zimbabwe was a contentious matter during the constitution making process. The two principal parties were at loggerheads over issues such as the extent of tiers of government.

¹³ *Decentralization, deconcentration and devolution: what do they mean? Interlaken Workshop on Decentralization, 27-30 April 2004, Interlaken, Switzerland. Compiled by Elizabeth Linda Yuliani Forests and Governance Program at the Center for International Forestry Research, in Bogor, Indonesia.*

¹⁴ *Serdar Yilmaz, Yakup Beris, and Rodrigo Serrano-Berthet, 2008. Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance. Social Development Working Papers. Local Governance & Accountability Series Paper No. 113 / July 2008. Washington DC : World Bank*

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The arguments for pro-devolution included development arguments surmising that the state did not have the capacity to provide tailor made development interventions at the very local level, in a democratic society devolution would advance the principles of accountability and transparency in countering corruption and profligacy and that it was a cornerstone in addressing the violence and instability that had taken place in the events leading to the formulation of the GPA. On the other hand the preservative forces in the constitution making process argued that devolution would lead to fragmentation and detachment of the peoples from each other and reiterated that this would be an overemphasis of the principles of self-determination leading ironically to instability and a threat to cohesion, unity and peace.

Zimbabwe inherited a dichotomous and tripartite local government framework comprised of urban councils, white rural councils and black rural local authorities fragmented along rural lines¹⁵. In the late 1980s the fragmented councils were combined culminating in Rural District Councils. This inherited system had no apparatus for devolution or decentralisation and local authorities were left to deal with relatively insignificant aspects of the welfare of their designated regions

Section 5 of the 2013 constitution of Zimbabwe recognises three tiers of government, the national government, the provincial and metropolitan councils and local authorities, paving the way for devolution. *Article 264* evinces the general principles that pertain to the decentralisation of governmental powers and states that wherever appropriate governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities.

The Constitution in that regard recognises the rights of the people to manage their own affairs and to further their development and to ensure the equitable sharing of local and national resources, it is ultimately a recognition of the minority rights of the peoples of Zimbabwe and how centralisation of governmental powers can result in marginalisation of other communities and peoples.

Land Reform

The fast track land reform programme that started around year 2000 which were characterised by haphazard and violent seizure of commercial farms from whites by war veterans and others alike had catastrophic effects on the principles of freedom of property and conveying. The Fast Track Land Reform Programme was a manifestation of the agitation of the black majority to fast forward the reversal of the ethnical imbalance in land ownership and whilst the motive may have been noble, the means to achieve the objective had adverse impacts on principles of the law such as the rule of law and even International investment law.

The preservative political forces in the constitution making process have in every way possible influenced the land reform and or situation in Zimbabwe. The preamble to the constitution of Zimbabwe speaks of the Zimbabwean people "exalting and extolling the brave men and women who sacrificed their lives during the Chimurenga/ Umvukela and national liberation struggle" and one can already sense that what proceeds can only seek to promote the interest of those who shout the cliché' "we died for this country", which as far as being a Zimbabwean is concerned was a noble and priceless gesture, but was only half the battle in fighting for the emancipation of the majority black person big and small in so far as the land reform in the country is concerned.

¹⁵ Masundu-Nyamayaro, O. 2008. *The case for modernization of local planning authority frameworks in Southern and Eastern Africa: A radical initiative for Zimbabwe. Habitat International 32 (2008) 15-27*

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Section 289 of the Zimbabwean Constitution reiterates the principles guiding policy on agricultural land with noteworthy provisions such as *section 289 (c)* which states that, “the allocation and distribution of agricultural land must be fair and equitable having regard to gender balance and diverse community interests”. Proviso (f) goes on to say that no person may be deprived arbitrarily of their right to use and occupy land”. These provisions introduce a new framework on agricultural land policy, but the constitution only goes so far as to state these principles to be guidelines for promulgation of legislation land reform, therefore there is still need for a realignment of the Land Reform Act and other related enactments with the new constitution.

The preservative forces in the constitution making process are responsible for the contents of *section 290* which in totality states the continuation of rights of the state in agricultural land acquired or identified in terms of *section 16B(2)(a)(ii)* or (iii) of the previous Lancaster House constitution. This creates consistency in land reform and seeks to cement the gains that the state has already made in terms of the Land Reform Program that took place in the late 90s.

