

**THE CONSTITUTIONAL EXPERIENCE OF ZIMBABWE: SOME BASIC
FUNDAMENTAL TENETS OF CONSTITUTIONALISM WHICH THE NEW
CONSTITUTION SHOULD EMBODY**

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DECLARATION:

I, PEACEMORE TALENT MHODI declare that

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PROLEGOMENON

This Dissertation follows the standard format and referencing system prescribed by the *South African Law Journal* and the School of Law, Howard College. Further this Dissertation is divided into five chapters, with each chapter having its footnotes isolated from the other chapter.

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ABSTRACT

Zimbabwe adopted the Lancaster Constitution in 1980. This constitution has been amended a record nineteen times. The critic on some of the amendments is that they have undermined the fundamental tenets of constitutionalism. Therefore, in the light of the fact that the tide of constitutionalism is sweeping throughout Africa, the dissertation critically evaluates the extent to which the Lancaster Constitution subsumes the basic tenets of constitutionalism. This evaluation is precipitated by the fact that Zimbabwe is currently grappling with drafting a new Constitution. Through this evaluation the inescapable conclusion is that the Lancaster Constitution merely provides a veneer of constitutionalism. Drawing from the constitutional experience of Anglophone African countries which include Botswana, Ghana, Lesotho, Malawi, Namibia, South Africa and Zambia; the dissertation offers some reforms which the drafters of the new constitution could include in the envisaged constitution. It is argued that it is only after a constitution embodies the identified fundamental tenets of constitutionalism that it becomes worth the paper it is written on.

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I INTRODUCTION

A) *Overview of the dissertation topic*

Zimbabwe is a landlocked country on the southern hemisphere of the African continent. Like most African countries it has suffered from the scars of colonialism. The year 1980 heralded hope that the wounds of authoritarianism inflicted during the colonial epoch would be allowed to heal. This belief stemmed from the fact that independence from white minority rule had been achieved alongside a constitution – the Lancaster Constitution of 1979.¹ Therefore, it was hoped that Zimbabwe was on course for a better future for all who lived within its borders. Although the constitution was a negotiated document which was a compromise,² it was thought that given the circumstances it was better to take it than reject it. Further, there was hope that once the encumbering provisions lapsed, the government of the burgeoning country would ameliorate whatever shortcomings were in the Constitution, so as to turn the document into a perfect one. To live up to this expectation, the government had to ensure that the Constitutional amendments it effected inculcates constitutionalism. The question which is worthy of asking is whether the Constitution as it stands today reflects constitutionalism.

This dissertation seeks to answer that question. Moreover, given the fact that in keeping with Article VI of the Global Political Agreement³ the country is embroiled in the process of drafting a new Constitution, an answer to this question becomes imperative. However, given the fact that it is impossible to properly answer such a question in the absence of a definition of constitutionalism, it is instructive to give an overview of its meaning. The concept of constitutionalism is an age-old concept. The core of this concept was encapsulated in the words of one of the Founding Fathers of the Constitution of the United States of America, James Madison where he stated:

In framing government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable government to control the governed, and in the next place

¹ Constitution of Zimbabwe as amended on 13th February, 2009 (Hereinafter “The Lancaster Constitution” or “The Constitution of Zimbabwe”).

² I Mandaza ‘Perspectives on Armed Struggle and Constitutionalism: The Zimbabwe model’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 71, 72.

³ Article VI of the Global Political Agreement, 2008.

oblige it to control itself. A dependence on the people is no doubt, the primary control on government, but experience has taught mankind the necessity of auxiliary precautions.⁴

The preceding statements highlights the embodiment of constitutionalism which is: (a) the idea that government should be limited; (b) that constitutionalism is about creating auxiliary precautions to control government power; and (c) that constitutionalism is set in contradistinction to arbitrary power.⁵ It will be conceded that the concept of constitutionalism is elusive. Perspectives on constitutionalism vary and are contradictory. However, notwithstanding these subtle differences in the definition of constitutionalism, there is wide acknowledgment of the fact that constitutionalism embodies core elements which make the Constitution worth the paper it is written on. These core elements or “auxiliary precautions” as Madison would prefer, have become the basic tenets of constitutionalism. As will be noted in chapter III of the dissertation, the core elements of constitutionalism include *inter alia*, (but are not limited to) the doctrine of separation of powers; rule of law; bill of rights and entrenchment provisions; independence of the judiciary; judicial review; and the supremacy of the constitution.

Therefore, the concept of constitutionalism will form the bedrock of this dissertation. Constitutionalism will be the yardstick used to measure whether the Constitution of Zimbabwe embodies constitutionalism. In other words, the dissertation tackles the question of whether Zimbabwe fits the mould of those African countries with ‘constitutions, but without constitutionalism’.⁶

In making this assessment, the dissertation will be divided as follows. First, chapter II titled ‘The historical context’ will give a detailed account of the constitutional developments in Zimbabwe. That chapter will outline the various amendments made to the Constitution of Zimbabwe. The salient changes brought about as a result of these amendments will be highlighted.

⁴ Federalist Papers no. 51 available at <http://avalon.law.yale.edu/medieval/magframe.asp>, accessed on 19 July 2012.

⁵ Alex Magaisa ‘Constitutionality versus constitutionalism: Lessons for Zimbabwe’s constitutional reform process’ 51, 54 available at <http://kar.kent.ac.uk/30495/1/Submission4.pdf>, accessed on 30 April 2012.

⁶ H Okoth-Ogendo ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3.

Secondly, a definition of constitutionalism will be given in chapter III of the dissertation. In that part it will be shown that although the concept of constitutionalism is contentious and unsettled, some consensus exists regarding its outlook in general. The core elements of constitutionalism will be noted and an argument to the effect that a constitution which does not embody those core elements cannot be hailed as subscribing to the notion of constitutionalism will be made. Having identified the core elements of constitutionalism, the dissertation will engage in a comparative analysis. That is, constitutions from Anglophone African countries will be utilised to note how these countries have grappled with constitutionalism. The countries whose constitutions will be used are: Botswana, Ghana, Lesotho, Malawi, Namibia, South Africa and Zambia.

The rationale for the choice of these countries is informed by two considerations. The first is that some of the countries share a similar historical parentage with Zimbabwe. For instance: Botswana, Lesotho, Malawi and Zambia were at one time or the other colonised by Britain. The second reason for this choice is that countries like Botswana, Ghana and South Africa have shown fidelity to constitutionalism. Therefore, it is hoped that Zimbabwe can draw inspiration from them in crafting a constitution which includes fundamental tenets of constitutionalism.

Chapter IV of the dissertation will evaluate the extent to which the Constitution of Zimbabwe can be said to foster constitutionalism. In that part, the relevant sections in the Constitution of Zimbabwe will be juxtaposed against the core elements of constitutionalism. This will be done in a bid to answer the question underlying this dissertation, which is whether the Constitution of Zimbabwe subsumes constitutionalism.

The dissertation will conclude with chapter V, which raises the inescapable conclusion that the Constitution of Zimbabwe merely provides for a semblance of constitutionalism. In the light of this, the dissertation will proffer some advice on how this could be ameliorated. Furthermore, given the fact that Zimbabwe is grappling with drafting a new constitution, some tentative lessons which the drafters can learn will be given.

B) Methodology

From a methodological point of view, this is library-based research. Both primary and secondary sources have been consulted. Primary sources which have been used include *inter alia* international treaties, constitutions, international, regional as well as domestic cases, and

reports. Academic writings, media reports and internet sources make up the secondary sources which have been used in this research.

II HISTORICAL CONTEXT

A) The struggle for independence and the adoption of the Lancaster House Constitution

Zimbabwe as a country could be said to have been begotten in the era of Cecil John Rhodes, a chief proponent of British supremacy in Africa.¹ Circa 1894, Southern Rhodesia was the name ascribed to modern-day Zimbabwe.² The territory now known as Zimbabwe had been brought under white settler control through the manoeuvres of Rhodes through the British South Africa Company.³ Initially Britain had refused to extend its imperial rule to Southern Rhodesia. However, in 1923 Britain officially declared Southern Rhodesia a British colony with limited self-rule concentrated in the hands of the white minority population.⁴ When the winds of change circa 1950s-1960s started to blow,⁵ the minority government in Southern Rhodesia refused to be swept by the tide. Thus, in 1965 Ian Smith passed the Unilateral Declaration of Independence.

The black population could no longer tolerate the colonial legacy which had not only alienated them from their rightful land, but had also disenfranchised them from national affairs. Therefore, they decided to take up arms in a bid to repel white domination. The two political formations at the forefront of the war for liberation were the Zimbabwe African People's Union (ZAPU) led by the late Joshua Nkomo, and Zimbabwe African National Union (ZANU) led by Robert Mugabe. After a protracted struggle, the Smith government acceded to negotiations which became known as the Lancaster House Conference.

The Lancaster Agreement was agreed upon at the Conference, and the Lancaster Constitution was adopted. This paved the way for free general elections based on universal adult suffrage.⁶ Mugabe's ZANU party reigned supreme in the elections with Nkomo's

¹ L Van Dijk *A history of Africa* (2004) 178.

² *Ibid* at 176.

³ *Ibid* at 177.

⁴ *Ibid*.

⁵ This was the time when African countries were seeking (and gaining) independence.

⁶ Van Dijk op cit note 1 at 178.

ZAPU coming second.⁷ On assuming the reins, Mugabe fostered reconciliation when he stated that it is time ‘to draw a line through the past, in the interests of national reconciliation’.⁸

B) The post-independence constitution: some characteristics of the Lancaster House Constitution of 1980

The Lancaster House Constitution was drafted as a compromise.⁹ This becomes evident if regard is had to the fact that the Constitution incorporated special mechanisms designed to maintain the status quo which was tilted heavily in favour of Britain, the former colonial master.¹⁰ These mechanisms were the reservation of twenty House of Assembly seats for the white population, and the prevention of the amendment of the property clause for a period of ten years after independence.¹¹

The Lancaster Constitution provided that the Constitution was the supreme law of the land. Thus, the independency of the judiciary was ensured. As a consequence of an independent judiciary, the rule of law was enshrined. The Lancaster Constitution also provided for a non-executive President (who had powers akin to the British monarch), a Prime Minister and a Cabinet answerable to the Parliament.¹² The Constitution provided for a bicameral parliament which was composed of a forty member Senate and a House of Assembly with one hundred members.¹³ Parliament was the supreme legislative organ, while the executive authority vested in the Prime Minister and his Cabinet.¹⁴ Thus, in true

⁷ J Hatchard ‘The Constitution of Zimbabwe: Towards a Model for Africa?’ (1991) 35 *Journal of African Law* 79, 80 available at <http://www.jstor.org/stable/745495>, accessed on 13 April 2012.

⁸ H Holland *Dinner with Mugabe: The Untold Story of a Freedom Fighter Who Became A Tyrant* (2008).

⁹ I Mandaza ‘Perspectives on Armed Struggle and Constitutionalism: The Zimbabwe model’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991)71, 72.

¹⁰ W Ncube & S Nzombe ‘The Constitutional Reconstruction of Zimbabwe: Much Ado about nothing?’ (1987) 5 *The Zimbabwe Law Review* 1, 8.

¹¹ *Ibid* at 8.

¹² J Hatchard *Individual freedoms and state security in the African context: the case of Zimbabwe* (1993) 16

¹³ M Gwisayi ‘Theory and Practice of Liberal Democracy in the Post-Colonial State in Africa: The Zimbabwe Experience’ (1991-1992) 9 & 10 *The Zimbabwe Law Review* 110, 114.

¹⁴ *Ibid* at 114.

Westminster spirit the President was a titular head of state, somewhat of a figurehead lacking real power.¹⁵

On the land question the Constitution provided that land transactions could only be initiated on a willing-buyer, willing-seller basis.¹⁶ To this end, section 16 which contained a provision sanctioning compulsory acquisition of property by the state was inserted into the Lancaster Constitution.¹⁷

C) The post-independence constitution: constitutional amendments effected to the Lancaster House Constitution of 1980

Since independence in 1980, nineteen separate Amendment Acts have been made to the Constitution of Zimbabwe. In light of the historical parentage of the Constitution some of the amendments were inescapable and therefore necessary.¹⁸ However, the preceding statement does not hold true for the other amendments which have been repugnant to constitutionalism in Zimbabwe.¹⁹

(i) Constitution of Zimbabwe Amendment (No. 1) Act 27 of 1981

This constitutional amendment came into effect on 10 June 1981. The amendment introduced a number of changes. Firstly, the qualification for membership of the Senate Legal Committee was amended. Secondly, whereas, initially for one to qualify for membership to the Public Service Commission s/he had to have experience of five years, this was lowered to three years. Thirdly, the requirement that one had to have experience of seven years to qualify for membership to the Judicial Service Commission was reduced to five years. *In toto* this amendment made the above positions accessible to black lawyers.

¹⁵ Ncube & Nzombe op cit note 10 at 6.

¹⁶ M Meredith 'The State of Africa: A history of fifty years of Independence' (2005) 619.

¹⁷ Ncube & Nzombe op cit note 10 at 7.

¹⁸ J Hatchard et al *Comparative Constitutionalism and Good Governance in the Commonwealth* 1 ed (2004)45.

¹⁹ For example, Constitution of Zimbabwe Amendment (No. 17) Act, 2005, which introduced section 16B, a provision ousting the jurisdiction of the courts insofar as the constitutionality of the expropriation of land by the Government of Zimbabwe is concerned.

(ii) Constitution of Zimbabwe Amendment (No. 2) Act 25 of 1981

This Constitutional amendment came into effect on 31 July 1981. In terms of the amendment there would be a Supreme Court separate from the High Court. Furthermore, the qualification periods for appointment as a judge were specified, thus making this more attainable by blacks. The membership of a tribunal tasked with considering the removal of a judge was reconstituted. The amendment further made changes to the membership of the Judicial Service Commission as well as reducing the minimum age for appointment as a Senator from forty years to thirty years.

(iii) Constitution of Zimbabwe Amendment (No. 3) Act 1 of 1983

This constitutional amendment was promulgated on 22 April 1983 with sections 14 and 15 coming into force on that date and the remainder of the Amendment Act coming into operation on 1 September 1983. A number of significant changes were brought about by this amendment, such as the fact that the right to dual citizenship was abolished. Towards this end, Parliament was vested with the power to make citizenship laws provided that a citizen by birth could not be deprived of citizenship unless he was or became a citizen of another country.

Certain revisions were effected to the provisions dealing with the publication of Acts. Whereas, previously it had been a prerequisite that a Minister could only be so appointed if s/he was a Senator or MP, this was jettisoned. In terms of the amendment, a Minister who was not a Senator or MP at the time of appointment was obligated to become one within three months from the date of appointment. The amendment also provided that the registrar of the Supreme Court or the High Court was to be given powers in terms of an Act of Parliament to decide preliminary or uncontested matters. Furthermore, Senators, MPs and local councillors were made ineligible for appointment to commissions.

(iv) Constitution of Zimbabwe Amendment (No. 4) Act 4 of 1984

This amendment came into force on 27 April 1984. The amendment allowed for the appointment of judges for fixed period, and the retirement age was capped at sixty-five. It was provided that the Attorney-General and three other appointees were to form part of the

Judicial Service Commission. In addition the Office of the Ombudsman was created. In terms of the amendment, the President was given the power to appoint both the Ombudsman and the Deputy Ombudsman on the advice of the Prime Minister. Previously, the President made the appointments on the advice of the JSC.

The amendment also allowed for the President to appoint the Director of Prisons and the Comptroller and Auditor-General. However, the President had to act on the advice of the Prime Minister, after consultation with the Public Service Commission (PSC). The previous position had been that the President could appoint on the advice of the PSC, after consultation with the responsible Minister.

Furthermore, the amendment provided that the President was to appoint Police officers, pursuant to the advice of the Prime Minister, after consultation with the Commissioner of Police. Previously, the President would appoint on the advice of the Commissioner of Police. In terms of the amendment the President had to act on the advice of the Prime Minister, after consultation with the relevant Commander, in appointing officers of the Defence Forces. Prior to the amendment, the President appointed on the advice of the relevant Commander. Thus, the net effect of Amendment No. 4 was to fortify the power of the President and the Prime Minister in the appointment of these functionaries.

(v) *Constitution of Zimbabwe Amendment (No. 5) Act 4 of 1985*

It came into effect on 5 April 1985. The amendment introduced salient changes into the Constitution. The amendment allowed for the appointment of Provincial Governors by the President. Accordingly, appointment as a governor would disqualify a person from appointment as President, Deputy President of the Senate, or as Speaker or Deputy Speaker of the House of Assembly, or as a Minister or Deputy Minister.

Adaptations were made to the provisions relating to the removal of judges. The Prime Minister as well as the Chief Justice could now advise the President as to whether an investigation about whether or not a judge should be removed from office had to be conducted. Previously, only the Chief Justice could tender such advice.

(vi) *Constitution of Zimbabwe Amendment (No. 6) Act 15 of 1987*

As stated above, the Lancaster Constitution had created a bi-cameral legislature which was composed of the House of Assembly and the Senate. The House of Assembly was staffed with 100 members of parliament elected directly by a popular vote. Out of these 100 seats there were twenty seats which were ‘white roll’ seats and would be filled by legislators elected by voters who were registered on the white roll. However, these were abolished when their tenure had elapsed.²⁰ The reservation of 20 seats for voters registered on the ‘white roll’ for a period of seven years had been one of the mechanisms used by the Lancaster Constitution to provide for the special protection of the white minority.²¹

(vii) *Constitution of Zimbabwe Amendment (No. 7) Act 23 of 1987*

The Lancaster Constitution created a non-executive President whose powers and functions were akin to those of the British monarch.²² This was jettisoned by Amendment No. 7.²³ This constitutional amendment constituted a major constitutional alteration to Zimbabwe’s political system.²⁴ It transformed Zimbabwe’s political strata from a parliamentary regime into a semi-presidential regime.²⁵

However, for present purposes, it cannot be gainsaid that the creation of an executive presidency through Amendment No. 7 ushered in an era of executive terrorism in the chapter of the constitutional history of Zimbabwe. With hindsight it cannot be contradicted that this amendment *ipso facto* created the centralisation of power in the hands of the executive President.

Consequent to the creation of an executive presidency, the method of appointment of various functionaries was modified. First, the Secretary or Deputy Secretary of a Ministry,

²⁰ Constitution of Zimbabwe Amendment (No. 6) Act, 15 of 1987.

²¹ Hatchard op cit note 7 at 79.

²² Hatchard op cit note 12 at 16.

²³ Constitutional Amendment (No. 7) Act, 23 of 1987, came into full force on 31 December 1987.

²⁴ L Mhlaba ‘Whither parliamentary democracy: A look at recent constitutional changes in Zimbabwe’ (1989-90) 7 *The Zimbabwe Law Review* 1, 4.

²⁵ *Ibid* at 4.

Director of Prisons and Comptroller and Auditor-General were to be appointed by the President after consultation with the Public Service Commission (PSC). If the appointment was not consistent with the PSC recommendation, the House of Assembly had to be notified. Secondly, the Attorney-General was to be appointed by the President after consultation with the PSC, which in turn had to consult the Judicial Service Commission (JSC). Thirdly, the Chief Justice and other judges had to be appointed by the President after consultation with the JSC. If the appointment was inconsonant with the recommendations of the JSC, the House of Assembly had to be notified. Fourthly, the Commissioner of Police was to be appointed by the President after consultation with the board established under section 93(6) of the Constitution. Lastly, the Defence Force Commanders were to be appointed by the President after consultation with the board established under section 97(7). If the appointment was not consistent with the board's recommendation, the House of Assembly had to be notified. These Commanders could be removed by the President after consultation with the Cabinet.

Most alarmingly, the Presidential prerogatives were not to be enquired into by any court. This provision was introduced subsequent to the Supreme Court's pronouncements in *Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs*.²⁶ In the *Patriotic Front-ZAPU* case, the Supreme Court had recognised that there were executive prerogatives exercisable by the President vested in him by the Constitution, such as the ones in section 31H of the Constitution. The court could not enquire into those powers. However, should the executive prerogatives be exercised under unlawful conditions or *ultra vires*, the court had a duty to enquire into the lawfulness of the prerogative.²⁷ The Supreme Court adopting the formulation in the *Council of Civil Service Union and Others v Minister for the Civil Service*²⁸ endorsed illegality, irrationality, and procedural impropriety as the three grounds upon which actions taken under executive prerogative could be reviewed by the courts.²⁹

The net effect of the *PF-ZAPU* reasoning was that whenever the exercise of an executive prerogative affected private rights, interests and legitimate expectations of the citizens, that

²⁶ *Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1986(1) SA 532 (ZS).

²⁷ *Ibid* at 540G - 541G.

²⁸ *Council of Civil Service Union and Others v Minister for the Civil Service* [1984] 4 ALL ER 935.

²⁹ *Ibid* at 548D - 549E.

prerogative would be justiciable. The principles enunciated by the Supreme Court resonate with what has been termed the doctrine of legality in the jurisprudence of South Africa.³⁰

Unfortunately, the impact of this progressive decision was transitory. This was because Amendment No. 7 was promulgated shielding the exercise of an executive prerogative from judicial enquiry.³¹ Thus, whereas the Supreme Court had sought to haul out the exercise of executive prerogatives from the bowels of the Presidency into the glare of legal scrutiny, the legislature undermined this by enacting Amendment No. 7.