In relation to property rights the constitution is very vague when it deals with security of tenure in agricultural land in *section 292* which connotes that the state must take appropriate measures to give security of tenure to every person lawfully owning or occupying agricultural land. If and when the state will take such measures is another topic on its own deserving of a grand forum. This should also be considered in terms of *section 72* of the constitution which *inter alia* ousts the jurisdiction of the courts in determination of any question relating to compensation and the acquisition of land by the state may not be challenged on the grounds of discrimination

Government Accountability in the New Constitution

The Presidency

Chapter 5 of the 2013 Constitution of Zimbabwe provides for the Executive authority of Zimbabwe and *section 88 (2)* states that, “the Executive authority of Zimbabwe vests in the President who exercises it subject to this constitution through cabinet”

The power of the President is aptly captured by *section 89* which reiterates that the President is the Head of State and Government and the Commander-in-Chief of the defence forces. The qualifications for election into the office of President or Vice-President are that the candidate must be a Zimbabwean citizen by birth or by descent, has attained the age of forty years, is ordinarily resident in Zimbabwe and is a registered voter and that the prospective candidate must not have already held office as President under the constitution for two terms¹⁶. This is a shift from the 1980 Lancaster House Constitution which did not demand the requirement that the candidate be a registered voter and had no limits as to the term of office, one of the reasons why Zimbabwe has known one President since independence.

¹⁶ ***Section 91*** of the 2013 Constitution

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The limitation on terms is a culmination of the democratic forces and transformative political forces in Zimbabwe, which wanted to limit the danger of an incumbent using the influence of his position to ensure re-election into office. On the other hand, it is argued that term limits restrict democratic choice and may be against the clear wishes of an electorate which may want a highly popular and exceptionally competent President continue in office. The better argument seems to be the one which advocates for safeguards against an incumbent using patronage to steer the vote in their favour in light of the fact that Zimbabwean elections since 2000 have been marred with allegations of rigging and violence. The limitation of terms is a much appreciated addition to the qualifications of a prospective President as pertains to the rule of law and democratic participation in society.

In the 2013 Constitution as in the 1980 Lancaster House Constitution the general executive authority of the President translates into *inter alia* assenting to and signing bills, making appointments, calling of elections, deploying the defence forces¹⁷. As relates to accountability and answerability mechanisms, the 2013 Constitution goes a long way to try and ensure that there are checks and balances in the exercise of presidential powers as in shown in the following instances:

The president has power to issue states of public emergency as envisaged by *article 113* which expire after 14 days unless Parliament before the end of that period makes a declaration by at least two-thirds of the total membership of Parliament at a joint sitting of the senate and the National Assembly. The previous 1980 Constitution only provided for two-thirds of the National Assembly to make the declaration. Furthermore the Constitutional Court on the application of any interested person may determine the validity of a declaration of a state of emergency, this acts as a check and balance on the President's powers to issue states of public emergency.

As according to *section 327* of the Constitution, an international treaty which has been concluded or executed by the president under the President's authority does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an act of Parliament. This ensures that there is parliamentary oversight of the obligations and duties which Zimbabwe arrogates to itself and consequently discourages profligacy, undue influence and other wrongful and reckless considerations in the Presidents exercise of this power.

The unfettered powers of the President to make appointments to the many arms of government are a manifestation of the preservative forces in the constitution making process. These powers are scattered not only in the Constitution but also in various pieces of subsidiary legislation such as the power to appoint the Reserve Bank Governor as provided in the Reserve Bank of Zimbabwe Act.

The Public Service

The civil service in Zimbabwe is established in terms of section 199 of the Constitution of Zimbabwe which dictates that there is a single Civil Service which is responsible for the administration of Zimbabwe and as according to *section 199(2)* the civil service consists of persons employed by the state other than members of the security services and any other security service that may be established, judges magistrates and persons presiding over courts established by an act of parliament, members of commissions established by this constitution, the staff of parliament and any other persons whose office or post is stated, by the Constitution or an Act of Parliament, not to form part of the civil service.

¹⁷ *Section 110 of the 2013 Constitution*

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In Kenya, under the old 1960 Constitution, the public service was totally subservient to the president, who had power to constitute and abolish offices in the public service, to make appointments to any such office, and terminate any such appointment¹⁸. Further, the terms of office for those who held such jobs were at “the pleasure of the President.” Thus he could— and often did—terminate their services at will¹⁹. The position has since changed and Article 236 of the new 2010 Constitution provides that public officers will not be victimized or discriminated against for carrying out their duties in accordance with the law, or “dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.” Now public servants in Kenya are protected from the draconian presidential powers that were bestowed on the President.

In Zimbabwe the Constitution of Zimbabwe does not go so far as the section 236 of the Constitution of Kenya, in as much as limiting the Presidential powers to dismiss, but section 200 (2) of the Zimbabwean Constitution states that no member of the Civil Service may obey an order that is manifestly illegal, this protects the civil service from the influences of partisan influences via superior orders, in another vein, civil servants can refuse to carry out illegal orders without the fear of being victimised, this bridges the gap between presidential powers and the performance of the civil service and public.

Another fundamental change in the Kenyan Constitution was the introduction of the article 73, which introduced principles on leadership and Integrity which bind all holders of public office. Essentially what the article 73 states is that the authority assigned to a state officer is a public trust that “must be exercised in a manner that is consistent with the purpose and objects of the Constitution and promotes public confidence in the integrity of the office”²⁰. Article 75 of the Kenyan Constitution again imposes a strict duty on public officials to “behave, whether in public and official life, in private life, or in association with other persons in a manner that avoids any conflict between personal; interests and public or official duties”.

It is in light of these qualitative changes in the Kenyan Constitution that Zimbabwean should or should have drawn its inspiration in the crafting of the 2013 Constitution though it is a richer document than the Lancaster House Constitution, it is still a far cry from the regional standards set by the Kenyan and South African Jurisprudence in the domain of Public Service, its protection, optimisation and functionality.

Criminal Justice

In Zimbabwe the 2013 constitution provides for the National Prosecuting Authority in *section 258* and the office of the Prosecutor General in *section 259* whose functions include the institution of criminal proceedings on behalf of the state. This is coming from the backdrop of the previous Lancaster House Constitution which provided for the office of the Attorney General in *section 76* which gave that office the power to institute criminal proceedings on behalf of the state. This is a large step towards safeguarding against impunity and partiality. In the previous constitution the Attorney General was an ex-officio member of cabinet, principal legal advisor of the government, member of the Judicial Service Commission and the chief public prosecutor²¹.

¹⁸ *Institutional Reform in the New Constitution of Kenya Dr. Migai Akech*

¹⁹ *J.B. Ojwang, Constitutional Development in Kenya (Nairobi: ACTS Press, 1990), 91.*

²⁰ *Dr Migai Akech at page 27*

²¹ *1980 Constitution of Zimbabwe, Section 76(1) and 76 (3b)*

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In the new Constitution as per *section 114* the office of the Attorney General has the functions of advising the government, representing the Government in all civil and constitutional matters. The Attorney General is also appointed into office by the President this does not automatically hint at impartiality or a risk of abuse of power. It however magnifies the powers of the president in so much as he can appoint people who will further his interests.

The Prosecutor-General according to the new constitution of Zimbabwe is appointed into office by the President on the advice of the Judicial Services Commission²², which consists of *inter alia* the Chief Justice, Deputy Chief Justice, Judge President of the High Court and Attorney General²³, all of whom are appointed into office by the President²⁴. This creates an unsatisfactory situation wherein there are no balances and checks in the criminal justice system. In the previous constitution when the office of the Attorney-General had the mandate to institute criminal proceedings, this was used as a weapon for serving partisan interests, by selectively instituting criminal proceedings and it greatly diminished the impartiality of that office. In this new constitutional era nothing has changed except for the creation of the office of the Prosecutor-General and the National Prosecuting Authority which are still subject to the influence of the President.