(viii) *Constitution of Zimbabwe Amendment (No. 8) Act 4 of 1989*

This amendment provided for the appointment of a Vice-President (V-P) who was to act for the President in his absence. The V-P could be given administration of any Act or Ministry, or Department. However, the V-P was barred from becoming the President or Deputy President of the Senate, or the Speaker or Deputy Speaker of the House of Assembly. The amendment also provided for the Attorney-General (A-G) becoming an *ex officio* member of Cabinet and was given the right to speak in the House of Assembly. The power of the A-G to direct police investigation was specified. Thus, by providing that the A-G be a member of Cabinet, the amendment brought the judiciary under the influence/control of the executive.

(ix) *Constitution of Zimbabwe Amendment (No. 9) Act 31 of 1989*

In terms of the Lancaster Constitution, the legislature was composed of the House of Assembly and the Senate. Thus, Zimbabwe had a bi-cameral parliament. The lower chamber, that is, House of Assembly was made up of legislators who were popularly elected, whereas the upper chamber was the Senate which was indirectly elected.³² However, the bi-

³⁰ See *President of the Republic of South Africa v South African Rugby Football Union* 1999(4) SALR 147 (CC); *Ex parte President of the Republic of South Africa* 2000 (2) SALR 674 (CC).

³¹ Constitution of Zimbabwe Amendment (No. 7) Act, 23 of 1987 in section 2 inserted into the Constitution section 31K which purports to oust the jurisdiction of the courts insofar as the exercise of executive prerogative is concerned.

³² Hatchard op cit note 12 at 16.

cameral parliament was discarded in favour of a unicameral parliament.³³ The Constitutional Amendment at that time was criticised on the basis that it effectively gave the President power to appoint thirty members of Parliament.³⁴ It did this by creating the appointment of thirty members of Parliament through special procedures. The Amendment provided that provincial governors were *ex officio* members of parliament. Further it provided that chiefs would be members of parliament. The net-effect of this was that the thirty members of the unicameral house were indirectly appointed by the President, in light of the fact that both the provincial governors and the chiefs were appointed by the President in accordance with other laws.³⁵

Compounding the fact that there was strict policing of members of parliament at party level, academics projected that the legislature was treading the course of becoming a rubber stamp body.³⁶ It would seem that they have been vindicated in this regard. With hindsight, the role of Amendment No. 9 in the creation of a parliament which was deferential to the executive cannot be refuted. It can be postulated that the culture of a parliament which has acted as a rubber stamp of the executive is traceable to Amendment No. 9.

Further, the amendment provided that a member lost his seat if the political party s/he represented declared in writing to the Speaker of Parliament that such a member had ceased to represent its interest in Parliament.³⁷ This had the effect of compromising the independence of legislators from the political party elites since the party could unilaterally and *mero motu* terminate membership of a legislator.³⁸

(x) *Constitution of Zimbabwe Amendment (No. 10) Act 15 of 1990*

The salient change effected by this amendment was that it allowed for the appointment of not more than two Vice-Presidents. This amendment was a consequence of the Unity Accord

³³ Constitution of Zimbabwe Amendment (No. 9) Act, 31 of 1989. Latter jettisoned, and substituted by Constitution of Zimbabwe Amendment (No. 17) Act, 5 of 2005.

³⁴ Mhlaba op cit note 24 at 3.

³⁵ *Ibid* at 3.

³⁶ Hatchard op cit note 6 at 84.

³⁷ Constitution of Zimbabwe Amendment (No. 9) Act, 31 of 1989.

³⁸ Hatchard op cit note 7 at 83.

which had been signed between the two political formations, ZANU-PF and PF-ZAPU.³⁹ As a result of the Unity Accord, Joshua Nkomo (leader of PF-ZAPU) was appointed as Vice-President in 1990. The significance of this amendment was that it ended the problem of dissidence, but most importantly, it led to the co-opting of PF-ZAPU by ZANU-PF.⁴⁰

(xi) *Constitution of Zimbabwe Amendment (No. 11) Act 30 of 1990*

This amendment came into effect on 17 April 1991. In terms of the amendment, the name “Republic of Zimbabwe” was formally adopted. Further, section 15 of the Constitution was amended to defeat the Supreme Court ruling in the case of *S v A Juvenile*.⁴¹ In *A Juvenile case* the Supreme Court had to decide whether or not ‘the imposition of a sentence of whipping or corporal punishment upon juveniles conflicted with section 15(1) in that it was inhuman or degrading’.⁴² It was held that ‘the imposition of a sentence of whipping or corporal punishment upon a juvenile is an inhuman or degrading punishment or treatment which violates the prohibition against such punishment contained in section 15(1) of the Constitution’.⁴³ In an illustration of a culture of defying and undermining court orders which has permeated the political landscape of Zimbabwe, Parliament amended section 15(1) to provide that notwithstanding the ruling by the Supreme Court, corporal punishment of juveniles was still permissible.

Ironically, whereas the amendment negated the progressive decision made by the Supreme Court, it also purported to guarantee the independence of the judiciary. The amendment restated the independence of the judiciary. Another change effected by the amendment was that whereas, previously MPs could not become members of the JSC, that bar was removed.

Changes were also made to the property clause (section 16). It was provided that rural land was to be acquired for resettlement. The words ‘adequate compensation payable promptly’ were substituted for the words ‘fair compensation payable within a reasonable

³⁹ Unity Accord 22 December, 1987.

⁴⁰ Hatchard op cit note 7 at 81.

⁴¹ *S v A Juvenile* 1990 (4) SA 151 (ZS).

⁴² *Ibid* at 152F.

⁴³ *Ibid* at 163H.

time'. Further, the right of a person who had had his land expropriated to question the fairness of the compensation in a court of law was stifled.

(xii) *Constitution of Zimbabwe Amendment (No. 12) Act 4 of 1993*

The amendment reorganised the public service, removing the detail concerning the structure of this unit from the Constitution. It was accordingly provided that an Act of Parliament would provide for the organisation and functions of the public service.⁴⁴

The Commissioner of Police was to be the head of the Police Force, and would be appointed by the President. The detail of the structure of the Police Force was removed from the Constitution and was also to be provided in an Act of Parliament.⁴⁵ Furthermore, the amendment dealt with armed forces providing that the President would be the supreme Commander-in-Chief of the Defence Forces.⁴⁶

The amendment confirmed that Zimbabwe follows a dual system in so far as international conventions are concerned. In terms of the amendment, treaties were not to form part of Zimbabwean law unless included by way of an Act of Parliament.⁴⁷ Thus, this provision meant that treaty-making falls within the preserve of the executive, subject to parliamentary ratification.

(xiii) *Constitution of Zimbabwe Amendment (No. 13) Act 9 of 1993*

This amendment came into force on 5 November 1993. The amendment provided that delay in carrying out a death sentence was not *per se* inhuman or degrading. The amendment was occasioned by the judicial pronouncements made by the Supreme Court in the *Catholic Commission* case.⁴⁸

⁴⁴ Section 6(a) of the Constitution of Zimbabwe Amendment (No. 11) Act, 30 of 1993.

⁴⁵ Section 93(2) of the Constitution of Zimbabwe.

⁴⁶ Section 96(2) of the Constitution of Zimbabwe.

⁴⁷ Section 12 of the Constitution of Zimbabwe Amendment (No. 12) Act, 4 of 1993.

⁴⁸ *Catholic Commission for Justice and Peace v Attorney General and Others* 1993 (4) SA 239.

In the *Catholic Commission* case, the Supreme Court held that the delays of fifty-two months and seventy-two months from the date the death sentence was imposed to the proposed date of execution were repugnant with section 15(1) of the Constitution.⁴⁹ Importantly, the Supreme Court was not seeking to overturn its earlier decision where the appeals of the prisoners against the death sentences had been dismissed.⁵⁰ Rather, the Supreme Court had to ascertain whether ‘supervening events established that the execution of the sentences on the proposed dates would constitute inhuman treatment repugnant to section 15(1)’.⁵¹

The Supreme Court held that the condemned prisoners retained constitutional protection.⁵² It was further held that the prisoner on death row retained all the basic rights except those removed from him in terms of the law either expressly or impliedly.⁵³ The onus was on the condemned prisoner to prove that the delay was inordinate; it arose not from his act; and that it caused acute suffering such that the infliction of the death penalty would fall foul of section 15(1).⁵⁴ In ascertaining whether section 15(1) had been transgressed, the relevant period of time spent in a condemned cell should be considered to start when the death sentence is imposed.⁵⁵ It was held that it is during this period that the prisoner suffered the ‘death row phenomenon’.⁵⁶

The Supreme Court found that it was obligated to exercise a value judgment in establishing whether the length of the delay fell foul of the condemned prisoners’ constitutional rights under section 15(1). This value judgment should be cognisant of the sensitivities of the people of Zimbabwe as well as international values evident in international judicial pronouncements, and academic writings.⁵⁷ Thus, the Supreme Court found that the delays of fifty-two months and seventy-two months respectively were inordinate. Therefore,

⁴⁹ *Ibid* at 270A – F.

⁵⁰ *Ibid* at 243H.

⁵¹ *Ibid* at 243H.

⁵² *Ibid* at 248F - G.

⁵³ *Ibid* at 248F - G.

⁵⁴ *Ibid* at 248F - G.

⁵⁵ *Ibid* at 267E.

⁵⁶ *Idem*.

⁵⁷ *Ibid* at 269J - 270A.

they had to be declared repugnant with section 15(1). In *casu*, the death sentences of the condemned prisoners were commuted to life sentences.

The government of Zimbabwe lambasted the decision, and in an attempt to mitigate the impact of the decision Amendment No. 13 was enacted.⁵⁸ Two saving provisions were inserted into section 15(1).⁵⁹ Thus, the impact of the landmark decision crafted by the Supreme Court was ephemeral since the legislature promptly amended the Constitution.

(xiv) *Constitution of Zimbabwe Amendment (No. 14) Act 14 of 1996*

The amendment was promulgated on 6 December 1996. The amendment was consequent upon the Supreme Court's decisions in *Rattigan*⁶⁰ and *Salem*.⁶¹ The Supreme Court in *Rattigan* had to grapple with the issue of whether the right to freedom of movement of a wife married to a foreign husband was undermined when the immigration officers refused to grant the husband permanent resident status.⁶² Chief Justice Gubbay writing for the court found that the constitutional right of freedom of movement accorded to the wife was devalued or undermined if the husband was barred from residing in Zimbabwe.⁶³ Thus, the Supreme Court held that restricting the movements of alien husbands also restricted the freedom of movement of their wives. Consequently, such restriction contravened the right to freedom of movement, and was thus unlawful.⁶⁴

⁵⁸ A Gubbay 'The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience' (1997) 19(2) *Human Rights Quarterly* 227, 242.

⁵⁹ Section 15(1)(5) of the Constitution of Zimbabwe provides that delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be in contravention of subsection (1). Subsection 6 provides that a person upon whom any sentence has been imposed by a competent court, whether before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act, 1993, in respect of a criminal offence which he has been convicted shall not be entitled to a stay, alteration or remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1).

⁶⁰ *Rattigan and Others v Chief Immigration Officer, Zimbabwe and Others* 1995 (2) SA 182 (ZS).

⁶¹ *Salem v Chief Immigration Officer, Zimbabwe and Another* 1995 (4) SA 280 (ZS).

⁶² *Rattigan* supra note 60 at 187 E - F.

⁶³ *Ibid* at 190H.

⁶⁴ *Ibid* at 191A - B.

In the *Salem* case, the Supreme Court held that the right to freedom of movement protected in section 22(1) of the Constitution would be rendered illusory if an alien husband was not allowed to engage in employment or other gainful activity in Zimbabwe.⁶⁵ In that case the applicant who was a citizen of Zimbabwe by birth and permanent resident of Zimbabwe had sought that her husband, a British national, be allowed to lawfully engage in employment in Zimbabwe.⁶⁶ That is, the applicant sought that the ruling in *Rattigan* be extended so as to incorporate the right of her husband to engage in employment or gainful activity in Zimbabwe. It was argued on behalf of the applicant that this right was subsumed into her constitutional right to freedom of movement, which embraced her entitlement to look to him for partial or total support, as she resided permanently with her alien husband in Zimbabwe. It was contended that failure to recognise this right would jeopardise her unqualified right to remain in Zimbabwe. The contention was that the wife may be compelled by necessity to forego her right to remain in the country and accompany her husband to a land where he is not prohibited from earning a livelihood.⁶⁷

The court found that as had been held in the *Rattigan* case,⁶⁸ it was a constitutional right for a wife to have her husband residing with her in Zimbabwe.⁶⁹ Gubbay CJ held that it would be untenable to diminish the right to freedom of movement of an impoverished wife, who would have no choice but to depart with her alien husband to country where he could assume the role of breadwinner again.⁷⁰ Gubbay CJ held that this would have the effect of differentiating between an affluent wife, who would not so have to depart, for she would have the means to support herself, and the poor wife who would have to depart with her husband in order to be supported.⁷¹

Thus, the Supreme Court construed section 22(1) to include under its ambit the right for a husband married to a citizen of Zimbabwe to not only reside, but to have a right to seek lawful employment in Zimbabwe.

⁶⁵ *Salem* supra note 61 at 283F.

⁶⁶ *Ibid* at 281E - F.

⁶⁷ *Ibid* at 282F - G.

⁶⁸ *Rattigan* supra note 60 at 191A - B.

⁶⁹ *Salem* supra note 61 at 282A.

⁷⁰ *Ibid* at 283I.

⁷¹ *Ibid* at 283A - B.

Regrettably, the impact of these decisions was short-lived since Parliament swiftly responded by enacting Amendment No. 14.⁷² The amendment had the effect of reversing and overruling the cases of the Supreme Court by diktat.⁷³ As such, in terms of the amendment, marriage to a citizen of Zimbabwe does not automatically grant one the right to reside in Zimbabwe.

(xv) *Constitution of Zimbabwe Amendment (No. 16) Act 5 of 2000*

This amendment was passed on 19 April 2000 – two months before the general elections of 2000. The principal effect of the amendment was to transfer responsibility for compensation from the government of Zimbabwe to the British government, the latter being Zimbabwe's former colonial master. The amendment provided that it was the responsibility of Britain to establish a fund from which compensation for agricultural land compulsorily acquired for resettlement purposes would be paid.⁷⁴ However, the government of Zimbabwe still had a duty to pay compensation for improvements made on the land, albeit it had to do so through instalments over a period of time.

(xvi) *Constitution of Zimbabwe Amendment (No. 17) Act 5 of 2005*

The amendment was promulgated by the parliament of Zimbabwe in September 2005. As has been the trend, the Amendment Act contained multiple changes. It dealt with issues ranging from property rights, freedom of movement and also the reintroduction of the Senate as the apex chamber of a bicameral parliament.

The amendment inserted a new section into the Constitution, namely, section 16B. According to section 16B, all agricultural land was to be vested in the State. The amendment was to have both retrospective and prospective application. The State was not enjoined to pay compensation for acquired land except for improvements effected on the land prior to its

⁷² Constitution of Zimbabwe Amendment (No. 14) Act, 14 of 1996.

⁷³ Gubbay *op cit* note 58 at 243.

⁷⁴ Section 16A(1) of the Constitution of Zimbabwe inserted by the Constitution of Zimbabwe Amendment (No. 16) Act, 5 of 2000, s3.

acquisition.⁷⁵ Significantly, the amendment contained an ouster clause.⁷⁶ The section provided that the jurisdiction of the courts of law was ousted in matters relating to land acquisition. The true import of section 16B(3) is that the constitutionality of the acquisition of land is not justiciable. The courts can only adjudicate on the amount of compensation payable. This is regrettable as it marks an erosion of judicial review which is one of the core tenets of constitutionalism.⁷⁷

A challenge to the constitutionality of Amendment No. 17 was brought before the Supreme Court of Zimbabwe by Mike Campbell.⁷⁸ The Supreme Court limited the issue for determination in that it made a procedural enquiry rather than a substantive enquiry. Malaba JA was not prepared to interrogate the amendment to ascertain whether it comported with the core tenets of constitutionalism. Rather, he focused on whether or not Parliament had complied with the letter of the law in enacting the amendment. On that basis the application was dismissed, since the court found that the amendment had been enacted in accordance with the strictures of the Constitution.

The applicants took the case to the SADC Tribunal where the case was heard as *Mike Campbell (Pvt) Ltd et al. v Republic of Zimbabwe*.⁷⁹ The SADC Tribunal identified four issues it had to grapple with. First, it had to ascertain whether or not it had jurisdiction to hear the matter. Secondly, whether or not the applicants had been denied access to courts in Zimbabwe. Thirdly, the Tribunal had to establish whether or not the applicants had been discriminated against on the ground of race. Fourthly, whether or not compensation was payable for lands compulsorily acquired by the government of Zimbabwe.

⁷⁵ Section 16B(2)(a) of the Constitution of Zimbabwe inserted by the Constitution of Zimbabwe Amendment (No. 17) Act 5, 2005.

⁷⁶ Section 16B(3) of the Constitution of the Zimbabwe inserted by the Constitution of Zimbabwe Amendment (No. 17) Act 5, 2005.

⁷⁷ Alex Magaisa 'Constitutionality versus constitutionalism: Lessons for Zimbabwe's constitutional reform process' 51, 54 available at <http://kar.kent.ac.uk/30495/1/Submission4.pdf>, accessed on 30 April 2012.

⁷⁸ *Mike Campbell (Pvt) Ltd. And Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008] available at <http://www.saflii.org/zw/cases/ZWSC/2008/1.html>, accessed on 10 July 2012.

⁷⁹ *Mike Campbell (Pvt) Ltd et al. v Republic of Zimbabwe* [2008] SADCT 2 available at <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>, accessed on 11 July 2012.

The Tribunal found that it had jurisdiction to hear the matter. His Excellency Mondlane J found that by having a clause ousting the jurisdiction of the courts, Amendment No. 17 was inimical to the rule of law. This was because the purported ousting of the jurisdiction of the courts of law was repugnant to the twin fundamental human rights, namely, the right to access the courts and the right to a fair hearing, which were hallmarks of the concept of the rule of law. Thus, by depriving the applicants of their agricultural land without affording them recourse in a court of law, the section deserved the greatest censure. This is because a provision like section 16B falls foul of the concept of the rule of law which is a foundational value in a constitutional democracy.

The Tribunal opined that Amendment No. 17 is discriminatory since it indirectly targets white farmers. Thus, the Tribunal embraced a tenet of constitutionalism which is that a law has to be general rather than being targeted at a distinct group of the population. Lastly, it was opined that the government of Zimbabwe could not use its municipal law to shirk from its international law obligations, which proscribes expropriation of land without fair compensation. In *casu*, it was held that fair compensation was due and payable by the government of Zimbabwe to the applicants for the expropriated lands.

However, notwithstanding the findings by the SADC Tribunal which were in favour of the applicants, the Government of Zimbabwe was recalcitrant, contending that the Tribunal lacked jurisdiction over the matter. At a SADC summit made up of the Heads of State of SADC, a moratorium was put on the Tribunal's work. This fuelled speculation that the summit had bowed to pressure from the Government of Zimbabwe.

A further incident of Amendment No. 17 was that the unicameral parliament which had been created was jettisoned.⁸⁰ A bicameral parliament consisting of the Senate and the House of Assembly was embraced. The Senate was to consist of sixty-seven Senators.⁸¹ Fifty of the Senators were to be popularly elected, whereas, the remaining sixteen would be directly and indirectly elected by the President.⁸² The age for qualification as a Senator was to be forty

⁸⁰ Constitution of Zimbabwe Amendment (No.9) Act, 1989.

⁸¹ Section 34 of the Constitution of Zimbabwe.

⁸² According to section 34(1)(a)-(d) of the Constitution of Zimbabwe, the President had the power to appoint six Senators directly. He also has the power to appoint ten Senators indirectly because notwithstanding the fact that

years. The amendment also provided that provincial governors of the ten provinces were *ex officio* members of parliament.⁸³

(xvii) *Constitution of Zimbabwe Amendment (No. 18) Act 11 of 2007*

The date of commencement of the amendment was 30 October 2007. The amendment reduced the term of office of the President from six years to a period of five years concurrent with the life of Parliament.⁸⁴ Whereas Amendment No. 17 had provided that the Senate would consist of sixty-six Senators, Amendment No. 18 provided that the Senate would be made up of eighty-four Senators. Previously, the ten provinces could popularly elect five Senators each. In terms of the new amendment each province would now popularly elect six Senators. Provincial Governors of each province had their membership relocated from the House of Assembly to the Senate. Thus, Provincial Governors were to be *ex officio* Senators. The President and the Deputy President of the Council of Chiefs would be Senators. Also, sixteen of the members of the Senate would be chiefs, and five would be appointed by the President.⁸⁵ The number of parliamentarians which had been pegged at one-hundred and fifty by the Amendment No. 9 was increased to two-hundred and ten.