In terms of the judiciary as has been highlighted above the President is responsible for the appointment of almost all the judicial officers on advice of the judicial service commission which he also appoints officers into. For the proper functioning of the Judiciary and particularly the criminal justice system in Zimbabwe, there is need for a clear severance of the Judiciary from the Executive functions of the State and from partisan influences. In the past the courts have been used to selectively employ criminal justice especially as relates to the land issue. The stance of ZANU-PF is clear and it is evinced by the provisions of *section 72(3) (b)* which ousts the Jurisdiction of the courts as relates to matters of land that has been compulsorily acquired. Accountability, transparency and propriety stand at peril when the influence of the ruling elite is extended to the Judiciary and the courts and in most cases

The Legislature

The business of the legislature is primarily conducted in, or through, committees. The committee system enables the legislature to organize its affairs and to shadow the operations of government ministries, departments, and agencies²⁵. The proper functioning of Parliament requires a very meticulous level of accountability, otherwise without accountability the legislature may find itself abusing its authority and powers in the law making process.

According to section 116 of the Constitution the legislature of Zimbabwe consists of Parliament and the President acting in accordance with the constitution. The Chapter 6 of the Constitution gives the legislature authority to amend the constitution, to make laws for the peace order and good governance of Zimbabwe, to confer subordinate legislative powers upon another body or authority in accordance with *section 134*.

²² **Section 259 O**

²³ **Section 189**

²⁴ See **Section 180 and section 114**

²⁵ Joel Barkan and Fred Matiangi, "Kenya's Tortuous Path to Successful Legislative Development," in *Legislative Power in Emerging African Democracies*, Joel Barkan, ed. (Boulder, CO: Lynn Rienner, 2009), 48-49.

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The new Constitution introduces proportional representation in the election of Senators according to *section 120* of the constitution out of the 80 senators 60 are elected from the provinces, sixteen are chiefs, the president and Deputy President of the national Council of Chiefs and the remaining two senators are elected in the manner prescribed in the Electoral Act. The introduction of the proportional representation system adds to the accountability mechanism in the legislative field

In the Kenyan Constitution *Article 118* imposes a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees, while *Article 119* gives every person the right to petition Parliament "to consider any matter within its authority." In Zimbabwe also *section 141* of the Constitution provides that parliament must facilitate public involvement in its legislative and other processes and also *section 149* states that every citizen and permanent resident of Zimbabwe has a right to petition Parliament to consider any matter within its authority, including the enactment amendment or repeal of legislation.

On this point the Zimbabwean and Kenyan Constitution are at par with the level of accountability that is required in the proper functioning of the legislative arm of the government, however it should be considered that if impunity, graft and decadence are going to be dealt with, legislative mechanism need to be put in place to regulate issues pertaining to lobbying, misconduct and abuse of office or power.

The Judiciary

As regards the Judiciary there have been two major lines of thinking as relates to constitutional reforms introduced by the 2013 Constitution in Zimbabwe, the first one being the institutionalisation of the Constitutional Court and the latter being the independence of the Judiciary. The creation of the Constitutional Court by *Section 166* was a welcome reform in terms of the functionality of the courts. The spread of the superior Courts in Zimbabwe now allows for a relatively better case management in terms of completion of cases and also enriches the efficiency of the courts as relates to expediency. The operational framework of the courts creates a better environment for curing adverse judgements from inferior courts and in particular the Constitutional Court is the watchdog of the constitution which is a welcome development in pursuit of the principle of rule of law.

According to *section 167* the Constitutional Court is the highest Court in all Constitutional matters and its decision on those matters bind all other courts. Apart from this, the Constitutional Court can advise on the Constitutionality of any proposed legislation, hear and determine disputes relating to election to the office of President etc. One of the most important provisions to note at this point is *section 167 subsection (5)* which connotes that "Rules of the Constitutional Court must allow a person, when it is in the interests of Justice and with or without leave of the Constitutional Court- (a) to bring a constitutional matter directly to the Constitutional Court (b) to appeal directly to the Constitutional Court from any other Court (c) to appear as a friend of the Court".

As a qualitative change, the 2013 Constitution specifically provides for the Administrative Court (*section 173*), Labour Court (*section 172*) and other Courts and Tribunals. This is a big shift from the now repealed Lancaster House Constitution which did not specifically mention these courts. The protection of these courts by their inclusion in the supreme law of the land is of fundamental gravity, taking into consideration the hierarchy of these courts and the rather whimsical perception by people that these courts are unnecessary and redundant.