(xviii) *Constitution of Zimbabwe Amendment (No. 19) Act 1 of 2009*

The amendment was made against the backdrop of the Global Political Agreement.⁸⁶ This was a power sharing deal signed by the three Principals of the three different political parties, namely; Mr Mugabe of ZANU-PF, Mr Tsvangirai of MDC-T, and Mr Mutambara of MDC-M. The deal was brokered by the former President of South Africa, Mr Thabo Mbeki. Schedule 8 embodying the nature of the agreement between the respective political parties was inserted into the Constitution. The salient change effected by the introduction of Schedule 8 into the Constitution was that some executive powers no longer vested solely in

the ten Senators had to be chiefs representing each province, the Chiefs were *ipso facto* appointed by the President in accordance with other laws.

⁸³ This has been repealed by Constitution of Zimbabwe Amendment (No. 18) Act 18 of 2007.

⁸⁴ Constitution of Zimbabwe Amendment (No. 7) Act 23 of 1987 had introduced six years as the term of office of the President.

⁸⁵ Section 6 of the Constitution of Zimbabwe amendment (No. 18) Act, 2007.

⁸⁶ Global Political Agreement, 2008.

the President. Rather, they were now shared by the President, the Prime Minister, and the Cabinet. Thus, whereas previously the discretion of the President insofar as making certain appointments was not encumbered, schedule 8 fettered that discretion. For instance, the President had to act ‘in consultation’ with the Prime Minister in making key appointments. The phrase ‘in consultation with’ in terms of the schedule is to be construed as referring to the fact that the consent of the consulted person has to be secured prior to a decision being made. Another example highlighting the attenuation of the powers of the President is the fact that the President can no longer unilaterally dissolve parliament.

Another significant change introduced by Amendment No. 19 is the creation of the office of the Prime Minister. The Prime Minister is to be the Deputy Chair of the Council of Ministers a body established to, *inter alia* assess the implementation of Cabinet decisions, and to help the Prime Minister in attending to matters of co-ordination in the government. Furthermore, the amendment has introduced what has become known as ‘State Institutions Supporting Constitutional Democracy’. It is to this end that the amendment provides for the creation of an Anti-Corruption Commission and an Independent Electoral Commission. The amendment inserts a detailed structure on the organisation, functions, and powers of these institutions. The object of these sweeping changes is to ensure that the goal of ‘free, fair and regular elections’, which belatedly has been added to the Constitution by the same amendment, is accomplished.

D) Conclusion

Academics have criticised the culture of the parliament of Zimbabwe to amend provisions of the Declaration of Rights arbitrarily.⁸⁷ Arguments proffered by academics are that such a practise not only negates the principle of the rule of law, but it also significantly diminishes the impact of the Declaration of Rights.⁸⁸ It has been argued that the amendments have changed the Constitutional experience of Zimbabwe into an *ipso facto* executive dictatorship with the legislature effectively assuming a rubber-stamp role.⁸⁹ The amendments have accentuated the power of the executive resulting in power being centralised in the Presidency.

⁸⁷ Gubbay op cit note 58 at 243.

⁸⁸ *Ibid* at 238.

⁸⁹ Hatchard op cit note 18 at 48.

Therefore, as will be illustrated later, overall, the amendments have negated some of the tenets which have become the core of the concept of constitutionalism. Thus, as a result of some of the amendments, Zimbabwe has failed in its quest for a golden triptych of good governance, constitutionalism and sustainable development.⁹⁰

⁹⁰ *Ibid* at 2.

III CONSTITUTIONALISM

A) The concept of constitutionalism

(i) *The meaning of constitution*

It has been stated that the difference between a constitution and constitutionalism “is more than a simple exercise in semantics”.¹ In describing a constitution some scholars have referred to it as a “power map”² while others have likened a constitution to a “job description”.³ Bo Li has viewed a constitution as a “commitment device”.⁴ It has also been contended that liberal thinkers like John Locke would view a constitution as a fundamental aspect of the social contract.⁵ In other words, since John Locke contended for a limited government, it is argued that he would view a constitution as regulating the relationship between the governors and the governed.⁶ Therefore, what emerges is that a constitution is a document detailing how those in government should exercise the governmental power vested in them by virtue of their position.

There is no fixed or standard form for a constitution.⁷ That is, some constitutions may be written, which is certainly the case with most constitutions, while others may not be written as is the case with Britain.⁸ However, emphasis should not be placed solely on constitutions

¹ C Fombad ‘The Constitution as a Source of Accountability: The role of Constitutionalism’ (2010) 2 *Speculum Juris* 41 at 43 citing Curry et al *Constitutional Government: The American Experience* 3ed (1997) 4. [Hereinafter Fombad, *The Constitution as a Source of Accountability*].

² H Okoth-Ogendo ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3, 5.

³ Bo Li ‘What is Constitutionalism’ available at http://www.oycf.org/Perspectives2/6_063000/what_is_constitutionalism.htm, accessed on 20 July 2012.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ C Fombad ‘Post-1990 Constitutional Reforms in Africa A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism’ in A Nhema & P Zeleza (eds) *The Resolution of African Conflicts* (2008) 179, 180. [Hereinafter Fombad, *Post-1990 Constitutional Reforms*].

⁸ Britain does not have a constitution contained in a single document. However, it has a number of documents which have constitutional force, such as the Magna Carta (1215); Bill of Rights (1689) and the Act of Settlement (1701).

because, as has been noted, it is possible to have ‘constitutions without constitutionalism’.⁹ Rather, the emphasis should be placed on a constitution which not only ‘veneers constitutionalism’,¹⁰ but which subsumes the fundamental tenets of constitutionalism so as to foster an ethos of democracy and the rule of law.

(ii) *The meaning of constitutionalism*

Constitutionalism is not only a ‘fuzzy word’¹¹ but it is also a concept which is “confusing”¹² and “elusive”.¹³ Certain scholars have distinguished between what they term the traditional form of constitutionalism and the modern conception of constitutionalism.¹⁴ In making this distinction it has been argued that the former focuses on procedure and restraint, while the latter is preoccupied with values.¹⁵ However, today it is accepted that this distinction has become blurred because constitutionalism is understood to be an admixture of both the traditional approach and the modern approach.¹⁶ This is because constitutionalism in its modern day conception subsumes both the prescriptive (the traditional approach), and the normative component (the modern approach to constitutionalism).¹⁷ In short, the anatomy of constitutionalism today consists of both procedure and values. On the other hand, scholars like Bo Li have reasoned that constitutionalism is synonymous with ‘liberal constitutionalism’.¹⁸

⁹ Okoth-Ogendo *op cit* note 2 at 3; See also Bo Li *op cit* note 3 above.

¹⁰ C Fombad ‘The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?’ (2007) 23 *SAJHR* 93 [Hereinafter Fombad, *The Swaziland Constitution of 2005*] where the author argues that the constitution crafted in 2005 only veneers constitutionalism since it does nothing to curb the authoritarian tendencies of the absolute monarch Mswati III.

¹¹ Bo Li *op cit* note 3.

¹² I Shivji ‘Contradictory Class Perspectives in the Debate on Democracy’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 253,255.

¹³ Fombad, *Post-1990 Constitutional Reforms* *op cit* note 7 at 181.

¹⁴ A Mangu ‘Challenges to Constitutionalism and democratic consolidation in Africa’ (2005) 24 *Politeia* 315 at 316.

¹⁵ *Ibid* at 317.

¹⁶ *Ibid* at 318.

¹⁷ G Barrie ‘Paradise Lost: the history of Constitutionalism in Africa post-independence’ (2009) *TSAR* 290 at 292.

¹⁸ Bo Li *op cit* note 3 where he cites Giovanni Sartori who lists five elements of what he terms liberal constitutionalism.

However, the absence of a trite definition of the concept of constitutionalism does not bar one from noting the content, form and features of this concept. As such it has been observed that constitutionalism can be said to ‘encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations’.¹⁹ Constitutionalism stems from an appreciation that, as Madison put it, ‘men are not angels’.²⁰ Accordingly, it is a prerequisite to have mechanisms controlling them when they exercise power. Therefore, if the ‘twin evils of anarchy and tyranny’²¹ which are inimical to democracy and the rule of law are to be thwarted, there is a need to have ‘auxiliary precautions’²² designed to check power. Constitutionalism provides an antidote to the perennial problem of tyranny,²³ and can thus be construed as the ‘auxiliary precautions’ which Madison was referring to in the Federalist papers.

Essentially, constitutionalism can be construed as having fundamental tenets which are ‘irreducible’²⁴ which have become accepted as the core elements of constitutionalism.²⁵ Informed by what academics have argued and the African constitutions crafted subsequent to the ‘third wave of democracy’²⁶ the inevitable conclusion is that the fundamental tenets or core elements of constitutionalism are:

- (i) the provision for the recognition and protection of fundamental human rights;
- (ii) the separation of powers. In other words, the creation of a government structure which ensures institutional comity between the different organs of state;

¹⁹ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 181 citing Louis Henkin in his seminal paper ‘Elements of Constitutionalism’.

²⁰ Federalist Papers no. 51 available at <http://avalon.law.yale.edu/medieval/magframe.asp>, accessed on 19 July 2012.

²¹ Fombad, *The Swaziland Constitution of 2005* op cit note 10 at 98.

²² Federalist Papers op cit note 20.

²³ Bo Li op cit note 3.

²⁴ Fombad op cit note 7 at 181.

²⁵ Bo Li op cit note 3 citing Louis Henkin who propounds nine elements which have to be construed as forming the core elements of constitutionalism. See also Barrie op cit note 17 at 293 who argues that a state is only a constitutional state if it displays seven fundamental characteristics of constitutionalism.

²⁶ J Hatchard et al *Comparative Constitutionalism and Good Governance* (2004) 22.

- (iii) the use of the presidential term limits as a means of restraining the powers of the president;
- (iv) the independence of the judiciary;
- (v) the review of the constitutionality of laws;
- (vi) the existence of provisions controlling the amendment of the constitution; and
- (vii) the establishment of “autochthonous oversight bodies”²⁷ or institutions that promote or foster democracy.

Hatchard identifies good governance, constitutionalism and sustainable development as the golden triptych which Africa is striving towards.²⁸ It is submitted that if this triptych is to be a lived reality there is a need for the core elements of constitutionalism to be the norm rather than the exception in the institutions of government in Africa.

(iii) *Constitutionalism and the rule of law*

The notion of the rule of law was given impetus by A V Dicey who defined the rule of law in accordance with three main principles.²⁹ Firstly, the law was supreme. Secondly, equality before the law had to be observed. Thirdly, the Constitution was the result of ordinary law of the country.³⁰ The question which arises is what is the relationship between constitutionalism and the rule of law? Bo Li in answering the preceding question identifies a ‘four-fold’ connection between constitutionalism and the rule of law.³¹ The picture which emerges is that constitutionalism is symbiotic to the rule of law. In other words, there is an umbilical link between constitutionalism and the rule of law. The only discernible factor distinguishing the one from the other is that the rule of law is narrow in scope whereas constitutionalism is expansive.³² Inevitably, the absence of the rule of law would mean that there is no

²⁷ *Ibid* at 208.

²⁸ *Ibid* at 2.

²⁹ I Currie & De Waal *The New Constitutional and Administrative Law*’ (2001) 75.

³⁰ *Ibid* at 75.

³¹ Bo Li op cit note 3 where the scholar states that ‘constitutionalism forms an institutional foundation for the rule of law, strikes a proper balance between the rule of law and the rule of person, provides a minimal guarantee for the justice of both the content and the form of law, and finally, is itself safeguarded by the rule of law’.

³² Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 182.

constitutionalism. Therefore, the rule of law is a condition precedent necessary for constitutionalism to thrive.³³

(iv) *Constitutionalism and Democracy*

Constitutionalism has been identified as a *sine qua non* of democracy.³⁴ Conversely, democracy has been dubbed a driving force behind constitutionalism, such that without democracy the prospects of constitutionalism diminish tremendously.³⁵ As such, democracy and constitutionalism are interdependent concepts which should not be viewed as incompatible with each other.³⁶ Therefore, democracy and constitutionalism are not concepts which are antagonistic, but rather they are concepts that are mutually reinforcing.³⁷

B) An overview of Africa's post-independence experience with constitutionalism

Ghana attained independence on 6 March 1957 heralding the “wind of change” which was to sweep throughout Africa until 1994 when South Africa was the last of the African countries to gain independence.³⁸ Unfortunately, post-independence Africa was besieged not only by woes of poverty and underdevelopment but it was also bedevilled by the lack of a culture of constitutionalism.³⁹ In understanding why constitutionalism failed to take root in post-independence Africa a recapitulation of the events that occurred subsequent to independence is necessary.

It has been noted that constitutions adopted in Africa after the colonial epoch were arrived at through a “scissors and paste” process.⁴⁰ Anglophone countries adopted constitutions modelled around the Westminster Constitution, albeit modified since the elements of the

³³ *Loc cit.*

³⁴ Mangu op cit note 14 at 321; See also, Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 183.

³⁵ *Ibid* at 321.

³⁶ *Ibid.*

³⁷ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 183.

³⁸ M Meredith *The State of Africa, A History of Fifty years of Independence* (2006) 162.

³⁹ HK Prempeh ‘Africa’s “constitutionalism revival”: False start or new dawn?’ (2007) 5 *Int'l J Const L* 469 at 481 available at <http://heinonline.com>, accessed on 16 July 2012 [Hereinafter Prempeh, *Africa's Constitutionalism Revival*].

⁴⁰ Hatchard et al op cit note 26 at 25.

United States presidential system were added.⁴¹ On the other hand, Francophone countries adopted the Gaullist constitutional model which hybridized the Westminster parliamentary system and the US presidential system.⁴² In light of the historical legacy of Africa, where administration had been based on authoritarianism and power had been centralised, African leaders construed these constitutions as an affront.⁴³

As such, the state elites preoccupied themselves with subverting the constitutional order. They did this by brazenly ignoring the constitution, abrogating it or brandishing it as a liability through political rhetoric.⁴⁴ Therefore, the constitution emerged recast providing for an imperial president who was omnipotent and had pre-eminent discretion in making appointments and dismissals.⁴⁵ State elites squeezed out constitutionalism from these constitutions as they pursued reconstruction of the power map.⁴⁶ The rulers who assumed power after independence have been said to have fostered a culture of ‘Big man rule’.⁴⁷ These rulers became known as “*WaBenzi*” symbolising the amount of power they had at that time.⁴⁸ Their rule was synonymous with corruption, cronyism, patrimony, kleptocracy, and nepotism.⁴⁹

However, in 1990 what has been termed the “third wave” of democracy swept across Africa. A groundswell of discontent with poor economic management, nepotism, cronyism and maladministration propelled this ‘third wave’.⁵⁰ Although scholars refute the extent to which the “third wave” succeeded,⁵¹ what is not refutable is that this wave ushered in an era of constitutionalism. Although some unpleasant relics from the *ancien régime* seem to be

⁴¹Ogendo op cit note 2 at 9.

⁴²Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 183.

⁴³Ogendo op cit note 2 at 11.

⁴⁴*Ibid* at 13.

⁴⁵*Ibid* at 14.

⁴⁶*Ibid* at 13.

⁴⁷Meredith op cit note 38.

⁴⁸Barrie op cit note 17 at 299.

⁴⁹*Ibid* 306-316 where the author cites the likes of Mobutu Sese Seko of Zaire who treated the state’s coffers as his personal account. The author highlights the “platinum life” led by the likes of Félix Houphouët-Boigny of Ivory Coast, as well as the corrupt regimes of Daniel Arap Moi of Kenya.

⁵⁰Meredith op cit note 38.

⁵¹Prempeh, *Africa’s Constitutionalism Revival* op cit note 39 at 472.

resurfacing⁵² this does not negate the fact that the “third wave” has led to constitutionalism taking root in Africa. For instance, whereas the *ancien régime* condoned “perpetual incumbency”,⁵³ nowadays it is frowned upon with presidential term limits swiftly becoming the norm.⁵⁴ Attention will now be turned to identifying and discussing those elements which have assumed the status of core elements of constitutionalism with the object of noting how they have been interpreted in the African context.

C) The fundamental tenets of constitutionalism

At the outset it must be noted that the list of what has become the core elements of constitutionalism is not exhaustive. Although seven core elements of constitutionalism were noted, only five of those will be discussed in this work. These are: the separation of powers; presidential term limits; independence of the judiciary; provisions controlling the amendment of the constitution; and the establishment of institutions that foster democracy.

The *raison d’être* for this is that these five elements of constitutionalism have been egregiously negated in the Lancaster Constitution. For instance there has been a ‘damning assessment on the independence of the judiciary’⁵⁵ which has been labelled by some as a system which has become a ‘cornucopia of irrelevance’.⁵⁶ The Lancaster Constitution has been subject to a number of constitutional amendments which have denuded traits of constitutionalism from that constitution. As such, it would be instructive to consider the mechanisms adopted by other countries to curb constitutional amendments which are whimsical. Furthermore, the separation of powers has been blurred such that the legislature has been accused of merely playing a rubber-stamping function.⁵⁷ Moreover, the incumbent

⁵² HK Prempeh ‘Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa’ 35 *Hastings Constitutional Law Quarterly* 761 at 816 available at <http://www.hastingsconlawquarterly.org/archives/V35/14/prempeh.pdf>, accessed on 16 July 2012 [Hereinafter Prempeh, *Presidential Power in Comparative Perspective*].

⁵³ C Fombad & N Inegbedion ‘Presidential term limits and their Impact on constitutionalism in Africa’ in C Fombad & C Murray (eds) *Fostering Constitutionalism in Africa* (2010) 1, 2.

⁵⁴ *Ibid* at 3.

⁵⁵ International Bar Association’s Human Rights Institute (IBAHRI) *Zimbabwe: Time for a new approach*, September 2011, available at http://www.ibanet.org/Search/Default.aspx?q=zimbabwe&page_num=3, accessed on 31 August 2012.

⁵⁶ Civil Alliance for Democracy and Governance *The Rule of Law in Zimbabwe* 15 February, 2006, available at <http://www.kubatana.net/html/archive/demgg/060215cadego.asp?sector=OPIN>, accessed on 31 August 2012.

⁵⁷ Hatchard et al op cit note 26 at 48.

President has exercised powers with longevity mainly because of the absence of a presidential term limit in the Lancaster Constitution. It is therefore instructive to consider how the countries forming part of this study have grappled with these five core elements of constitutionalism.

(i) *Separation of powers:*

The doctrine of separation of powers is informed by the same perspective which led Lord Acton to caution that ‘all power tends to corrupt, and absolute power corrupts absolutely’.⁵⁸ This perspective is the one which was expressed by Madison when he said that in the exercise of power there is a need to create “auxiliary precautions”.⁵⁹ This doctrine of separation of powers has since become ‘an important touchstone of constitutional democracy’.⁶⁰ In other words, separation of powers has assumed the status of a fundamental tenet of constitutionalism.

Charles Louis de Secondat Baron de Montesquieu has been celebrated as an exponent of the doctrine of separation of powers.⁶¹ In his seminal work, “The Spirit of Laws”, Montesquieu propounded that government has to be separated into three different arms, namely executive, legislature and the judiciary.⁶² He further advocated that ‘power should check power’.⁶³ In other words, he was contending for what the Americans have called “checks and balances”, or as Madison would put it, “auxiliary precautions”. In 1787 the doctrine of separation of power was given expression by the Americans.⁶⁴ The American Constitution provides for the separation of powers, albeit with nuanced changes.⁶⁵ These nuanced variations to the pure theory of separation of powers manifest themselves in the

⁵⁸ Lord Acton quotes available at <http://www.acton.org/research/lord-acton-quote-archive>, accessed on 31 August 2012.

⁵⁹ Federalist Papers op cit note 20.

⁶⁰ C Fombad ‘The Separation of powers and constitutionalism in Africa: The case of Botswana’ (2005) 25 *Boston College Third World Law Journal* 301, 341 [Hereinafter Fombad, *The Separation of powers*]

⁶¹ Currie & De Waal op cit note 29 at 17.

⁶² Montesquieu ‘The Spirit of Laws’ Book XI, available at <http://www.constitution.org/cm/sol.htm>, accessed on 13 April 2012.

⁶³ *Ibid.*

⁶⁴ Currie & De Waal op cit note 29 at 17-18.

⁶⁵ *Ibid* at 18.

notion of “checks and balances” which allows for the intermixing between the different arms of government.⁶⁶

The doctrine of separation of powers has had a tortuous path in its evolution since it was expounded by Montesquieu. In spite of this, the underlying object of the doctrine has been to thwart tyranny.⁶⁷ In the African context the doctrine of separation of powers manifest itself in three types, namely the American Presidential system, the British parliamentary system and the French hybrid system.⁶⁸ Anglophone countries amalgamated the American presidential system with the British parliamentary system to come up with a hybrid, while Francophone countries have embraced the French hybrid system.⁶⁹ It would be imperative to briefly note the manifestation of the doctrine of separation of powers in Africa. However, as a preface, a note on the three types of systems which the crafters of constitutions in Africa had to choose from suffices.

The British parliamentary system recognises the three arms of government, but envisages a close relationship between the legislature and the executive.⁷⁰ Notwithstanding this, Britain still has separation of powers because the three different arms of government exist in their exclusive domains, and incursions into the domain of the other should be in terms of the law. The United States Presidential system provides for a form of constrained parliamentarism.⁷¹ It provides for the sovereignty of the constitution and its corollary is an independent judiciary with strong powers of review.⁷² The US Constitution also provides for a system of checks and balances among the three organs of state. The French hybrid system does not embrace a strict form of the separation of powers, but allows for close co-operation between the executive and the legislature.⁷³ The French system has a number of peculiar features which include *inter alia*, vesting the power to review the constitutionality of the law in a quasi-

⁶⁶ *Ibid.*

⁶⁷ Fombad, *The Separation of powers* op cit note 60 at 309.

⁶⁸ *Ibid* at 310.

⁶⁹ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 188.

⁷⁰ *Ibid* at 187.

⁷¹ Currie & De Waal op cit note 29 at 18.

⁷² M Tushnet ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-based Worries’ (2003) 38 *Wake Forest Law Review* 813-834.

⁷³ Fombad, *The Separation of powers* op cit note 60 at 316.

administrative body; making the President the guardian of the courts; and giving residual legislative power to the President.⁷⁴ Making the President the guardian of the judiciary denotes a hierarchy among the three arms of government, which is not the case with the Westminster and the US presidential system.

The extent to which the doctrine of separation of powers has been given effect to in the constitutions of the countries forming part of this study will now be considered. The study will focus particularly on the two arms of government, namely the executive and the legislature. Specific consideration will be on the relationship between these two arms, and the manner through which they exercise power.

All the constitutions of the countries studied provide for the separation of powers between the executive, legislature and the judiciary.⁷⁵ The President in most jurisdictions under consideration is elected directly by the electorate in terms of universal adult suffrage.⁷⁶ In Botswana and South Africa, the popular election is for members of the legislature who then elect the President.⁷⁷ However, despite these differences, the President in those countries is both the head of state and head of government.⁷⁸ The term of the President in most of the constitutions surveyed in this study has been limited to two terms.⁷⁹ In some of the jurisdictions under investigation the President has an unfettered discretion when exercising executive powers. However, in certain jurisdictions the President has to seek parliamentary approval when exercising some of the executive powers.⁸⁰ Hatchard stresses that the utility of this mechanism hinges ‘on the existence of an effective and properly structured parliamentary committee system’.⁸¹

⁷⁴ *Ibid* at 317.

⁷⁵ See Art 1(3) of the Constitution of Namibia as an example.

⁷⁶ Section 80(2) of the Constitution of Malawi; Art 63 of the Constitution of Ghana; Art 27 of the Constitution of Namibia; Art 34 of the Constitution of Zambia.

⁷⁷ Section 32 of the Constitution of Botswana; and Section 86(1) of the Constitution of South Africa.

⁷⁸ Section 47(1) of the Constitution of Botswana; Art 58 of the Constitution of Ghana; Art 29 of the Constitution of Namibia; Art 34 of the Constitution of Zambia; and Section 83(a) of the Constitution of South Africa.

⁷⁹ Section 34(1) of the Constitution of Botswana; Art 66(2) of the Constitution of Ghana; Section 83(3) of the Constitution of Malawi; Art 29(3) of the Constitution of Namibia; Section 88(2) of the Constitution of South Africa; and Section 35(2) of the Constitution of Zambia.

⁸⁰ Art 78(1) of the Constitution of Ghana.

⁸¹ Hatchard et al op cit note 26 at 73.

In most jurisdictions where the President is elected directly, the president can only be removed through a cumbersome process of impeachment.⁸² However, these jurisdictions do not debar the legislature from passing a vote of no confidence in the members of the executive, in which case the member must resign or be fired by the President.⁸³ In certain jurisdictions like Botswana, the Constitution allows for the legislature to pass a vote of no confidence in the President.⁸⁴ However, the usefulness of this mechanism is doubtful since the provision operates as a “double-edged sword”.⁸⁵ That is, once the legislature passes a vote of no confidence on the President, Parliament is dissolved. Thus, such a provision might have the effect of coercing the legislators against passing a vote of no confidence in the President. Furthermore, the existence of anti-defection clauses in most of the constitutions has been identified as having the effect of constraining the legislators from voting against the President as they fear expulsion from their political parties.⁸⁶ It is submitted that the best approach that fortifies the utility of votes of no confidence is to be found in the Constitution of South Africa. In terms of section 102 of the Constitution of South Africa, if the National Assembly via a majority passes a vote of no confidence in the President, she/he must resign.⁸⁷

In some jurisdictions the President has the power to determine the sessions of parliament.⁸⁸ It has been submitted that this is anachronistic and it undermines the business of parliament.⁸⁹ South Africa and Namibia have jettisoned this practice. In terms of the South African Constitution, once the first sitting of the National Assembly has taken place, the National Assembly determines the time and duration of its future sittings.⁹⁰ A provision with a similar import is found in the Namibian Constitution which provides that the National Assembly sits for at least two sessions during each year, which commence and terminate on such dates as the National Assembly determines.⁹¹

⁸² See Art 32 of the Constitution of Namibia as an example.

⁸³ Art 82(1) of the Constitution of Ghana; Art 39 of the Constitution of Namibia.

⁸⁴ Section 92 of the Constitution of Botswana.

⁸⁵ Fombad, *The Separation of powers* op cit note 60 at 326.

⁸⁶ Hatchard et al op cit note 26 at 74 -75.

⁸⁷ Section 102 of the Constitution of South Africa.

⁸⁸ Section 90(1) of the Constitution of Botswana; and Art 112 of the Constitution of Ghana.

⁸⁹ Hatchard et al op cit note 26 at 77.

⁹⁰ Section 51(1) of the Constitution of South Africa.

⁹¹ Art 62(1) of the Constitution of Namibia.

Moreover, in certain countries like Botswana and Namibia, the President may dissolve parliament.⁹² It is submitted that this impinges on the doctrine of the separation of powers and undermines the business of parliament. Further, it is submitted that should a need to insert such a provision exist, the better approach would be the one that is found in the Constitution of Namibia. The Constitution of Namibia in Article 57 contains a “suicide provision”.⁹³ That is, once the President dissolves parliament his/her term ends as well. Such a provision may serve to dissuade a President from dissolving parliament on whimsical grounds.

An appraisal of the constitutions studied evinces that same persons forming part of the executive do form part of the legislature. For instance according to section 91(3) of the South African Constitution, the Vice President and cabinet ministers are members of the legislatures since they are appointed by the president from parliament.⁹⁴ Such an approach vindicates the conclusion that although Anglophone African countries have embraced the US presidential system, they still retain the Westminster system which is characterised by a close cooperation between the legislature and the executive.

With regard to the manner through which Bills become law, a few comments would suffice. Certainly, in all the countries forming part of the study, a Bill only becomes law when the President assents to it. Differences arise with regard to the procedure utilised in the law making process. Two camps emerge. On one hand, there are those jurisdictions where it is discretionary for the President to assent to a Bill⁹⁵ and on the other hand, countries like South Africa make it peremptory for the President to assent to a Bill.⁹⁶ Botswana is one such country where the President has discretion as to whether to assent to a Bill or not.⁹⁷ According to the Constitution of Botswana, the President may assent to a Bill or failing which, automatically dissolve parliament and call for fresh elections. It has been noted that the threat of dissolution, ‘... is likely to persuade parliamentarians to comply with presidential

⁹² Art 57 of the Constitution of Namibia; and Section 92 of the Constitution of Namibia.

⁹³ Hatchard et al op cit note 26 at 75.

⁹⁴ Section 91(3) of the Constitution of South Africa; see also Section 39 and 42(3) of the Constitution of Botswana; Art 35 of the Constitution of Namibia; and Section 63 of the Constitution of Malawi.

⁹⁵ See in this regard Section 87 of the Constitution of Botswana.

⁹⁶ Section 79 of the Constitution of South Africa.

⁹⁷ Section 87 of the Constitution of Botswana.

wishes...'.⁹⁸ This problem is more apparent than real in the light of the fact that initiation of the law making process is now *de facto* the preserve of the executive.

However, given the fact that, '...Parliaments generally have dutifully legislated in accordance with presidential wishes...'⁹⁹ it should be peremptory for the President to assent to a bill. The South African position provides a useful approach. Section 79 makes it peremptory for the President to assent to a Bill unless she/he has reservations. If she/he has reservations the Bill is referred back to the National Assembly for reconsideration.¹⁰⁰ After the National Assembly has reconsidered the Bill, and his/her concerns have been addressed, the President has to either assent to the Bill or refer it to the Constitutional Court for determination of its constitutionality.¹⁰¹ Once the Constitutional Court pronounces that Bill is constitutional, the President has no discretion but to assent to and sign the Bill into law.¹⁰² This procedure ensures that the '...President [does not] block the passage of legislation and at the same time emphasises Parliament's independence'.¹⁰³

Overall, constitutions of Anglophone countries can be said to have embraced the doctrine of separation of powers. Thus, owing to the presence of separation of powers, countries such as Botswana, South Africa and Ghana have been lauded as exemplars of constitutionalism. In stark contrast, constitutions of Lusophone and Francophone African countries have been dismissed as merely providing a semblance of the separation of powers.¹⁰⁴

In the final analysis it appears that the doctrine of separation of powers at the very least requires an understanding that certain matters are in the realm of one arm of government, and thus not exercisable by the other. The argument for the separation of powers in Africa becomes more compelling when regard is had to the history of our continent which has wobbled under the colossal weight of the 'big man' syndrome, executive hegemony, and

⁹⁸ Hatchard et al op cit note 26 at 76.

⁹⁹ *Ibid* at 76.

¹⁰⁰ Section 79(1) of the Constitution of South Africa.

¹⁰¹ Section 79(4) of the Constitution of South Africa.

¹⁰² Section 79(5) of the Constitution of South Africa.

¹⁰³ Hatchard et al op cit note 26 at 77.

¹⁰⁴ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 188.

imperial presidencies.¹⁰⁵ Therefore, it is irrefutable that the doctrine of separation of powers is now embedded in the ethos of constitutionalism since it seeks to achieve effective checks and balances.¹⁰⁶

(ii) *Presidential term limits*

As has been highlighted above, most constitutions in post-independence Africa were reconstituted such that the new “power map” did not provide for presidential term limits. As such there was a proclivity among the state elites to monopolise the office of the President and hold power in perpetuity.¹⁰⁷ This had detrimental repercussions because the state elites arrogated to themselves power so as to ensure that no one could oust them from office. This heralded what Prempeh has referred to as “executive hegemony”.¹⁰⁸ As a result, the President became above the law and exercised power with impunity, thus leading to executive terrorism.¹⁰⁹

In light of the tendency of African leaders to monopolise and arrogate power, the argument for having presidential term limits to curb executive excesses becomes forceful. The problem of not having presidential term limits is that ‘it elevates the president into a cult and an institution, thus turning the office into an inheritance’.¹¹⁰ The argument for presidential term limits refers to an appreciation of the fact that Africa has suffered from an authoritarian past where the executive has annexed power for itself. Such power led to the emergence of an “imperial president”¹¹¹ who exercised power without restraint. Thus, one way of curbing a resurgence of “executive hegemony” in light of the dawn of legislatures

¹⁰⁵ Prempeh, *Presidential Power in Comparative Perspective* op cit note 52 at 763.

¹⁰⁶ Barrie op cit note 17 at 293.

¹⁰⁷ Hatchard et al op cit note 26 at 64; Fombad & Inegbedion op cit note 53 at 2 where the authors give examples of Africa’s long serving leaders, these include Teodoro Nguema Mbasogo of Equatorial Guinea, Lansana Conté of Guinea, Robert Mugabe of Zimbabwe, and Paul Biya of Cameroon.

¹⁰⁸ Prempeh, *Presidential Power in Comparative Perspective* op cit note 52 where the author uses the words “presidential supremacy”, “imperial presidency”, and “hegemonic presidency” to evince that the balance of power between the three arms of government was skewed in favour of the president.

¹⁰⁹ Hatchard et al op cit note 26 at 57-60

¹¹⁰ Fombad & Inegbedion op cit note 53 at 2 quoting B Nwabuzé *The Presidential Constitution of Nigeria* (1982) 201.

¹¹¹ Ogendo op cit note 2 at 14.

which are characterised by domination of one political party in a multi-party system is through presidential term limits.¹¹²

Therefore, it is now clear that presidential term limits should be construed as constituting a fundamental tenet of constitutionalism.¹¹³ This is because presidential term limits curb the proclivity of staying in power for too long. In short, presidential term limits end “perpetual incumbency” and fosters peaceful and democratic transition of power between presidents subsequent to elections. As such, Africa’s constitutional landscape has been changed by presidential term limits since “perpetual incumbency” which was a common feature in the *ancien régime* has been jettisoned.¹¹⁴

Nevertheless, although there are a string of leaders who have adhered to their term limits¹¹⁵ there are those who have successfully amended their constitutions to remove presidential term limits.¹¹⁶ Furthermore, there are incumbents who have continued to hold power in perpetuity, notwithstanding the tide of presidential term limits that is sweeping through Africa.¹¹⁷ This has led to Prempeh contending that African presidents have ‘been term limited but have not been tamed’.¹¹⁸ The question which arises is what can be done to fortify presidential term limits in light of the fact that they can be emasculated. The answers are considered below.

Presidential term limits can be fortified by entrenching them in the Constitution.¹¹⁹ In other words, in order to curb prolongation of incumbency through amending the term limits, the constitution could provide for a cumbersome process to be followed when an amendment to the presidential term limit is envisaged. Therefore, the onerous process could entail the

¹¹² Fombad & Inegbedion op cit note 53 at 20-21.

¹¹³ *Ibid* at 3.

¹¹⁴ HK Prempeh ‘Presidents untamed’ (2008) 19 *Journal of Democracy* 109, 110 [Hereinafter Prempeh, *Presidents untamed*].

¹¹⁵ Fombad & Inegbedion op cit note 53 at 4, These presidents include *inter alia* Nelson Mandela of South Africa, Joachim Chissano of Mozambique and Benjamin Mkapa of Tanzania.

¹¹⁶ *Ibid* 12-15. Examples in this regard are Sam Nujoma of Namibia; Yoweri Museveni of Uganda and Paul Biya of Cameroon.

¹¹⁷ *Ibid* at 15 where the authors cite Teodoro Nguema Mbasogo of Equatorial Guinea and Robert Mugabe of Zimbabwe as examples.

¹¹⁸ Prempeh, *Africa’s constitutionalism revival* op cit note 39 at 497.

¹¹⁹ Fombad & Inegbedion op cit note 53 at 27.

requirement of special parliamentary majorities, such as two thirds of the members, as well as making the amendment subject to a referendum. The other method would be to include provisions dealing with presidential term limits under provisions which cannot be amended. For example the Constitution could provide for the tenure of the president to be a maximum of two terms. This is because two terms have been said to be ‘long enough for any exceptional leader to leave indelible footprints...and short enough for people to tolerate a poor leader.’¹²⁰

To conclude, presidential term limits have become a standard provision in Africa¹²¹ since what Africa needs, as Prempeh notes, are ‘flat prohibitions and bright-line rules, and not open-ended or discretionary provisions’.¹²² If Africa is to curb “presidential hegemony” a ghost from the *ancien régime*¹²³ the answer lies in presidential term limits. It can now no longer be gainsaid that presidential term limits are a core element of constitutionalism¹²⁴ which if adhered to might rectify the balance of power which is skewed in favour of the executive.¹²⁵

(iii) *Independence of the judiciary*

The presence of a judiciary which is independent ensures that controls on executive power, or the “auxiliary precautions” as Madison would prefer, do not become redundant.¹²⁶ Judicial independence can now be considered to be a fundamental tenet of constitutionalism.¹²⁷ This is because the creation of a constitutional system where the constitution is supreme inevitably necessitates the existence of a judiciary which is independent. Judicial independence has been recognised at an international and regional level.¹²⁸ There have also been various

¹²⁰ C Fombad ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future prospects’ (2011) 59 *Buff. L. Rev* 1007, 1052 [Hereinafter Fombad, *Constitutional Reforms*].

¹²¹ Fombad & Inegbedion op cit note 53 at 28.

¹²² Prempeh, *Presidents untamed* op cit note 114 at 120.

¹²³ *Ibid* at 114.

¹²⁴ Fombad & Inegbedion op cit note 53 at 28.

¹²⁵ Prempeh, *Presidential Power in Comparative Perspective* op cit note 52 at 832.

¹²⁶ Alex Magaisa ‘Constitutionality versus constitutionalism: Lessons for Zimbabwe’s constitutional reform process’ 51, 57, available at <http://kar.kent.ac.uk/30495/1/Submission4.pdf>, accessed on 30 April 2012.

¹²⁷ Barrie op cit note 17 at 293.

¹²⁸ Art 10 of the Universal Declaration of Human Rights, 1948; Art 14.1 of the International Covenant on Civil and Political Rights; and Art 7(1) of the African Charter on Human and Peoples’ Rights.

instruments which have been adopted bearing testimony to the fact that judicial independence is sacrosanct.¹²⁹

It has been noted that independence of the judiciary is ‘foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law’.¹³⁰ Further, it has been noted that the independency of the judiciary is an indispensable cornerstone of a constitutional democracy.¹³¹ The argument for an independent judiciary tasked with controlling the executive is rendered more forceful in the context of Africa where there has been a culture of imperial presidents.¹³² The presence and existence of an independent judiciary is a hallmark of constitutionalism which is crucial if a country is to be governed by the rule of law as opposed to the rule of men.¹³³

Although judicial independence has no settled definition,¹³⁴ it is trite that judicial independence embodies three characteristics, namely security of tenure, personal independence and institutional independence.¹³⁵ In *The Queen in Right v Bearegard*¹³⁶ it was held that the core principles central to the independence of the judiciary was the ‘complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges’.¹³⁷ This means that judicial power is exercised by the judiciary, and may not be usurped by the legislature, the executive or any other institutions.

¹²⁹ United Nations Basic Principles on the Independence of the Judiciary, *Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985*; and the Bangalore Principles (*The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002*).

¹³⁰ *Justice Alliance of South Africa v President of the Republic of South Africa and others* 2011(5) SA 388 (CC) para 36.

¹³¹ *Ibid* para 40.

¹³² Fombad, *The Separation of powers* op cit note 60 at 332.

¹³³ C Fombad ‘Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions’ (2007) (2) *Public Law* 233, 239 [Hereinafter Fombad, *Prospects for Judicial Independence*].

¹³⁴ *Ibid* at 238.

¹³⁵ *Valente v The Queen* [1985] 2 S.C.R 673.

¹³⁶ *The Queen in Right v Bearegard* (1986) 30 DLR (4th) 481 (SCC).

¹³⁷ *Ibid* at 491.

Judicial officers exercise their powers subject only to the Constitution and the law, not the whims of public opinion or of the majority in Parliament.

Gleaning from the myriad declarations and statements relating to the notion of judicial independence, Fombad has propounded six core elements of judicial independence.¹³⁸ These are: institutional arrangements for judicial autonomy; financial arrangements for judicial autonomy; presence of arrangements pertaining to security of tenure; adequate remuneration; transparency in the appointment process; and judicial accountability.¹³⁹ A consideration of these elements as adumbrated above in the context of Africa is pertinent for the purpose of this study.

For the judiciary to exercise its proper role in a constitutional democracy which is to act as the guardian of the rights enshrined in the Constitution it must be independent. Judicial independence envisages that judicial functions must vest exclusively in the judiciary.¹⁴⁰ That is, the Constitution must contain a clear statement of judicial independence. For instance, the Namibian Constitution provides that the courts are independent making them only subject to the Constitution or the law, and barring the executive or the legislature from interfering with its role.¹⁴¹ The Ghanaian Constitution also provides for a robust guarantee of judicial independence as it provides that the judicial power vests in the judiciary, and the President and Parliament are barred from exercising the functions of the judiciary.¹⁴² Provisions with the same import as the one in the Namibian Constitution have been inserted in a number of Constitutions in the Anglophone countries.¹⁴³ The utility of vesting judicial functions exclusively in the courts is that it inhibits the executive or the legislature from bypassing the judiciary on matters of a sensitive nature by transferring judicial functions to bodies which are biased.¹⁴⁴

¹³⁸ Fombad, *Prospects for Judicial Independence* op cit note 133 at 242.

¹³⁹ *Ibid* at 242.

¹⁴⁰ L Madhuku 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46 *Journal of African Law* 232, available at <http://www.jstor.org/stable/4141335>, accessed on 16 July 2012.

¹⁴¹ Art 78 of the Constitution of Namibia.

¹⁴² Art 125(3) of the Constitution of Ghana.

¹⁴³ Section 165(2) of the Constitution of South Africa; Section 103(1) of the Constitution of Malawi; and Section 118(2) of the Constitution of Lesotho.

¹⁴⁴ Fombad, *Prospects for Judicial Independence* op cit note 133 at 243.

The goal of judicial independence is rendered illusory if the appointment process is not transparent.¹⁴⁵ Although there are diverging views insofar as how the appointment of judges ought to be made, there is consensus that the process must be imbued with sufficient checks.¹⁴⁶ The *raison d'être* for the checks is to prevent the appointment of judges who are beholden to the executive or the legislature. In most Anglophone countries political involvement in the appointment of judges is allowed.¹⁴⁷ The notable differences relate to the degree or the extent to which such political involvement is warranted.