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In the Words of Mr Justice Sydney Robins, everything which can be said (on the topic of judicial independence) has already been said and repeated on so many occasions and in so many learned articles that any further observations are inevitably redundant. Though this statement might be true it is frivolous to then disregard the topic on judicial independence altogether as it is interconnected to a number of principles acceptable in a democratic society. It is quite clear that in a democratic society or in other words for there to be a democracy in the first place there is need for the existence of three distinct organs of the state namely the Judiciary, the Legislature and the Executive, this principle is referred to as the principle of separation of powers. The separation of powers is pivotal in introducing a system of checks and balances against abuse of power and allows for the rule of law to be observed.

It is very usual for the Executive which exercises authority over state machinery, (the army, the police, the intelligence and other law enforcement agencies) to become more powerful than other organs of the state²⁶, this usually results in the Executive interfering with the functioning of the Judiciary and the Legislature. In relation to the discussion at hand in Zimbabwe the Executive has in the past refused to enforce certain court orders and decisions that were seen to be unfavourable and detrimental to the ambitions and aspirations of the ruling party ZANU PF. This has resulted in unwarranted attacks on the Judiciary and the legal profession as a whole, with the Judiciary crumbling to the partisan influences of the Executive. A lot of ordinary people in Zimbabwe have lost all confidence and faith in the justice and court system and would rather refrain to self-help and other arbitrary forms to achieve their own justice. Evidenced by the United Nations Special Rapporteur On The Independence Of The Judges And Lawyers, Dato' Param Cumaraswamy, who submitted to the United Nations Human Rights Commission a report dated 10 January 2003 which had a recommendation as follows: " With regard to Zimbabwe, the Special Rapporteur once again urges the Commission to consider and address appropriately its concerns about the deterioration in that country, inter alia with regard to the independence of the judiciary and its impact on the rule of law."

It is worth mentioning at international level the threshold that has been set by the United Nations Basic Principles on the Independence of the Judiciary (1985) *article 1* which states that, "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 governmental or other institutions to respect and observe the independence of the judiciary."

The constitution in *section 164* outlines that the courts are independent and are subject only to the constitution and the law, which must be applied impartially, expeditious and without fear, favour or prejudice. *Subsection 2(a)* of the same provision goes on to state that neither the state nor any institution or agency of the government at any level and no other person may interfere with the functioning of the courts, this is an elaborate expansion of the *section 79B* of the now repealed Lancaster House Constitution which read, "In the exercise of judicial authority a member of the judiciary shall not be subject the direction or control of any person or authority..."

²⁶ THE LEGAL PROFESSION AND THE JUDICIARY AS HUMAN RIGHTS DEFENDERS IN ZIMBABWE IN 2003. SEPARATION OR CONSOLIDATION OF POWERS ON THE PART OF THE STATE? By Arnold Tsunga

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The administration of justice requires that the judiciary be given, by the Constitution, power to make binding and final decisions in disputed cases as to the facts and the law that apply to them, coupled with the power of enforcement²⁷. The words of the Chief Justice Godfrey Chidyausiku of Zimbabwe are significant at this point where he stated that, "put bluntly, independence (of the judiciary) is not achieved solely by the presence of a neat structural balance as theorised by the doctrine of separation of powers) but in addition three factors are required :-

- (a) *The attitude of the Executive and the Legislature to Judicial independence and all it entails*
- (b) *The commitment of judges themselves to guard and defend their independence*
- (c) *The readiness of the people to support the independence of judges as defenders of people's liberties*

Until the Government of Zimbabwe realises the importance of an independent judiciary in the moderation of societal norms and the promotion of a democratic nation founded on values such as the rule of law fairness and justice, all other spheres of the law, society and even culture and peace will deteriorate. The quality of the justice system is very important in the regulation of all government and even civil functionality.

Security Sector Reform

It is no lie that security sector reform is one of the most topical and critical issues at the moment in Zimbabwe, the most important aspect being the role of security actors in politics in the country

Security sector reform is the transformation of the security system which includes all the actors, their roles, responsibilities and actions, so that it is managed and operated in a manner that is more consistent with democratic norms and sound principles of good governance, and thus contributes to a well-functioning security framework. Responsible and accountable security forces reduce the risk of conflict, provide security for citizens and create the right environment for sustainable development. The overall objective of security sector reform is to contribute to a secure environment that is conducive to development.²⁸

In the case of regular armed forces, for example, this means the establishment of clear roles and appropriate structures for civilian control through defined chain of command responsibilities for the commander in chief (often the president), the general staff, the ministry of defence, defence minister and parliament, and a clear delineation of responsibilities between different levels of government. In Central and Eastern Europe this has occurred through the drafting and implementation of constitutional and legislative provisions which clearly identify roles and responsibilities²⁹

²⁷ "Modern Challenges To The Independence of the Judiciary" by Hon G.G. Chidyausiku Chief Justice of Zimbabwe. Conference and Annual General Meeting of the Southern African Chief Justices' Forum. Johannesburg, South Africa 13-14 August 2010

²⁸ DFID 2003, p. 30, OECD/DAC 2001, pp. 11-35

²⁹ Andrew Cottey, Timothy Edmunds and Anthony Forster, 'Introduction: the challenge of democratic control of armed forces in postcommunist Europe', in Cottey et al. *Democratic Control of the Military*, p. 7.

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First generation security sector reforms are more concerned with establishing principles and frameworks for ensuring transparency and accountability in the security sector and this implies the necessity of civilian control of the security sector. These reforms aim at depoliticising the security sector and removing it from partisan interferences. It is in line with the well-established principle of separation of powers. Delineation of responsibilities between relevant actors such as the Executive, legislature and security sector formations and different tiers of government is primarily a first generation security sector reform.

In a number of ways this can be done through making security sector actors answerable to Parliament or Parliamentary committees on issues such as security sector budgets and policies. In another vein first generation security reform encompasses the process of professionalising the security sector. This entails defining missions, tasks and structures for security sector actors in line with the priorities outlined in relevant legal documents such as national security concepts³⁰

The military represents the coercive side of the state and as such there is a need for regulation of its behaviour. From a historical perspective Zimbabwe gained independence through armed struggle and this has translated into security sector actors dabbling with politics. Such ignorance has resulted in a number of ills bedevilling government institutions and agencies as it were. Failure to remove security sector actors from partisan interferences instigates profligacy, decadence and human rights abuses due to lack of accountability.

Security sector reform was on the agenda in the Government of National Unity in Zimbabwe from 2009-2013. Article 13 of the GPA noted the need for state institutions to “remain non-partisan and impartial”, while also calling for a new training curriculum for the security forces. There was however no provision on the inclusion of security sector reform in the constitutional review.

The new constitution of Zimbabwe Amendment no. 13 was the first step in trying to create a framework for security sector reform at a higher level. *Section 208* of the constitution reiterates the concerns of most security sector reform advocates and calls for security sector actors to desist from acting in a partisan manner³¹. Furthermore *section 207 (2)* states that “the security services are subject to the authority of this constitution, the President and Cabinet and are subject to parliamentary oversight”, this provision is in pursuit of the accountability and transparency of the security sector in providing for a system of checks and balances. This parliamentary oversight is buttressed by *section 214*³² which connotes political accountability for deployment of the Defence Forces.

On paper this creates an environment for security sector reform in Zimbabwe, but in practice a lot is still desired for the realization of these constitutionally entrenched principles. There is need for alignment of the constitution with subsidiary law and the Defence Act of Zimbabwe has always reiterated the need for non-partisan security service actors but more often than not, service chiefs have always dabbled with politics to an extent of publicly endorsing the ruling party and President Mugabe.

³⁰ Timothy Edmunds *Security sector reform: Concepts and implementation* at page 7.

³¹ **Section 208** “neither the security services nor any of their members may in the exercise of their functions (a) act in a partisan manner (b) further the interests of any political party or cause (c) prejudice the lawful interests of any political party or cause (d) violate the fundamental rights or freedoms of any person

³² *When the defence forces are deployed (a) in Zimbabwe to assist in the maintenance of public order or (b) outside Zimbabwe; the President must cause Parliament to be informed, promptly and in appropriate detail, of the reasons for their deployment .*

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Some security chiefs in Zimbabwe have even gone as far as refusing to salute any other candidate in the Presidential run besides Mugabe. This is unsavory in a democratic society founded on the rule of law and it is against the crucial principle of separation of powers.