In countries like South Africa, Botswana and Lesotho the Constitutions distinguish between the appointment of the Chief Justice and the rest of the constitutional court judges as well as judges of other courts. In the case of South Africa, the President is not bound by the advice of the Judicial Service Commission (JSC) when the Chief Justice is being appointed.¹⁴⁸ However, there is some level of constraint on the President since he or she has to make the appointments after consulting the JSC as well as the leaders of the parties represented in the National Assembly.¹⁴⁹ In Lesotho and Botswana the President is bound by the advice of the JSC when making such an appointment.¹⁵⁰ Namibia arguably provides the best model which insulates the judges from political influence, since the President has to act on the recommendation of the JSC.¹⁵¹

Most African constitutions provide for a certain body to be responsible for the appointment of the judiciary. The rationale for this is to ensure the independence of the judiciary. However, if this body is an alter ego of the President then the prospect of judicial independence is stifled.¹⁵² As such, the composition and structures of these bodies must be such that they inhibit political meddling in their decision-making and functioning.¹⁵³ The

¹⁴⁵ *Ibid* at 243.

¹⁴⁶ Madhuku op cit note 140 at 234.

¹⁴⁷ *Ibid*.

¹⁴⁸ Section 174(3) of the Constitution of South Africa.

¹⁴⁹ *Idem*.

¹⁵⁰ Section 9(1) of the Constitution of Botswana; and Section 120(1) of the Constitution of Lesotho.

¹⁵¹ Art 82(1) of the Constitution of Namibia.

¹⁵² Madhuku op cit note 140 at 238.

¹⁵³ Fombad, *Prospects for Judicial Independence* op cit note 133 at 250.

constitutions of Namibia, South Africa and Ghana arguably provide for a greater scope of independence of the judiciary by thwarting political meddling in the composition of the JSC.

It has been contended that security of tenure is the *sine qua non* of judicial independence.¹⁵⁴ Most of the Anglophone African constitutions guarantee security of tenure by providing for the number of years judicial officers can be in office. However, a disturbing feature in these constitutions is the provision for the hiring of expatriate judges on fixed term contracts.¹⁵⁵ This appears to be irreconcilable with the need for security of tenure, since pressure might be brought to bear on an expatriate judge under the apprehension that his/her contract may not be renewed.¹⁵⁶

Mechanisms dealing with how judges are removed from office are vital since they might have a bearing on the independence of the judiciary. As such, it has been observed that to curb an abuse of the powers to remove judges a stringent and detailed criterion for such removal must be provided for in the constitution.¹⁵⁷ In other words, to prevent judicial officers being removed at the whim of the executive, the body or commission tasked with investigating and recommending or making the decision on whether a judge must be removed must not be staffed by political appointees. South Africa has developed a largely transparent system in the removal of judges since the number of political appointees in the commission is curtailed.¹⁵⁸

Another basic characteristic of judicial independence is that the remuneration of judges has to be secured by law. This is intended to thwart machinations of political pressure which might compromise the independence of the judiciary. Most Anglophone countries provide that judicial salaries are to be paid from a Fund which is administered by Parliament.¹⁵⁹

¹⁵⁴ *Ibid* at 246.

¹⁵⁵ Hatchard et al op cit note 26 at 159.

¹⁵⁶ Fombad, *Prospects for Judicial Independence* op cit note 133 at 246.

¹⁵⁷ *Ibid* at 247.

¹⁵⁸ Section 178 of the Constitution of South Africa.

¹⁵⁹ Section 122 of the Constitution of Botswana; and Section 127(4) of the Constitution of Ghana.

Judicial independence of the courts has been fortified by the expansion of their scope of judicial review. The Constitution of South Africa has entrenched both abstract and concrete review of the constitutionality of laws.¹⁶⁰

It cannot be refuted that judicial independence in Africa is facing challenges. For instance: the appointment of judges in certain jurisdictions is flawed; progressive judgments made by the courts have been negated; and extra-legal means have been used to remove judges from office.¹⁶¹ However, this does not mean that the prospects of judicial independence are bleak. Constitutional provisions in jurisdictions like South Africa and Botswana epitomise commitment to judicial independence, and overall they highlight fidelity to constitutionalism. Furthermore, notwithstanding the challenges noted, there has been a spirited commitment by the judiciary to foster the ethos of constitutionalism by acting boldly to enforce the spirit and object of the law.¹⁶² Thus it appears that a constitution which does not provide for an independent judiciary is not worth the paper in which it is written since an independent judiciary has become one of the core elements of constitutionalism.

(iv) *The control of constitutional amendments*

A constitution differs markedly from national legislation in that it is the supreme law – *lex fundamentalis*.¹⁶³ From a philosophical point of view, a constitution can be equated to what Kelsen would term the “Grundnorm”. That is, the constitution is the highest normative document from which other norm-giving documents find their legitimacy. Having noted that a constitution is a supreme document, two questions arise for consideration. Firstly, whether or not a constitution should be amended? Secondly, if a constitution can be amended, how should it be amended? These two questions are considered in the subsequent paragraphs.

¹⁶⁰ Section 167(4) of the Constitution of South Africa.

¹⁶¹ L van de Vijver *The Judicial Institution In Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 252 where the study reveals that the Chief Justice of Zimbabwe resigned as a result of intimidation and political pressure.

¹⁶² See in this regard the decisions by the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace v Attorney General and Others* 1993(4) SA 239; and the Constitutional Court of South Africa in *S v Makwanyane and Another* 1995(3) SA 391(CC); and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 717 (CC).

¹⁶³ I Rautenbach & E Malherbe *Constitutional law* 1 ed (2009) 26.

A survey of the constitutions of Africa, particularly constitutions of Anglophone African countries, evince that there is a general consensus among constitutional engineers that although a constitution is supreme, it is not immortal. That is, constitutional drafters of African constitutions have realised that it is possible for a constitution to contain “imperfections”¹⁶⁴ since human beings are “infallible”.¹⁶⁵ As such, there ‘is an inherent right’¹⁶⁶ for a constitution to be amendable. The rationale for contending that a constitution should be amendable is that societal values are fluid; as such, constitutions which cannot be amended might become anachronistic and antiquated.¹⁶⁷ Sunstein has noted that ‘constitutions should be amended by each generation in order to ensure that the dead past would not constrain the living present’.¹⁶⁸

Having noted that constitutions are not cast in stone, the next question falling for consideration pertains to how a constitution ought to be amended. Although views diverge on this question, what is notable is that there is an appreciation that a constitution should not be ‘casually, carelessly, or brazenly amended’.¹⁶⁹ That is, scholars opine that it is necessary to control amendments to a constitution by having “formal procedural safeguards”.¹⁷⁰ Therefore, providing for mechanisms to control the amendment of a constitution has become a core element of constitutionalism. Some of the “formal procedural safeguards” which have been incorporated in the constitutions of African countries are highlighted below.

Some Anglophone African countries have adopted the amendment procedure as provided for by the Westminster model.¹⁷¹ The Westminster model provides for a special parliamentary majority procedure as well as the publication of the Bill in the Government

¹⁶⁴ J Hatchard ‘“Perfecting imperfections”: developing procedures for amending constitutions in Commonwealth Africa’ (1998) 36 *The Journal of Modern African Studies* 381, 384.

¹⁶⁵ C Fombad ‘Limits on the power to amend Constitutions: Recent trends in Africa and their potential impact on constitutionalism’ (2007) 6 *U. Botswana L.J* 27, 31 [Hereinafter Fombad, *Limits on the power to amend Constitutions*].

¹⁶⁶ Hatchard et al op cit note 26 at 44.

¹⁶⁷ Fombad, *Limits on the power to amend Constitutions* op cit note 165 at 58.

¹⁶⁸ C Sunstein ‘Designing Democracy, What Constitutions Do’ 1 ed (2001) 96.

¹⁶⁹ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 182.

¹⁷⁰ Hatchard op cit note 164 at 384.

¹⁷¹ *Ibid* at 384.

Gazette not less than 30 days before parliament votes on the Bill.¹⁷² The Westminster model has been copied in jurisdictions like Zambia and Zimbabwe.¹⁷³ This model has been criticised by Hatchard on two fronts. Firstly, it has been argued that it is premised on the fallacious view that parliament is the guardian of the constitution.¹⁷⁴ Secondly, it has been contended that it is an anomalous procedure in the sense that despite the replacement of parliamentary sovereignty by the supremacy of the constitution, an exclusively parliamentary process is used to amend the supreme law.¹⁷⁵

A dual thread which runs as the *raison d'être* of the special parliamentary majority is to ensure that the constitution is not amended for partisan purposes, and to ensure that the interests of minorities are protected.¹⁷⁶ However, the requirement for special majorities in parliament has proved ineffectual in the face of “imperial presidents” and single dominant parties in the legislature.¹⁷⁷ In other jurisdictions like Ghana, Lesotho, Malawi and South Africa the special parliamentary procedure is not the sole procedure, but it is part of the amendment process.¹⁷⁸ For instance, in South Africa the Constitution provides for the second chamber to play a role in the amendment process.¹⁷⁹ However, the effectiveness of this is doubtful where the second chamber is compliant to the executive.¹⁸⁰

The Malawian Constitution provides that amendments to the fundamental principles or human rights in the Constitution do not only require a simple parliamentary majority, but also needs the support of the majority of voters in a referendum.¹⁸¹ In countries like Ghana¹⁸² the

¹⁷² Hatchard et al op cit note 26 at 45.

¹⁷³ Section 79(2) (a) and (b) of the Constitution of Zambia (as amended 1996); and Section 52(2) and 52(3) of the Constitution of Zimbabwe, 1979.

¹⁷⁴ Hatchard et al op cit note 26 at 54.

¹⁷⁵ *Ibid.*

¹⁷⁶ Hatchard op cit note 164 at 390.

¹⁷⁷ Fombad, *Limits on the power to amend Constitutions* op cit note 165 at 55; See also Hatchard op cit note 26 at 47 where the author cites the events in Zimbabwe showing the ineffectiveness of special parliamentary majorities where the legislature is compliant to the executive.

¹⁷⁸ Hatchard op cit note 164 at 390.

¹⁷⁹ Section 74 of the Constitution of South Africa

¹⁸⁰ Hatchard et al op cit note 26 at 47.

¹⁸¹ Section 196 of the Constitution of Malawi.

drafters have coupled the requirement for special parliamentary majorities with the addition of “strict time lines”. The South African Constitution provides for a “cooling-off” period as part of the time lines.¹⁸³ This provision was inserted into the Constitution of South Africa subsequent to the ruling in the *First Certification case*.¹⁸⁴

Thus, it would seem that although there might be variations on how the amendment procedure is carried out, there is an appreciation that the constitution as the supreme law deserves to be protected from “retrogressive amendments”.¹⁸⁵ It is now trite that for a constitution to comport with constitutionalism it has to provide for mechanisms controlling the amendment of the constitution. Therefore, it is irrefutable that controlling amendments to a constitution has become one of the fundamental tenets of constitutionalism.¹⁸⁶

(v) *The “Fourth Branch”: oversight bodies that foster constitutionalism*

One vision which a constitution may have is a constraining vision.¹⁸⁷ According to this vision, government has to be limited when exercising power and such power should be exercised in accordance with the law.¹⁸⁸ It is clear that the constraining vision resonates with constitutionalism which attempts to impose limitations and ensure that such limitations are legally enforceable.¹⁸⁹ Therefore, there is a need to create institutions which ensure that

¹⁸² Art 290(3) of the Constitution of Ghana which provides that a bill amending an entrenched provision shall not be introduced in Parliament until after the expiry of 6 months after its publication in a Government Gazette.

¹⁸³ Section 74(7) of the Constitution of South Africa which provides that an amendment cannot be put to a vote in the National Assembly within 30 days of its tabling.

¹⁸⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of RSA* 1996 (4) SA 744 (CC).

¹⁸⁵ Hatchard op cit note 164 at 382.

¹⁸⁶ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 192.

¹⁸⁷ K Govender ‘The South African Human Rights Commission’ in P Andrews (ed) *The post-apartheid constitutions: perspectives on South African basic law* (2001) 571, 592 [Hereinafter Govender, *The South African Human Rights Commission*].

¹⁸⁸ *Ibid.*

¹⁸⁹ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 181.

power is exercised in accordance with the law. These institutions are what have been referred to in the Paris Principles as national human rights institutions.¹⁹⁰

These national institutions are designed to ensure that government is held accountable in the exercise of its power.¹⁹¹ The rationale for having national institutions is the belief that accountability of the government would ensure that the ethos of constitutionalism will thrive.¹⁹² The Paris Principles were adopted by the United Nations as a clarion call to member states to create national institutions to enhance the protection and promotion of human rights.¹⁹³ Govender has submitted that the Paris Principles envisage that these national institutions must be more than ‘surrogate court of law’.¹⁹⁴ This means that these institutions must be seen as ‘a product of the new constitutionalism’.¹⁹⁵ This constitutionalism requires that the relationship between the organs of state and these national institutions to be one where the organs of state assist and protect these national institutions to ensure their independence, impartiality, dignity and effectiveness.¹⁹⁶

Some of the national institutions, or – ‘oversight bodies’ – which have been created in a number of African constitutions include *inter alia* the Ombudsman, the Human Rights Commission, and the Anti-Corruption Commission. However, most of these constitutions state the powers and functions of these institutions in purely hortatory terms.¹⁹⁷ This is insufficient at the very least, and at the very most it is incompatible with the Paris Principles which require that these national institutions must be given a broad mandate in terms of a constitutional or legislative text.¹⁹⁸ Fombad contends that most of these national institutions have become ‘like a prize champion fighting with his hands tied on his back’.¹⁹⁹

¹⁹⁰ United Nations Principles Relating to the Status of National Institutions adopted by the United Nations as an Annex to General Assembly resolution 48/134 of 20 December 1993 [Hereinafter *Paris Principles*].

¹⁹¹ Fombad, *The Constitution as a Source of Accountability* op cit note 1 at 58.

¹⁹² *Ibid.*

¹⁹³ *Paris Principles*.

¹⁹⁴ Govender, *The South African Human Rights Commission* op cit note 187 at 572.

¹⁹⁵ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) .

¹⁹⁶ *Ibid* para 78.

¹⁹⁷ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 194.

¹⁹⁸ *Paris Principles*.

¹⁹⁹ Fombad, *Constitutional Reforms* op cit note 120 at 1040.

It has been propounded that for these national institutions to be truly independent, which is a requirement made explicit by the Paris Principles, there are six requirements which have to be in place.²⁰⁰ These are: demonstrable independence; adequate resources; accessibility to citizens; power to inquire into the widest possible range of complaints; adequate investigatory powers; and appropriate remedial power.²⁰¹ Hatchard opines that in the absence of the above elements these national institutions will become a ‘front and a façade lacking any relevance’.²⁰² It has been submitted by Fombad that for these national institutions to be effective they should be ‘constitutionally entrenched in such a way that they can operate as independent sites of oversight and supervision as well as enforcement of the constitution’.²⁰³

The drafters of the South African constitution attempted to heed that call in crafting what has been oft-referred to as “Chapter 9 institutions”. Six institutions under the heading “State Institutions Supporting Constitutional Democracy” are listed in that Chapter of the Constitution.²⁰⁴ However, the Constitution does not stop at merely listing, but uniquely lists four foundational principles which have been noted by Fombad as “ensure[ing] that these institutions are an effective log to the constitutional wheel and not a political charade of symbolic value’.²⁰⁵ In sum these four foundational principles impose both a positive and negative injunction on the state. That is, on the one hand, these institutions have to be given unequivocal support by the government in fulfilling their constitutional mandate, while on the other hand the government is prohibited from interfering with the workings of these institutions.²⁰⁶ Therefore, the South African Constitution demonstrates that to secure the independence of these national institutions the provisions dealing with these institutions have to be detailed and entrenched in the constitution.

It cannot be gainsaid that institutions such as the Ombudsman, the Human rights commission, the Anti-corruption commission, the Auditor general, and the Electoral

²⁰⁰ Hatchard et al op cit note 26 at 239.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 195.

²⁰⁴ Section 181(1)(a)-(e) of the Constitution of South Africa.

²⁰⁵ Fombad, *Post-1990 Constitutional Reforms* op cit note 7 at 194.

²⁰⁶ K Govender ‘The reappraisal and restructuring of Chapter 9 institutions’ (2007) 22 *SAPL* 190, 208 [Hereinafter Govender, *The reappraisal and restructuring*].

commission have become vital if the philosophy of constitutionalism is to take root in Africa.²⁰⁷ However, the true extent of the success of these institutions hinges on the political will of those in power since most of these national institutions do not have broad powers.²⁰⁸

D) Conclusion

Constitutionalism is symbiotic to democracy and is a *sine qua non* for the rule of law. Furthermore, constitutionalism subsumes certain elements which have become fundamental tenets if the twin ideals of democracy and the rule of law are to become a lived reality. These elements which have become the core of constitutionalism have been identified above, as being: the separation of powers; judicial independence; presidential term limits; the control of amendments to the constitution; and the existence of oversight institutions.

The tide of constitutionalism is sweeping across Africa. Thus, it is now up to the leaders of our time to allow the tide of constitutionalism to sweep out all the relics of the *ancien régime* which include *inter alia* imperial presidency, Big-man rule, and executive hegemony. Therefore, our leaders need a Damascene conversion from a culture of ‘constitutions without constitutionalism’²⁰⁹ to a culture of ‘constitutions with constitutionalism’. It is only once our leaders embrace constitutionalism that the evils of tyranny, despotism and dictatorship that have bedevilled the motherland can be confined to the dustbins of history. As such, our leaders must embrace constitutionalism and put an end to the view that some regimes in Africa are not democracies but are “pseudo democracies”, “façade democracies”, and “hybrid democracies”.²¹⁰

²⁰⁷ Fombad, *The Constitution as a Source of Accountability* op cit note 1.

²⁰⁸ Govender, *The appraisal and restructuring* op cit note 206 at 208.

²⁰⁹ Okoth-Ogendo op cit note 2 at 3.

²¹⁰ D Posner & D Young ‘The Institutionalization of Political Power in Africa’ (2007) 18 (3) *Journal of Democracy* 126, 137.

IV THE CONSTITUTIONAL EXPERIENCE OF ZIMBABWE

The main aim of this chapter is to evaluate the current Constitution of Zimbabwe.¹ This is done with a view towards delineating the extent to which the Constitution subsumes what has become known as the fundamental tenets of constitutionalism. The chapter will be divided into seven parts. Part A will focus on how the doctrine of separation of powers has been crafted in the Constitution of Zimbabwe. In this part it will be argued that the Constitution in its current form does not comport with the doctrine of separation of powers as it is understood in theory as well as in practice in the jurisdictions which subscribe to constitutionalism. Thus, ways in which the shortcomings identified could be ameliorated will be provided.

Part B tackles the question of whether there is merit in the argument that the envisaged new constitution should include presidential term limits. In this part, it will be highlighted that as was noted in chapter III, presidential term limits have become a core element of constitutionalism. As such, it is a prerequisite that the envisaged constitution should incorporate a provision dealing with term limits.

Part C notes that to date nineteen amendments have been made to the Lancaster Constitution. Since these amendments have negated the fundamental tenets of constitutionalism, this part will discuss methods through which those kinds of amendments can be avoided. Part D highlights that owing to a series of constitutional amendments; the Lancaster Constitution now only provides a veneer of judicial independence. Therefore, a discussion on how the independence of the judiciary in Zimbabwe can be restored will be done. In Part E an argument is made for the inclusion of institutions that ensure accountability and constitutionalism. In that part, it will be noted that such institutions play a crucial role in fostering and cementing constitutionalism.

Finally, Part F is a conclusion which sums up the constitutional experience of Zimbabwe. The inescapable conclusion reached is that the Constitution of Zimbabwe merely provides a semblance of constitutionalism. In the light of this conclusion, some tentative constitutional reforms to mitigate the dearth of constitutionalism will be proffered.

¹ Constitution of Zimbabwe as amended on 13th February, 2009 (Hereinafter “The Lancaster Constitution” or “The Constitution of Zimbabwe”).

A) The Lancaster constitution and the separation of powers

In form, the Lancaster Constitution appears to embrace the doctrine of *trias politica* as it separates the Executive, Legislature and the Judiciary. However, this is a far cry from the reality. The Constitution provides for a President who is the Head of State and Government as well as the Commander in Chief of the Defence Forces.² Similar to the position in the United States of America,³ the President of the Republic is directly elected in terms of universal adult suffrage.⁴ It has been noted in the previous chapter that this is not unprecedented as the same procedure is utilised in other jurisdictions such as Ghana⁵ and Malawi.⁶

Differing markedly from the Constitutions of other jurisdictions which provide a two-term presidential limit⁷ the Constitution of Zimbabwe only provides that the term of office of the President is five years which runs concurrently with the life of Parliament.⁸ The removal of the President can be done through a process of impeachment. The Constitution provides that where the President has acted in wilful violation of the Constitution, or is incapacitated, or where he or she is guilty of gross misconduct, then the President can be removed by impeachment.⁹ The process of impeachment requires that one third of the members of the House of Assembly recommend such removal and two thirds of the members of the House of Assembly vote in favour of the resolution.¹⁰

It is submitted that in the era of political party hegemony and party elitism it is unlikely that a President would be impeached. This is because it is doubtful whether the legislators enjoy the independence and the political will to bring the executive arm of government to account. One of the reason attributed as a cause of the loss in independence on the part of the legislators is the electoral system. It has been argued that a proportional representation

³ Albeit that there the process is slightly different because the president is elected through a college of votes.