The time has now come for the constitution to be translated into real reforms and real principles by holding those who go against it to the full wrath of the law otherwise we will continue living under the guise of a well-crafted but poorly implemented constitution which aggregates into almost invariably no reform at all.

4. The Challenges: Realizing the New Constitution

As has been highlighted in the discussions above the Constitution is the supreme law of the land and as such, it spells out the basic values and substance of the law regime in place. The Constitutional dispensation that was ushered in by the Amendment Act number 13 of 2013 brings about a lot of welcome reforms in other areas and also falls short of some of the most fundamental principles that are required by the notion of a democratic country. The history of the relatively young nation has been marred by the colonial influences that were inherent even in the 1980 Lancaster House Constitution.

Due to this phenomenon the injustices and flaws that are inherent even in the new Constitution are inherited, but nonetheless have not been addressed. The gains that have come with the 2013 Constitution, though being a far-cry from the standard set regionally in Africa by the 2010 Kenya Constitution and the South African Constitution, are very welcome. The major setback to the realisation of the already mentioned gains if not cured in time will be the re-alignment of the subsidiary legislation with the new norms and basic values that are stated in the Constitution. It is probably another flaw of the new Constitution that it does not specifically state as a basic principle that the acts of parliament should be construed within the values set by the new constitution. The Kenya 2010 Constitution specifically provides that, "All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution" (Clause 7[1], Sixth Schedule). The lack of such a provision in the Zimbabwean Constitution is the reason why a lot of confusion has surrounded the interpretation of various Acts of Parliament such as the Criminal procedure and Evidence Act which have since fallen out of the scope of the new constitution.

The Constitution of Zimbabwe though being the Supreme law of the land is not the only document that grants powers to Government or Officials of the government. The problem as has been highlighted in the preceding paragraphs lies with the Acts of Parliament generally and more precisely the discretionary powers that are given to these government officials, a good example of this are the powers that are given to the President through the Presidential Powers Act coupled with the lack of separation powers. The President thus has the ability to exercise power through beaurocrats, who are responsible for the day to day regulation of people's lives with the powers of discretion bestowed upon them to decide as they deem fit. In the past the Executive power of the government has spilled over into the Judiciary and the legislature or parliament to an extent that the credibility and integrity of the Parliament and the justice system has been sacrificed in order to fulfil partisan aspirations.

Article 262 of 2010 the Kenyan Constitution establishes a Commission for the Implementation of the Constitution, which will work together with the attorney general and the Constitutional Implementation Oversight Committee (a select committee of Parliament) to enact the laws that need to be passed, which are set out in the Fifth Schedule.

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The Constitutional Implementation Commission in Kenya is responsible for the development of legislation and administrative procedures required to implement the Constitution, this idea counters the difficulties that lie with re-alignment of subsidiary Acts of Parliament with the new Constitution and the disparities that are inherent between the two.

On the other hand in Zimbabwe there is no such provision or a constitution implementation committee to spearhead the re-alignment of the subsidiary Acts of Parliament with the new Constitution. The responsibility is therefore left to be borne by Parliament itself which in its Legislative agendas should ensure that all laws that are contrary to the spirit of the new Constitution are amended and/or repealed. In order for the new constitution to make the real and tangible impact it is supposed to make in governing societal norms, the government should take steps to ensure that the provisions within the Constitution are implemented without favour or discrimination.

5. Conclusion

The 2013 Constitution of Zimbabwe brings about new changes that are very welcome in the constitutional jurisprudence of the country. The new 2013 Constitution creates a framework which is vital for the realisation of the rule of law, separation of powers, constitutional supremacy, transitional justice and ultimately democracy. Though the changes are not as paramount as some would have wanted, they are still a step in the right direction and open the platform for progressive realisation of these constitutional gains; however these constitutional gains will be rendered illusory if the Government does not take lessons regionally and abroad on the implementation of Constitutions. Furthermore the government should be very aware of the problems, barriers and challenges that will be faced in implementing the constitution. Civil Societies and the public at large should voice their concerns and give pressure to the government in order that they implement the constitution.

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