⁴ Section 28(2) of the Constitution of Zimbabwe.

⁵ Art 63 of the Constitution of Ghana.

⁶ Section 80(2) of the Constitution of Malawi.

⁷ Art 66(2) of the Constitution of Ghana; Art 29(3) of the Constitution of Namibia; and Section 88(2) of the Constitution of South Africa.

⁸ Section 29(1) of the Constitution of Zimbabwe.

⁹ Section 29(3) of the Constitution of Zimbabwe.

¹⁰ *Ibid.*

system based on a party list system has created party-elitism with the aristocrats of the party able to coerce the members to tow the party lines. As a result of this, there have been calls (in the South African context) for the establishment of a Mixed Member Proportional Representation electoral system.¹¹ Those calling for such a system believe that constituencies provide legislators with a degree of independence from their political parties as they would be accountable downwards as well as upwards.¹² Although, there is merit in such an argument, the experience of Zimbabwe (which follows a constituency system) highlights that ultimately regardless of whichever system is chosen, the prospects of success hinge on the political will of the legislators.

The Constitution of Zimbabwe attests to the fact that some persons forming part of the executive also form part of the legislature.¹³ This section provides that the Vice President, Ministers and Deputy Ministers have to be Members of Parliament so as to preserve their tenure of office.¹⁴ On one hand this is a useful mechanism which ensures that the Vice President, Ministers and Deputy Ministers account to the legislature since they are also part of that arm of government. However, on the other hand, such a provision skews the balance of power between the two arms of government in favour of the executive. This is so because it creates the impression that the ultimate price in political life is to ascend to the office of Minister. Thus, it produces a mould of legislators who are pliant and timid.

Section 31F of the Constitution of Zimbabwe is a vote of no confidence clause.¹⁵ A properly phrased and enumerated vote of no confidence provision is one of the mechanisms through which the legislature can control the executive. Section 31F provides that Parliament needs a two thirds majority to pass a vote of no confidence in the government. If a vote of no confidence is passed, the President has three options, which are: to dissolve the Parliament; to remove the Cabinet members; or to resign from office.¹⁶ Two features distinguish the Constitution of Zimbabwe from that of South Africa. First, whereas in South Africa a

¹¹ R Southall 'Post Election South Africa: the continuing case for electoral reform' (2004) 3(2) *Journal of African Elections* 154.

¹² *Ibid.*

¹³ Section 31E (2) of the Constitution of Zimbabwe.

¹⁴ Section 31E (2).

¹⁵ Section 31F of the Constitution of Zimbabwe.

¹⁶ Section 31F (3).

distinction between a vote of no confidence in the Cabinet and in the President is made,¹⁷ no such distinction is made in Zimbabwe. According to the South African Constitution if a vote of no confidence is passed pertaining to the Cabinet, the President has to reconstitute the Cabinet. However, a vote of no confidence in the President means that s/he must resign.¹⁸ In the spirit of checks and balances, the Constitution of South Africa fetters the legislature's power to remove the President by providing that the vacancy in the office of the President must be filled within thirty days.¹⁹

Secondly, whereas the Constitution of Zimbabwe requires two thirds of the Members of Parliament to vote in favour of the motion,²⁰ only a simple majority of Members of Parliament in South Africa have to support the motion.²¹ It has been noted by Judge Dennis Davis that it is a constitutional right of minority parties to require Parliament to hold a debate on a motion of no confidence in the President as matter of urgency because it is in the public interest to do so.²² It was noted further that a majority party could not subvert this right through procedural obstacles.²³

It might well be argued that the approach in South Africa is distinguishable from the constitutional dispensation in Zimbabwe where the President is voted for directly by the electorate, and thus the legislature has no power to remove the president on the basis of a vote of no confidence. The reason for this is because of the concept of 'temporal rigidity' which refers to the fact that the tenure of a President who is directly elected is fixed and difficult to change.²⁴ However, it is submitted that by allowing the President to dissolve parliament when a motion of no confidence is passed in him/her, it might have the unintended consequence of creating a hierarchy between the executive and the legislature. Thus, the threat of dissolution renders the potential gains provided by a vote of no confidence illusory due to the fact that threat of dissolution of Parliament may lead Members of Parliament to

¹⁷ Section 102(1) of the Constitution of South Africa.

¹⁸ Section 102(2).

¹⁹ Section 86(3).

²⁰ Section 31F(1) of the Constitution of Zimbabwe.

²¹ Section 102 of the Constitution of South Africa.

²² *Mazibuko v Sisulu* (Western Cape High Court) as yet unreported case no 21990/2012 (22 November 2012).

²³ *Ibid* at 23.

²⁴ J Hatchard et al *Comparative Constitutionalism and Good Governance* (2004) 61 citing M Shugart and J Cary *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1992) 28-43.

think twice before passing such a resolution. It is submitted that section 102 of the Constitution of South Africa provides a better provision.

Certain matters are placed beyond the reach of the law. Section 31K makes certain decisions of the President unreviewable by a court of law. This is unpalatable as it is at odds with the rule of law. Further, it risks impunity and flies in the face of the doctrine of separation of powers which envisages that there should be checks and balances in the exercise of power. Therefore, an effective check on the exercise of governmental power is removed. For example, section 31I empowers the President to grant pardon to convicted prisoners.²⁵ Gubbay attributes the flagrant abuse of the presidential power of pardon to the fact that the courts are barred from reviewing the decision of the President.²⁶ Moreover, arguments to the extent that the President has used it for partisan purposes have been made.

This contrasts starkly with the approach enunciated in South Africa where the presidential power to pardon is reviewable under the principle of legality.²⁷ This principle is a judge-made substantive power of reviewing the exercise of public power to ascertain whether it complies with the constitution. In the context of the presidential power to pardon, the jurisprudential pronouncements in South Africa reveal that although the power to pardon constitutes an executive action,²⁸ it involves the exercise of public power which must comply with the constitution and the doctrine of legality.²⁹ This means that in exercising the power to pardon, the President must act in good faith, must not misconstrue his or her powers, must consider the application and must act rationally.³⁰

It has been noted that rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.³¹ In *Ryan*

²⁵ Section 31I of the Constitution of Zimbabwe.

²⁶ A Gubbay 'The Progressive erosion of the rule of law in independent Zimbabwe' Lecture at the Bar Council of England and Wales on 9 December 2009. Full Speech available at <http://www.newzimbabwe.com/opinion-1806-Gubbay+lecture+on+rule+of+law/opinion.aspx>; accessed on 13 April 2012.

²⁷ *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SALR 147 (CC); and *Ex parte President of the Republic of South Africa* 2000 (2) SALR 674 (CC)

²⁸ Section 84(2) (j) of the Constitution of South Africa.

²⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 5 BCLR 391 (CC) para 49.

³⁰ *Minister of Justice and Constitutional Development v Chonco* 2010 (2) BCLR 140 (CC) at para 30.

³¹ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 2 SA 674 (CC).

Albutt,³² Ngcobo CJ held that the doctrine of legality implicitly includes the requirement that a rational nexus should exist between the exercise of power and the purpose sought to be achieved through the use of the power. In that case the doctrine of legality and rationality was extended so as to encompass the requirement of procedural fairness in appropriate circumstances.³³ In the *JSC* case³⁴ the Supreme Court of Appeal noted that rationality contemplated that reasons ought to be given for a decision taken in the exercise of public power. Commenting on the presidential power to pardon, Govender notes that as a result of the seismic shift brought about by the principle of legality in the exercise of public power, ‘proper processes, lawful and rational decisions, and adequate justification, must be deemed to be the minimum standard’.³⁵ Therefore, it is now trite in the South African context that in using the power to pardon in section 84(2)(j) the President must act lawfully, in good faith and rationally.

Therefore, unlike Zimbabwe where the presidential pardon is exercised by the President on fiat, the presidential pardon in South Africa is considered public power and has to be exercised within the strictures of the Constitution. The new constitution should make the power of pardon subject to the glare of legal scrutiny. Further, it should provide for a criterion through which the power is to be exercised in order to control exercise of executive power. It is submitted that the following jurisdictional factors must exist before the power of pardon can be used: it must be exercised in consultation with others who are in a position to render advice; there should be a legitimate governmental objective; and reasons for the pardon should be disclosed.³⁶

Like in other jurisdictions, no Bill may become an Act of Parliament in Zimbabwe without the President appending his/her signature to it.³⁷ Zimbabwe is set apart from other jurisdictions in that the arrangement in the Constitution is ‘far less constructive and more

³² Supra note 29 at para 51.

³³ Supra note 29 at para 74.

³⁴ *Judicial Service Commission v Cape Bar Council and Another 2013 (SA) 170 (SCA)* a case which concerned the contention on whether the failure by the Judicial Services Commission to give reasons as to why it had not filled the two vacancies in the Cape High Court was rational.

³⁵ K Govender ‘Judicial Review of the pardon power in section 84(2)(j) of the Constitution of the Republic of South Africa, 1996’ (2012) 3 *Stellenbosch Law Review* 490.

³⁶ Hatchard op cit note 24 at 265-266.

³⁷ Section 51 of the Constitution of Zimbabwe.

obstructionist'.³⁸ The President may either assent to or withhold assent to a Bill.³⁹ The President is provided with the power to dissolve parliament if he does not want to assent to a Bill.⁴⁰ It is unclear whether the term of the President also expires when such dissolution is made. It is submitted that the preferable interpretation is that the term of office of the President also expires because of the fact that the term of the President runs concurrently with the life of Parliament. Construing section 51(3b) to be a "double-edged sword"⁴¹ will ensure that the President does not block the passage of legislation.⁴²

However, it may be argued that this debate is merely academic. This is due to the fact that *de jure* law-making has become the preserve of the executive, thus it is unlikely that the President will withhold assent to a Bill. Moreover, in most cases Cabinet members introduce Bills after having discussed them in Cabinet meetings chaired by the President, and the party whips ensure that the Bill sails through Parliament without much hindrance.⁴³ Notwithstanding this, it is novel that the new Constitution should make it peremptory for the President to assent to a Bill. Such an approach affirms the independence of Parliament, and simultaneously ensures that Parliament does its job which, after all, is to make laws.

The President is empowered by the Constitution to fix the sessions of Parliament.⁴⁴ It has been argued that this is not only outmoded but also undermines the business of parliament.⁴⁵ This provision has to be jettisoned and the drafters of the new constitution could look to the Constitutions of South Africa⁴⁶ and Namibia⁴⁷ for inspiration on an alternative solution as these provide a better approach, underscoring the fact that the legislature is not a rubber stamp body of the executive. Furthermore, in line with the Constitutions of Botswana and

³⁸ T Hwalima 'The Rule of Law and Separation of Powers in South Africa and Zimbabwe, a Comparative Study' 19, available at http://www.africalegalbrief.com/attachments/article/176/Constitutional_Law_Paper.pdf, accessed on 13 April 2012.

³⁹ Section 51(2) of the Constitution of Zimbabwe.

⁴⁰ Section 51(3b).

⁴¹ C Fombad 'The Separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301, 326 [Hereinafter, Fombad, *The Separation of Powers*].

⁴² Hatchard op cit note 24 at 77.

⁴³ Fombad, *The Separation of Powers* op cit note 41 at 322.

⁴⁴ Section 62(1) of the Constitution of Zimbabwe.

⁴⁵ Hatchard op cit note 24 at 77.

⁴⁶ Section 51(1) of the Constitution of South Africa.

⁴⁷ Art 62(1) of the Constitution of Namibia.

Namibia, the Constitution of Zimbabwe vests in the President the power to dissolve Parliament.⁴⁸ It is submitted that such a provision may serve to coerce the legislature to be pliant to the wishes of the executive. Therefore, the envisaged new constitution could either jettison the provision or utilise the method used in Namibia. The Namibian Constitution in Article 57 contains a “suicide provision”.⁴⁹ Such a provision operates as a “double-edged sword” in the sense that once the President dissolves parliament his/her terms expires as well.

The preceding analysis highlights that the Constitution of Zimbabwe provides for a semblance of separation of powers. In form the Constitution of Zimbabwe typifies both the Westminster model and US presidential system but in reality it operates differently to those two systems. The balance of power amongst the three arms of government is skewed in favour of the executive, especially the Office of the President. This resonates with the history of Africa where the executive branch of government arrogated power in its own favour. For all intents and purposes, the other two arms of government, namely the legislature and the judiciary, have been rendered impotent. The dominance of the executive (especially the Office of the President) has led to Parliament being reduced to a rubber stamp body and degenerating to a sub-committee of the ruling party. Owing to the stance of the government to confront and frustrate the judiciary, provisions which state that these arms of government are separate and independent of each other have been rendered nugatory.

Since this has been as a result of constitutional amendments, it might be instructive to adopt the basic structures doctrine. Although the basic structures doctrine will be discussed later, it would be recommended that the new constitution should entrench the separation of powers between the legislature, executive and the judiciary as a basic structure. The advantage of this is that any constitutional amendment which threatens the separation of powers would be invalidated on the ground that it attempts to destroy the basic structure of the constitution.

B) The Lancaster Constitution and presidential term limits

It is now clear that presidential term limits are a *conditio sine qua non* of constitutionalism.⁵⁰ There is no clause dealing with the term limit on the tenure of the President in the Lancaster

⁴⁸ Section 63 of the Constitution of Zimbabwe.

⁴⁹ Hatchard op cit note 24 at 75.

⁵⁰ C Fombad & N Inegbedion ‘Presidential term limits and their impact on constitutionalism in Africa’ in C Fombad & C Murray (eds) *Fostering Constitutionalism in Africa* (2010) 1, 3.

Constitution. Section 29(1) merely provides that the 'term of office of the President shall be a period of five years concurrent with the life of Parliament...'⁵¹ In fact the incumbent President has held power since an executive presidency was created through Constitutional amendment no. 7 in 1987. Prior to the amendment, the incumbent had been the Prime Minister from the 18th of April 1980, being the day when Zimbabwe attained independence from white minority rule. This is a total of thirty-three years.

Arguments why presidential term limits have become a core of constitutionalism will not be repeated again here since they were highlighted in part III. The issue which might seize the drafters relates to whether the clause providing for term limits should have retrospective application or prospective application. It may be argued that in the spirit of constitutionalism the term limit must be retrospective. The advantage of this is that it cures the mischief towards which the limited term was targeted. The essence of a limited presidential term militates against the proclivity to cling to power which countenances democracy and fosters autocratic rule.⁵²

There is also room for arguing that a constitution which provides for retrospective application in some instances and not in other instances evinces a sleight of hand on the part of drafters. Others have argued that the new constitution should set an age limit to the office of the President. It is submitted that such arguments are driven by political considerations and turn a blind eye to the fact that this would bar potentially brilliant statesman who would have entered politics later in life.

In the final analysis, the constitution should not be used as a platform to fight political battles. Rather, it must evince a desire to address and ameliorate the shortcomings of the past that has led Zimbabwe into the political doldrums. Thus, it is submitted that the new constitution should provide for a presidential term limit which is two terms and has prospective application. This is because the electorate will decide whom they want to lead them as their President. As such, it is unjustified for the drafters to exclude a person solely on the basis of age. Furthermore, the new constitution should provide that the presidential term limit cannot be amended. This is because term limits are now part of the basic structure of the constitution and thus cannot be amended. In any event, Zimbabwe does not suffer

⁵¹ Section 29(1) of the Constitution of Zimbabwe.

⁵² Hatchard op cit note 24 at 64.

from a bankruptcy of leaders. Moreover, it teaches the nation to rely less on the chance occurrence of a good leader and more on the principles which form the bedrock of the state.⁵³

C) The Lancaster Constitution and the control of constitutional amendments

In chapter II it was shown that the Lancaster Constitution of Zimbabwe has undergone extensive constitutional reconfiguration, having been amended 19 times. It was also noted that the net effect of these amendments has been to recast the Lancaster Constitution. The two amendments, namely, Amendments no. 16 and 17 which authorised land reform without compensation and ousted the jurisdiction of the courts have come under scathing criticism. It has been said that they are:

‘... without modern parallel in any constitutional democracy worthy of its name. They set Zimbabwe apart from all members of SADC, the British Commonwealth and the African Union, which function as constitutional democracies. They violate Zimbabwe’s international law obligations, most immediately through its membership of the AU. They entail the abrogation of constitutionalism and elevate fiat of the executive and legislature over the entrenched core provisions of the Constitution. They certify the existence of a totalitarian state’.⁵⁴

The pressing question is: how did this happen? This question and the answers to the question will be interrogated below.

The Lancaster Constitution provides for a special parliamentary majority procedure as well as the publication of the Bill in the *Government Gazette* not less than 30 days prior to parliament voting on the Bill.⁵⁵ Thus, a two-thirds majority is the appropriate special parliamentary majority which has to be garnered in order for the Constitution to be amended.⁵⁶ The House of Assembly may bypass the Senate where the Senate has withheld

⁵³ HK Prempeh ‘Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa’ 35 *Hastings Constitutional Law Quarterly* 761 at 833 available at <http://www.hastingsconlawquarterly.org/archives/V35/14/prempeh.pdf>, accessed on 16 July 2012 [Hereinafter Prempeh, *Presidential Power in Comparative Perspective*].

⁵⁴ Gubbay op cit note 26.

⁵⁵ Section 52(1) of the Constitution of Zimbabwe.

⁵⁶ Section 52(3).

consent to a Constitutional Bill.⁵⁷ However, this can only be done after 180 days have elapsed since the Senate has withheld its consent.⁵⁸ Further, the Constitution provides for specified time lines. That is, a period of 30 days must elapse between the publication of the proposed Constitutional Bill in the *Government Gazette* and its tabling in any of the two houses of parliament.⁵⁹ Notwithstanding this mechanism, amendments which have abrogated the fundamental tenets of constitutionalism have been passed. In light of the foregoing, there is a need for the drafters of the new constitution to devise a mechanism to control constitutional amendments. Some of the mechanisms which the engineers could consider are highlighted below.

Informed by the philosophy of John Locke it has been reasoned that people are the guardians of the constitution, thus they must be involved in the amendment process.⁶⁰ Thus, a “double-locking mechanism” whereby the amendment must not only be supported by a special parliamentary majority, but by the public through a national referendum has been advocated for.⁶¹ In the same vein, Fombad proposes that in the face of the hegemony of monolithic political parties the apposite method would be the one that requires that a certain number of voters vote in favour of the amendment.⁶² This approach is used in the Malawian Constitution which provides that a constitutional amendment to the Bill of Rights can only take place if it obtains the imprimatur of the majority of voters in a referendum.⁶³

The new constitution could be insulated from being brazenly and capriciously amended by inserting strict time lines into the amendment process. The mechanism provided for in the South African Constitution could be instructive. A “cooling-off period” to ensure that a constitutional amendment is not rushed through parliament is provided.⁶⁴

⁵⁷ Section 52(4).

⁵⁸ *Ibid.*

⁵⁹ Section 52(2).

⁶⁰ Hatchard op cit note 24 at 56.

⁶¹ *Ibid* at 56.

⁶² C Fombad ‘Limits on the power to amend Constitutions: Recent trends in Africa and their potential impact on constitutionalism’ (2007) 6 *U. Botswana L.J* 27, 60 [Hereinafter Fombad, *Limits on the power to amend Constitutions*].

⁶³ Section 196 of the Constitution of Malawi.

⁶⁴ Section 74(7) of the Constitution of South Africa.

The “basic structures” or “essential features” doctrine has been advanced as one of the methods which can thwart constitutional amendments which have the effect of undermining the foundations of the constitution. The basic structures doctrine was enunciated and given impetus in the Indian case of *Kesevanda v State of Kerela*.⁶⁵ The majority in that case held that ‘whatever procedure was adopted to amend the Constitution, it could not amend the Constitution so as to abrogate any of its essential features or basic structures’.⁶⁶ The Indian Supreme Court further developed the doctrine in the *Raj Narain* case.⁶⁷ Chandachud J held that: ‘[[t]he Constitution] did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution. ...The word ‘amendment’ postulates that the old Constitution must survive without loss of identity’.⁶⁸

The basic structures doctrine envisages the court engaging in a two-pronged approach, namely stating the chief features of the constitution and then applying these features so as to assess whether the amendment violates essential features.⁶⁹ Although no court in the Anglophone African countries has explicitly embraced the basic structures doctrine, it has been implicitly endorsed.⁷⁰ The basic structures doctrine seems to have been favoured by the Constitutional Court of South Africa in an *obiter* statement in the case of *Premier, KwaZulu Natal and Others v President of the Republic of South Africa and Others*.⁷¹ Mahomed DP noted that:

‘...it may perhaps be that a purported amendment to the Constitution following formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and recognising the fundamental premises might not qualify as an “amendment” at all’.⁷²

The basic structures doctrine was noted in the *UDM* case.⁷³ However, the court found it unnecessary to consider the kinds of amendments that would not qualify as amendments at

⁶⁵ AIR 1973, SC 1461.

⁶⁶ *Ibid* at 1461.

⁶⁷ *Indira Nehru v Raj Narain* (1975) SC 2299.

⁶⁸ *Ibid* at 2461.

⁶⁹ D Morgan ‘The Indian Essential Features Case’ (1981) 30 *Int & Comparative LQ* 307, 316.

⁷⁰ Hatchard op cit note 24 at 55.

⁷¹ 1996 (1) SA 769 (CC).

⁷² *Ibid* para 47.

all. It has been noted that ‘the doctrine is waiting in the wings since, should certain circumstances and a crisis situation arise, its application could be invoked by the Constitutional Court’.⁷⁴ Although no judgment has as of yet expressly endorsed the doctrine, this does not negate the fact that in the face of a pliant legislature, the judiciary may be the sole body that can prevent the Constitution from being brazenly or capriciously amended. However, the doctrine has come under scathing criticism. It has been said that the basic structures doctrine is nebulous and inevitably leads to the executive and the judiciary being on a collision course.⁷⁵ Further, the critic against the ‘basic structures’ doctrine has been that it would have to be divined by the judiciary.⁷⁶ That is, making the doctrine judge-made vests the judges with carte blanche powers to articulate what in their opinion constitutes the basic structure of the constitution.⁷⁷

To prevent the judges divining what constitutes the basic structures of a constitution, the drafters of the new constitution in Zimbabwe could look to the South African Constitution. It has been noted that by specifically protecting section 1 of the South African Constitution, the drafters have determined the basic structures of the Constitution.⁷⁸ The import of this argument is that any amendment which seeks to undermine the values upon which the constitutional order is premised, although constitutionally compliant, would be unconstitutional if it does not conform to section 74(1) of the Constitution of South Africa.⁷⁹ However, the preceding approach has two shortcomings. First, it vests the judges with wide discretion in defining what would constitute a ‘value’ in terms of section 1 of the Constitution. Secondly, it means that a dominant party with the required majority could erode the constitutional order upon which the state was founded, replacing it with a new type

⁷³ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (no2) 2003 (1) SA 495 (CC) See para 15 – 17.

⁷⁴ G Devenish ‘A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law’ (2005) 68 *THRHR* 243, 252.

⁷⁵ J Hatchard ‘The Constitution of Zimbabwe: Towards a Model for Africa?’ (1991) 35 *Journal of African Law* 79, 97 available at <http://www.jstor.org/stable/745495>, accessed on 13 April 2012.

⁷⁶ Morgan op cit note 69 at 308.

⁷⁷ A Henderson ‘Cry, the Beloved Constitution? Constitutional amendment, the vanished imperative of the Constitutional Principles and the controlling values of section 1’ (1997) *SALJ* 542, 553.

⁷⁸ *Ibid* at 554.

⁷⁹ *Ibid* at 551.

of state that was never envisaged. It could be argued that there is certainly nothing wrong if the people through the parliament – their elected representatives – call for such a change. However, this loses sight of the fact that in the age of political party elitism it is doubtful whether parliamentarians indeed are the representatives of the people.

It is submitted that a better approach would be one which couples the threshold required in parliament together with a referendum. Alternatively, the envisaged new constitution could expressly articulate the basic structures of the constitution and provide that these cannot be repealed. The jurisprudential basis for the latter approach is sourced in both international law and natural law.⁸⁰

Therefore, it is submitted that the following can be delineated from international law and natural law as amounting to the basic structures of a constitution: (i) constitutional democracy based on the supremacy of the constitution protected by an independent judiciary; (ii) a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness; (iii) the need for appropriate checks on governmental power; (iv) representative government embracing multi-party democracy, a common voters' roll and in general a mixed electoral system; the protection of the constitution against amendment save through special procedures and processes; (v) a two term presidential limit; (vi) independent oversight institutions that support a constitutional democracy; and (vii) enjoyment of fundamental human rights which are justiciable. Since these features are essential and are irreducible, any amendment which has the effect of frustrating them would be unconstitutional.

Ultimately, whatever the model chosen, sight should not be lost of the fact that the current method which makes the amendment process the prerogative of the parliament has made the Constitution become a play-thing in the hands of the government. This has produced dire consequences for the rubric of constitutionalism. Therefore, it is submitted that the Constitution as the supreme law of the land deserves to be insulated from retrogressive amendments otherwise it is not worth the paper it is written on.

⁸⁰ Devenish op cit note 74 at 251.

D) The Lancaster Constitution and the independence of the judiciary

The independence of the judiciary constitutes one of the hallmarks of constitutional democracy.⁸¹ Mahomed CJ put it succinctly when he said that, '[t]he independence of the judiciary is crucial. It constitutes the ultimate shield against that incremental and invisible corrosion of our moral universe which is more menacing than direct confrontation with visible waves of barbarism.'⁸² It is now trite that an independent judiciary is the bedrock of a constitutional democracy. The existence of an independent judiciary fosters a culture of justification and topples the culture of authoritarianism.⁸³ It has been noted that the judiciary must be independent and perceived to be independent.⁸⁴

Three characteristics have been identified as forming the core of judicial independence. These are: security of tenure; a basic degree of financial security; and institutional independence.⁸⁵ Expanding on these three characteristics the Canadian Supreme Court described a basic degree of financial independence to mean that the judge had to be 'free from arbitrary interference by the executive in a manner that could affect judicial independence'.⁸⁶ Institutional independence was found to encompass independence regarding matters that had a direct bearing on the exercise of judicial function.⁸⁷ In the *De Lange* case⁸⁸ the Constitutional Court of South Africa further defined institutional independence as meaning that judges should be free from the control of the executive branch. It has been propounded that the test for ascertaining the existence of institutional independence is an objective one.⁸⁹ This means that a reasonable and right-minded person should perceive that the judicial officer is independent and no pressure will be brought to

⁸¹ Hatchard op cit note 24 at 317.

⁸² I Mahomed 'The Independence of the Judiciary' (1998) *SALJ* 658, 666.

⁸³ *Ibid* at 660.

⁸⁴ R Mzikamanda 'The Place of the Independence of the Judiciary and the Rule of Law in Democratic Sub-Saharan Africa' Paper Presented on 14 November 2007 at the South Africa Institute for Advanced Constitutional, Public, Human Rights International Law (SAIFAC), Johannesburg, South Africa; full text available at http://www.saifac.org.za/docs/2007/mzikamanda_paper.pdf, accessed on 31 August 2012.

⁸⁵ *R v Valente* (1985) 24 DLR (4th) 161.

⁸⁶ *Ibid* para 180.

⁸⁷ *Ibid* para 187.

⁸⁸ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁸⁹ *Van Rooyen v The State* 2002 (5) SA 246 (CC) para 33.

bear on him. In other words, the judiciary should not only be independent but must also be seen to be independent.⁹⁰

The independence of the judiciary should be guaranteed in the Constitution. Fombad has observed that '[a] formal constitutionally entrenched, independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence'.⁹¹ Thus, a provision vesting the judicial authority exclusively in the judicial organs is a prerequisite to ensure that the judiciary is truly independent. The impact of this argument becomes pronounced when regard is had to the fact that the higher courts protect the lower courts.⁹² That is, 'the greater the protection given to the higher courts, the greater is the protection that all courts have'.⁹³ Therefore, at the very least the independence of the higher courts should be constitutionally entrenched because these courts deal with the 'most sensitive areas of tension between the legislature, the executive and the judiciary'.⁹⁴

The Constitution of Zimbabwe vests the judicial authority in the courts.⁹⁵ However, operating as a claw-back clause, parliament can 'vest adjudicating functions in a person or authority other than a court...'.⁹⁶ Such a provision 'constitutes a serious threat to the independence of the judiciary'.⁹⁷ This is because the legislature may bypass the judiciary on matters of a sensitive nature by relocating judicial functions to partisan bodies. This happened in the case of Roy Bennett who is a Movement for Democratic Change (MDC) Member of Parliament for Chimanimani.⁹⁸

In October 2004 Bennett was convicted and sentenced in terms of the Privileges, Immunities and Powers of Parliament Act. This Act accords judicial functions to Parliament

⁹⁰ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 25.

⁹¹ C Fombad 'The Constitution as a Source of Accountability: The role of Constitutionalism' (2010) 2 *Speculum Juris* 41, 47 [Hereinafter, Fombad, *The Constitution as a Source of Accountability*].

⁹² *Supra* note 89 para 23.

⁹³ *Ibid* para 23.

⁹⁴ *Ibid* para 25.

⁹⁵ Section 79(1) of the Constitution of Zimbabwe.

⁹⁶ Section 79(2).

⁹⁷ L Madhuku 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46 *Journal of African Law* 232, 233, available at <http://www.jstor.org/stable/4141335>, accessed on 16 July 2012.

⁹⁸ The facts are obtained from L van de Vijver *The Judicial Institution In Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 239, 244.

with regard to an act that is judged to be contemptuous. The matter against Roy Bennett arose when, during a parliamentary session on 18 May 2004, Bennett pushed Justice Minister Patrick Chinamasa as well as Minister Didymus Mutasa to the floor. Subsequently, a Parliamentary Committee on Privileges was constituted. The Parliamentary Committee which was heavily dominated by ZANU-PF members recommended that Bennett be sentenced to fifteen months' hard labour, three of which would be suspended. On 28 October 2005 by a vote of 53 to 42 (which was along party lines) the recommendation was acceded to. Having served nine months, Bennett was released in June 2005.⁹⁹ This has the effect of rendering the legislators impotent, and impinging on their right to freely express their views in parliament for fear of reprisal. In a different context, the Supreme Court of Appeal in South Africa declared unconstitutional a resolution through which parliament had suspended one of its members.¹⁰⁰ The court opined that the resolution was unconstitutional because it unreasonably curtailed Ms De Lille's right to freedom of expression in parliament.¹⁰¹

It is submitted that the courts in South Africa have been able to intervene and strike down any exercise of executive which is at odds with the constitution primarily because the constitution exclusively vests the judicial authority in the courts. In light of this, the recommendation by the International Bar Association's Human Rights Institute (IBAHRI) report that the new constitution could adequately safeguard the principle of judicial independence by giving exclusive authority to the courts is apposite.¹⁰²

Judicial independence is secured if the appointment process is permeated by an aura of openness and transparency. Although there is no rule of thumb on how the appointment of judges ought to be made, the process has to be imbued with sufficient checks. The Constitution of Zimbabwe provides that 'the Chief Justice, Deputy Chief Justice, Judge President and other judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission'.¹⁰³ The phrase "after consultation" is defined in section 115(1) to mean that the President is not bound by the

⁹⁹ *Ibid* at 245.

¹⁰⁰ *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA).

¹⁰¹ *Ibid* para 29.

¹⁰² International Bar Association's Human Rights Institute (IBAHRI) *Zimbabwe: Time for a new approach* September 2011, available at http://www.ibanet.org/Search/Default.aspx?q=zimbabwe&page_num=3 accessed on 31 August 2012 [Hereinafter IBAHRI, *Zimbabwe Report*].

¹⁰³ Section 84(2) of the Constitution of Zimbabwe.

advice of the Judicial Service Commission.¹⁰⁴ Further it states that ‘if the appointment of a Chief Justice, Deputy Chief Justice, Judge President or Judge of the Supreme Court or High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1) the President shall cause the Senate to be informed as soon as practicable’.¹⁰⁵ Ultimately, it means that although the President has to hear the advice of the Judicial Service Commission (JSC) he is nonetheless not bound by its advice. Moreover, section 84(2) is redundant because it does not clarify what the Senate is required to do in the circumstances.

Therefore, it appears that the President exercises the final decision as to who is appointed to the bench. Thus, the President is vested with wide discretion when it comes to appointing judges, and this creates the perception that individuals appointed to the bench are likely to do the bidding of the President. It would seem that a salient check on the powers of the President is removed, enabling the President to pack the bench with partisan individuals who are pliant to his/her wishes.

Furthermore, this is at odds with the Latimer House Guidelines.¹⁰⁶ These provide that, ‘in jurisdictions that do not already have an appropriate independent process in place, judicial appointments should be made on merit by a judicial services commission or by an appropriate officer of state acting on the advice of such a commission’.¹⁰⁷ The Namibian model might be instructive to those tasked with engineering a new constitution for Zimbabwe. The Namibian Constitution provides that ‘all appointments of judges to the Supreme Court and High Court shall be made by the President on the recommendation of the JSC...’¹⁰⁸ Thus, judges are insulated from political influence since the President has no discretion but to act on the recommendation of the JSC.

¹⁰⁴ Section 115(1).

¹⁰⁵ Section 84(2).

¹⁰⁶ These were produced by a Joint Colloquium on “Parliamentary Supremacy and Judicial Independence: Towards a Commonwealth Model” which was held at Latimer House in the United Kingdom from 15 to 19 June 1998. The Colloquium was attended by over 60 participants drawn from the judiciary and parliament drawn from 20 Commonwealth countries.

¹⁰⁷ *Ibid* at 3.

¹⁰⁸ Art 82(1) of the Constitution of Namibia.

In a seminal case, the Constitutional Court of South Africa invalidated a legislation that purported to empower the President to extend the tenure of the Chief Justice.¹⁰⁹ The *JASA* case¹¹⁰ illustrates the proposition that judicial independence is a facet of separation of powers which in turn is informed by the rule of law. The subtext underpinning the reasoning of the Constitutional Court appears to have been the perception that would be created if the President was to be allowed to have *carte blanche* powers in extending the tenure of a Constitutional Court judge. In censuring the impugned provision, the court noted that the wide discretion given to the President by the Act had the potential to ‘raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive’.¹¹¹

Through the case it is evident that judicial independence constitutes a fundamental hallmark of constitutionalism. The case shows that the process of extending the tenure of a judicial officer (and by corollary the appointment of a judicial officer) must not vest exclusively in the Executive. The reason is that if the President has wide discretion in appointing judicial officer or extending their terms, the judiciary may be perceived to lack real independence. Furthermore, it may communicate to the public that the judiciary – which is supposed to be the guardian angels ensuring that government complies with the Constitution – is likely to do the bidding of the government. Such a perception not only undermines the integrity of the judiciary but it also stifles the edifice of constitutional democracy.

The body responsible for the appointment of judges has to be independent of the President. The Constitution provides that the JSC is to be composed of six members, who are the Chief Justice, the Attorney-General, the Chairman of the Public Service Commission and a total of three others members appointed by the President.¹¹² It has been contended that this is an example of a body dominated by presidential appointees.¹¹³ This assessment is valid because although the Constitution provides that the President appoints three members directly; the Chief Justice, the Attorney-General and the Chairman of the Public Service Commission are indirectly appointed by the President. Therefore, the prospect of judicial independence in

¹⁰⁹ *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* para 68.

¹¹² Section 90 of the Constitution of Zimbabwe.

¹¹³ Madhuku op cit note 97 at 239.

Zimbabwe is diminished since the JSC is somewhat of a fiefdom of the President. On paper the South African Constitution provides for a greater scope of independence of the judiciary by thwarting political meddling in the composition of the JSC.¹¹⁴ Therefore, it could be instructive to adopt the approach used in South Africa.

The manner in which judges can be removed from office has a bearing on the independence of the judiciary. This is because institutional independence and security of tenure are some of the basic pillars of judicial independence.¹¹⁵ The Latimer House Guidelines limit the removal of a judge to the inability to perform judicial duties and serious misconduct.¹¹⁶ According to the Latimer House Guidelines, such a removal can only be effected after a ruling by an independent and impartial tribunal to that effect. The Constitution distinguishes between the removal of the Chief Justice and the removal of other judges.¹¹⁷ The President is granted power to initiate the removal proceedings of the Chief Justice.¹¹⁸ If the removal does not concern the Chief Justice, it is him/her who advises the President, who then appoints a tribunal.¹¹⁹ Tasking the tribunal with investigating whether or not adequate grounds for removal exist is not only in tandem with the Latimer House Guidelines, it also ensures that judicial officers are not removed at the dictates of the President. Further the President is bound by the tribunal's findings.

Notwithstanding the presence of safeguards in the constitutional text, the government of Zimbabwe has been charged with using extraneous means to remove the judicial officers from office.¹²⁰ In a show of total disregard for the rule of law and manifest disrespect of the court system, on 24 November 2000 a mob of government supporters invaded the buildings of the Supreme Court of Zimbabwe.¹²¹ They waved placards, chanted political slogans and threatened the judges.¹²² Such use of extralegal means has dealt a heavy blow to the

¹¹⁴ Section 178 of the Constitution of South Africa. .

¹¹⁵ *Supra* note 87 at 161.

¹¹⁶ See *Latimer House Guidelines*.

¹¹⁷ Section 87(2) Constitution of Zimbabwe.

¹¹⁸ *Ibid.*

¹¹⁹ Section 87(3).

¹²⁰ Gubbay *op cit* note 26.

¹²¹ L van de Vijver *op cit* note 98 at 252.

¹²² *Ibid.*

independence of the judiciary. As a result of this, the judiciary in Zimbabwe has been damningly assessed as a “cornucopia of contextual irrelevance”.¹²³

The judiciary in Zimbabwe is hamstrung by the Constitution which does not adequately entrench the independence of the judiciary.¹²⁴ The government has employed various stratagems against the judiciary; some legal and others extra-legal.¹²⁵ One such strategy has been through the “campaign of vilification”.¹²⁶ That is, judges viewed as “hostile” to the policies of the government have been hounded out of office so as to pack the bench with pliant judges.¹²⁷ The former Chief Justice of the Supreme Court of Zimbabwe, Anthony Gubbay notes that the government of Zimbabwe has had an avowed policy of appointing, ‘as judges to both the Supreme and High Courts, persons known to be sympathetic to its political ideology’.¹²⁸ Gubbay contends that the government has largely been successful in its avowed policy.¹²⁹

In the year 2000 the government, under the guise of “war veterans”, orchestrated a series of farm invasions.¹³⁰ The Supreme Court invalidated the farm invasions, but the order was disregarded and disobeyed by the government.¹³¹ Gubbay, who was the Chief Justice at that time, notes that the order did not preclude the government from engaging in land reform.¹³² Rather, the Supreme Court was criticising the haphazard and arbitrary manner in which the land resettlement had been implemented.¹³³ The Supreme Court noted:

¹²³ Civil Alliance for Democracy and Governance, *The Rule of Law in Zimbabwe*, 15 February 2006, available at <http://www.kubatana.net/html/archive/demgg/060215cadego.asp?sector=OPIN>, accessed on 31 August 2012.

¹²⁴ Hwalima op cit note 39 at 32.

¹²⁵ S Booysen ‘Dualities of Contemporary Zimbabwean Politics: Constitutionalism versus the Law of Power and the Land, 1999-2002’ (2002) 7 *African Studies Quarterly*, available at <http://web.africa.ufl.edu/asq/v7/v7i2a1.htm>, accessed on 31 August 2012.

¹²⁶ M Meredith ‘*The State of Africa: A history of fifty years of independence*’ (2005) 641 [Hereinafter Meredith, *The State of Africa*].

¹²⁷ *Ibid* at 641.

¹²⁸ Gubbay op cit note 27.

¹²⁹ *Ibid*.

¹³⁰ M Meredith ‘*Mugabe: Power, Plunder and the Struggle for Zimbabwe*’ (2008) 167 [Hereinafter Meredith, *Mugabe*].

¹³¹ Hatchard op cit note 24 at 59 (n7).

¹³² Gubbay op cit note 26.

¹³³ *Ibid*.

Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by government. The activities of the past months must be condemned.¹³⁴

However, the call fell on deaf ears as the government no longer respected the courts. This shows an endemic culture of defying court orders which the government does not favour. It is submitted that respect for the orders of the court are central if the rule of law is to be sustained.

For judicial independence to prevail, Africa requires a mould of political leaders who have respect for the courts. Nelson Mandela, the former President of South Africa is an illustration of a leader upholding the rule of law. In a television broadcast after the Constitutional Court's ruling in the case of *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*¹³⁵ he said:

The Constitutional Court has declared invalid proclamations which I made. At the time I was assured by my legal advisors that I had the authority and power to do so. I fully accept the decision of the Constitutional Court. We all act under the Constitution and I, as President must be the first one to show respect for the Constitution as interpreted by the Constitutional Court.¹³⁶

This statement can be contrasted with that of President Mugabe of Zimbabwe. He said that, 'the courts can do whatever they want, but no judicial decision will stand in our way ... my own position is that we should not even be defending our position in the courts...'¹³⁷ This statement is in stark contrast with that of Mandela and reveals a lack of commitment to the principle of judicial independence. Thus, Africa needs leaders such as Mandela who will show fidelity to the Constitution and accordingly, to the independence of the courts regardless of the outcome of the decision.

The independence of the judiciary is achieved if the remuneration of the judges is secured by law. In terms of the Constitution, salaries of the judges are to be paid from a Fund

¹³⁴ Hatchard op cit note 24 at 59.

¹³⁵ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

¹³⁶ Mzikamanda op cit note 84 at 71 (fn 268).

¹³⁷ Meredith, *The State of Africa* op cit note 126at 641.

administered by Parliament.¹³⁸ However, judges were recently given ad hoc gifts by the executive.¹³⁹ This leads to the view that the courts have been ‘softened’ by the executive so as to do the bidding of the executive. This has given credence to the argument that a *volte face* of the stance of the court on the land reform is as a result of the court accepting these gifts.¹⁴⁰ The IBAHRI report argues that this is incompatible with judicial independence.¹⁴¹ According to the report the appropriate means to tackle deteriorating salaries in the face of spiralling inflation would be to make payments through formalised legislative means.¹⁴²

Independence of the judiciary is secured when the judiciary has administrative and budgetary autonomy. This is because when the government controls the staff and the purse of the judiciary, it amounts to the control of the judiciary. The importance of the courts being in control of its purse strings was noted by the former Chief Justice of South Africa, Justice Ismail Mahomed who observed that if the executive pulled the purse strings:

The courts could easily be reduced to paper tigers with a ferocious capacity to snarl and roar but no teeth with which to bite and no sinews to execute their judgments, which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom or pious poetry.¹⁴³

The Constitution of Ghana provides for a greater scope of judicial independence since the administrative functions are vested in the Chief Justice. In that country the task of ensuring that justice is dispensed efficiently lies with the Independent Judicial Council.¹⁴⁴ The approach in Ghana shows that the Constitution has gone to great lengths to ensure that the judiciary is adequately insulated from political influence. In the context of South Africa it has been realised that having the executive or legislature control the administration of the judiciary constitutes an affront to judicial independence. Thus, the Office of the Chief Justice has been created and vested with power to govern its own administration.¹⁴⁵ This model preserves and secures the independence of the judiciary because of the fact that the judiciary is able to claim its place as a co-equal among the three arms of government.

¹³⁸ Section 88(1) of the Constitution of Zimbabwe.

¹³⁹ IBAHRI, *Zimbabwe Report* op cit note 102 at 36.

¹⁴⁰ Gubbay op cit note 26.

¹⁴¹ IBAHRI, *Zimbabwe Report* op cit note 102 at 36.

¹⁴² *Ibid* at 36.

¹⁴³ Mahomed op cit note 82 at 661.

¹⁴⁴ Art 154(1) of the Constitution of Ghana.

¹⁴⁵ Proclamation 44 of 2010.

It is submitted that giving administrative autonomy to the judiciary ensures that institutional independence is protected. The Constitutional Court in South Africa has identified that administrative independence is inextricably linked to institutional independence.¹⁴⁶ Thus, it would seem that in an instance whereby the executive controls the administration of the judiciary, the prospects of judicial independence diminish considerably.

Therefore, in crafting the new constitution the notion of judicial independence should not be viewed as a by-product of democracy, but as a cornerstone of democracy.¹⁴⁷ This is because of the fact that the judiciary is the least dangerous branch since it has no influence over either the sword or the purse.¹⁴⁸ Thus, if judicial independence is to thrive it needs a constitution which does not merely window dress the independence of the judiciary, but rather entrenches such independence. Ultimately, although the constitution may provide the judiciary with the constitutional power it needs, the extent to which constitutionalism will thrive rests with the judges. Prempeh notes that the ‘philosophic attitudes, background and assumptions, and outlook that judges bring to the task of interpreting the constitutional text’ is determinant on whether constitutionalism will thrive.¹⁴⁹

E) The Lancaster Constitution and the oversight bodies that foster constitutionalism

The United Nations adopted the Paris Principles which calls upon member states to establish national institutions tasked with the mandate to promote and protect human rights.¹⁵⁰ It cannot be gainsaid that Africa, particularly Zimbabwe, is facing a challenge when it comes to accountability. Therefore, accountability can only be fostered if its principles are constitutionalised. That is, every Constitution which is crafted should incorporate institutions

¹⁴⁶ *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) para 98.

¹⁴⁷ Mzikamanda op cit note 84 at 75.

¹⁴⁸ Federalist Papers no. 78, available at <http://avalon.law.yale.edu/medieval/magframe.asp>, accessed on 19 July 2012.

¹⁴⁹ H Prempeh ‘Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa’, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018752&download=yes, accessed on 31 August 2012 [hereinafter Prempeh, *Marbury in Africa*].

¹⁵⁰ United Nations Principles Relating to the Status of National Institutions adopted by the United Nations as an Annex to General Assembly resolution 48/134 of 20 December 1993 [hereinafter *Paris Principles*].

which promote accountability.¹⁵¹ Therefore, accountability should not be an afterthought but has to be construed as part and parcel of constitutionalism.

Institutions that foster accountability constitute a fundamental tenet of constitutionalism. These institutions include *inter alia*, the Ombudsman; the Human rights commission; the Anti-corruption commission; the Auditor-General; the Electoral commission; the Media commission; the Independent Prosecuting authority and the Judicial service commission.¹⁵² The envisaged new constitution should provide for the inclusion of these oversight institutions. This is because the non-existence of these institutions undermines the promotion of constitutionalism and accountability.

The subsequent discussion on these institutions will be confined to the following institutions namely; the Public Protector; the Human Rights Commission; and the Electoral Commission. The choice of these institutions is not because there ought to be a hierarchy amongst oversight institutions, but it is because of a two-fold rationale. First, the arguments made with regard to these three institutions apply with greater force to other oversight institutions. Secondly, the context of the country of analysis necessitates the discussion. The country has been said to have a culture of human rights abuse; a system of government which is based on patronage and corruption; and elections which have been marred by violence and fraud.

The Constitution of Zimbabwe establishes the office of the Public Protector.¹⁵³ In terms of that section the Public Protector is appointed after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.¹⁵⁴ This provision may be criticised for granting the President *carte blanche* in the appointment process. This is as a result of the fact that the phrase “after consultation” has to be interpreted to mean that the President is not bound by the advice of the JSC and the Committee on Standing Rules and Orders.¹⁵⁵ It is submitted that a better approach is the one provided in the Constitution of South Africa.¹⁵⁶ Section 193 provides that the legislature be involved in the appointment

¹⁵¹ Fombad, *The Constitution as a Source of Accountability* op cit note 91 at 58.

¹⁵² C Fombad ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2011) 59 *Buff. L. Rev* 1007, 1046 [hereinafter Fombad, *Constitutional Reforms*].

¹⁵³ Section 107 of the Constitution of Zimbabwe.

¹⁵⁴ Section 107(2).

¹⁵⁵ Section 115.

¹⁵⁶ Section 193 of the Constitution of South Africa.

process. However, a shortcoming of the South African constitutional context is the distinction it makes between the appointment of the Public Protector and the Auditor-General, and the rest of the commissioners of other oversight institutions. The Constitution of South Africa requires a special majority in the appointment of the Public Protector and the Auditor-General,¹⁵⁷ while a simple majority would suffice in the appointment of other commissioners.¹⁵⁸ It has been argued that this might have the ‘unintended consequence of creating a hierarchy of Chapter 9 institutions’.¹⁵⁹

It is submitted that the new constitution should not make a distinction in the appointment of commissioners. An appropriate process would be one which divests the President of the wide discretion he possesses, and provide for the involvement of the entire legislature in the process. In the age of dominant political party rule, this ensures that the voices of minority parties are heard. It also curbs the appointment of individuals who are perceived to be compliant to the diktat of politicians.

The Public Protector may be removed from office if found unable to discharge the functions of office.¹⁶⁰ The body tasked with making such a finding is a tribunal which is composed of a chairman (who is supposed to be or has been a judge of the Supreme Court or High Court) and two members appointed by the President.¹⁶¹ It is submitted that this process is flawed. A better method would be the one which fetters the discretion of the President by providing for the involvement of the legislature in the removal process. This would ensure that the tenure of office of the Public Protector, and other commissioners of oversight institutions, is secured since their ‘office inherently entails investigation of sensitive and potentially embarrassing affairs of government’.¹⁶²

The Constitution of Zimbabwe provides that the tenure of office of the Public Protector would be determined in terms of national legislation. It is submitted that the tenure of office should not be left to the design of the legislature, but should be expressly entrenched in the

¹⁵⁷ Section 193(5)(b)(i).

¹⁵⁸ Section 193(5)(b)(ii).

¹⁵⁹ K Govender ‘The reappraisal and restructuring of Chapter 9 institutions’ (2007) 22 *SAPL* 190, 197 [hereinafter Govender, *The reappraisal and restructuring*].

¹⁶⁰ Section 110(4) of the Constitution of Zimbabwe.

¹⁶¹ Section 110(5).

¹⁶² *Certification of the Constitution of the Republic of South Africa, 1966, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC) para 824.

constitution. In that regard, the tenure of office for the Public Protector (as well as commissioners of other oversight institutions) should be a non-renewable term which is reasonably long. This is advantageous as it achieves the twin goals of providing incumbents with security of tenure while simultaneously ensuring that expertise and experience is retained in the institution.¹⁶³ The defect with a renewable term is that it might have the consequences of bringing pressure to bear on the incumbent. Further, the appointment of commissioners should be on a ‘staggered basis’.¹⁶⁴ The advantage of this is that it prevents a situation whereby commissioners leave simultaneously, thereby resulting in the loss of experience and expertise.

However, as the South African context indicates, the ultimate success of the office of the Public Protector (or any of the other oversight institutions) rests on the appointees staffing them. Those tasked with leading these institutions should display independence, impartiality and competence. These attributes bolster the public perception that these oversight institutions are able to act as a sufficient counterweight against abuse of power by those in positions of government. Whereas, docility and timidity by those at the helm of these bodies creates the perception that the last line of defence against arbitrary exercise of power is weak. This perception stifles the chances of constitutionalism succeeding.

The veracity of the preceding comments is highlighted by the manner in which the office of the Public Protector in South Africa has fared. Under the current Public Protector Advocate Thuli Madonsela public confidence in the institution has buoyed. This is evident by the number of complaints her office has received.¹⁶⁵ Furthermore, through some of her findings she has made immense contributions to constitutionalism.¹⁶⁶ She has certainly heeded to the advice given by the Supreme Court of Appeal to her predecessor.¹⁶⁷ The court stressed that the Constitution guarantees that the office of the Public Protector must exercise

¹⁶³ Hatchard et al op cit note 24 at 216.

¹⁶⁴ Govender, *The reappraisal and restructuring* op cit note 159 at 199.

¹⁶⁵

¹⁶⁶The finding by the Public Protector that the South African Police Service and the Department of Public Works acted unlawfully and unconstitutionally in signing a lease agreement. This finding has led to the sacking of Police Commissioner Bheki Cele. See www.news24.com/SouthAfrica/News/Bheki-Cele-fired-20120612.

¹⁶⁷ *Public Protector v Mail and Guardian Ltd* 2011(4) SA 420 (SCA) where the court found that the decision by the Public Protector not to investigate the transaction between Imvume and the ANC was out of kilter with the injunctions of the Constitution.

its powers ‘without fear, favour of prejudice’.¹⁶⁸ It was advised that these powers could only be fulfilled if the Public Protector acted courageously, vigilantly and purposefully.¹⁶⁹

Hitherto, the electoral situation in Zimbabwe has been marred by violence and fraud. The electoral system in Zimbabwe is out of kilter with international best standards which have progressed towards election commissions being autonomous and independent of the state. Sachikonye has noted that the ‘institutional framework of electoral management is a cumbersome framework with multiple actors’.¹⁷⁰ Briefly, the institutional framework consisted of the Delimitation Commission, the Electoral Supervisory Commission, Election Directorate and Registrar General’s Office. Out of these, the Registrar General was ‘actually the key player in the electoral processes’.¹⁷¹

This compromised the entire system of the electoral system because the Registrar General was a civil servant whose impartiality and independence from the state has been highly questionable. Thus, Zimbabwe has not complied with the SADC Principles and Guidelines Governing Democratic Elections which call for the establishment of impartial, competent and accountable national electoral bodies.¹⁷² The voter’s roll is in a shambles¹⁷³ and the delimitation of boundaries has been politicised.¹⁷⁴ This has led to elections in Zimbabwe, like those in other parts of Africa, being ‘little more than a theatrical setting for the self-representation and self-reproduction of power’.¹⁷⁵

Currently, the Zimbabwe Electoral Commission (ZEC) is the body responsible for the handling of elections in Zimbabwe.¹⁷⁶ The appointment process used for the ZEC is akin to

¹⁶⁸ *Ibid* para 8.

¹⁶⁹ *Idem*.

¹⁷⁰ L Sachikonye ‘Constitutionalism, the electoral systems and challenges for governance and stability in Zimbabwe’ (2004) 4 *African Journal on Conflict Resolution* 171, 182.

¹⁷¹ *Ibid* at 184.

¹⁷² Clause 7.3 of the SADC Principles Governing Democratic Elections.

¹⁷³ N Jena ‘Zimbabwe: Ian Smith’s Name Still On Voter’s Roll - ZEC’, *AllAfrica.com*, 9 September 2012 available at <http://allafrica.com/stories/201209090437.html>, accessed on 9 September 2012.

¹⁷⁴ Meredith, *Mugabe* op cit note 130 at 228.

¹⁷⁵ Fombad, *Constitutional Reforms* op cit 152 note at 20, citing A Schedler ‘The menu of manipulation’ (2002) 13 *Journal of Democracy* 47.

¹⁷⁶ Section 100B of the Constitution of Zimbabwe inserted by section 11 of Act No. 1 of 2009 (19th Amendment).

that utilised for the appointment of the Public Protector.¹⁷⁷ Therefore, the criticism given against the appointment process of the Public Protector also applies. It could be added that the approach in South Africa by providing that the committee tasked with appointing members be proportionally composed of members from all parties represented in the Assembly ensures that the committee is not staffed by the majority party.

Differing markedly from the removal of the Public Protector where a tribunal has to be constituted, a commissioner of the ZEC may be removed by the President if the JSC and the Committee on Standing Rules and Orders approves.¹⁷⁸ The grounds which may trigger removal are namely the inability to exercise the functions of office; misconduct; incompetence; or disqualification.¹⁷⁹ It is submitted that this approach does not properly insulate the commissioners from political pressure and does not adequately secure the tenure of office. The approach in Malawi could be an inspiration to the drafters of the new constitution. The removal process is removed from the presidency and the President's role is that of formal endorsement after the process has been completed.¹⁸⁰ Alternatively, the constitution could follow the approach in South Africa which envisages a three stage process in the removal of commissioners.¹⁸¹ Since the President is enjoined to abide by the decision of the National Assembly it has been submitted that the discretion of the President in the Constitution of South Africa is 'purely mechanical'.¹⁸²

A salient question for consideration is whether the removal of a commissioner should be justiciable. Govender submits that judicial oversight over the removal process is advantageous because it ensures that the power to remove is exercised in accordance with the strictures of the constitution.¹⁸³ Therefore, the process should not be beyond the reach of the law, but courts could enquire into the decision albeit with a measure of respect or deference. The utility of embracing the principle of legality becomes apparent in this regard. The

¹⁷⁷ Section 100B(1) of the Constitution of Zimbabwe.

¹⁷⁸ Section 100G.

¹⁷⁹ Section 100G(a) - (d).

¹⁸⁰ Section 75(4) of the Constitution of Malawi.

¹⁸¹ Section 194(3)(b) of the Constitution of South Africa.

¹⁸² K Govender 'The South African Human Rights Commission' in P Andrews (ed) *The post-apartheid constitutions: perspectives on South African basic law* (2001) 571, 577 [Hereinafter Govender, *The South African Human Rights Commission*].

¹⁸³ *Ibid* at 578.

principle of legality would ensure that the level of scrutiny is less exacting as it will be confined to rationality. Such a requirement will ensure that the commissioners do enjoy independence and are properly insulated from political persecution.

The tenure of office for commissioners in the ZEC is two terms.¹⁸⁴ However, an evident shortcoming in this provision is that the term is renewable after a period of six years. It is submitted that a non-renewable term is to be favoured since a renewable term might bring pressure to bear on the incumbent. In so far as the Constitution has dealt with the Zimbabwe Human Rights Commission, it has attempted to conform to the international standards.¹⁸⁵ To a significant extent it achieves this, but there are certain shortcomings identifiable in that section. One such example is the appointment process which grants the President unfettered discretion in the appointment of commissioners. It has been highlighted in the preceding analysis that this is incompatible with the independence requirement made salient in the Paris Principles. In terms of the Paris Principles, guarantees must exist which would 'ensure the pluralist representation of the social forces [of civilian society] involved in the protection and promotion of human rights'.¹⁸⁶

In chapter III it was observed that oversight institutions can only have a measure of independence and impartiality if members staffing it are independent appointees who enjoy satisfactory conditions of employment, and they are in an institution which is funded adequately and resourced properly. Therefore, in light of the analysis a few recommendations would suffice.

First, it is imperative that individuals appointed to these institutions not only be independent but also be perceived to be independent. This could be ensured by making sure that the appointment process is imbued with sufficient checks. It was highlighted above that one such way would be to make the process far removed from the executive. Secondly, the process of removing commissioners of these institutions should be circumscribed. The merit in such an approach is that the commissioners would do their work without fear of being removed from office. Thirdly, the commissioners should be able to enjoy satisfactory conditions of employment. This could be achieved by making their salary not subject to

¹⁸⁴ Section 100B (5) of the Constitution of Zimbabwe.

¹⁸⁵ Section 100R.

¹⁸⁶ Paris Principles.

reduction. Also, the tenure of office should be a reasonably long period which is non-renewable.

Lastly, oversight institutions should have administrative and budgetary autonomy. The rationale for this is that controlling the purse strings and staff of an institution inevitably amounts to controlling the institution itself. It is not being argued here that the oversight institutions should not be accountable. Rather, what is being contended is that accountability does not equate to supervision. This distinction was recognised in the case of the *New National Party of South Africa v Government of the Republic of South Africa*.¹⁸⁷ The Court held that the oversight institutions were not state departments.¹⁸⁸ Further, it was found that independence entailed both financial independence and administrative independence.¹⁸⁹ The court defined financial independence to mean that the institution must be sufficiently funded in order for it to fulfil its mandate.¹⁹⁰ It was stated that Parliament, and not the executive was the arm enjoined to determine the budget of these institutions.¹⁹¹ Administrative independence was defined as affording the institutions the requisite powers to administer control over matters that were directly connected to its mandate.¹⁹²

Ultimately, although the Constitution of Zimbabwe does establish some of these oversight institutions, they are yet to make significant gains. This can be attributed to the fact that the functions of these institutions are limited in scope, thus rendering their powers illusory. Furthermore, there has been lack of political will by the government to promote and protect the institutional independence of these oversight bodies. This stems from the perception that these bodies are “hostile”¹⁹³ and as such their powers have to be limited.

The preceding analysis demonstrates the dearth of independent oversight institutions which are prerequisites if the ethos of constitutionalism is to take root in Zimbabwe.¹⁹⁴ In

¹⁸⁷ 1999 (3) SA 191 (CC).

¹⁸⁸ *Ibid* para 88.

¹⁸⁹ *Ibid* para 98 – 99.

¹⁹⁰ *Idem*.

¹⁹¹ *Idem*.

¹⁹² *Ibid* para 99.

¹⁹³ Prempeh, *Presidential Power in Comparative Perspective* op cit note 53 at 831.

¹⁹⁴ C Fombad ‘Post-1990 Constitutional Reforms in Africa A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism’ in A Nhema & P Zeleza (eds) *The Resolution of African Conflicts* (2008) 179, 194.

sum, if real independence for these institutions is to be secured, the new constitution should ensure that the basic structure of these institutions is detailed in the constitution; these institutions have wide powers to ensure that they are both reactive and proactive; and these institutions are accessible to the poor and marginalised in the society.¹⁹⁵ Zimbabwe continues to falter under the colossal weight of presidential absolutism. However, the presence of independent oversight institutions vested with real powers might act as a counterpoise to presidential hegemony which has held the advancement of constitutionalism hostage.¹⁹⁶

F) Conclusion

This chapter has shown that the Constitution of Zimbabwe is a ‘constitution without constitutionalism’.¹⁹⁷ The Constitution has all the trappings of legality and the veneer of constitutionalism. For instance, the Constitution provides for a semblance of separation of powers which envisages an effective legislature and an independent judiciary. However, the reality starkly contradicts this and unmask the Constitution of Zimbabwe for what it is – ‘an instrument for autocratic control, legitimising rather than preventing arbitrary power’.¹⁹⁸ Through a series of amendments to the constitution, power has been centralised in the executive branch of government.¹⁹⁹ The judiciary has been cowed into submission and the legislature has been reduced to a rubber stamp body of the executive.

Thus, the constitutional drafting process presents an opportune moment not only of crafting a new document but also of creating a document imbued with constitutionalism.²⁰⁰ There is no gainsaying that constitutionalism, good governance and sustainable development is the quest to which Zimbabwe and the whole of Africa is striving.²⁰¹ Therefore, if this is to be achieved, the Constitution of Zimbabwe has to undergo a legitimate seismic shift towards constitutionalism. Tentatively the new constitution should provide for separation of powers entrenching checks and balances; an independent judiciary which is exclusively vested with

¹⁹⁵ Fombad, *The Constitution as a Source of Accountability* op cit note 91 at 61.

¹⁹⁶ Prempeh, *Presidential Power in Comparative Perspective* op cit note 53 at 832.

¹⁹⁷ H Okoth-Ogendo ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3, 3.

¹⁹⁸ Alex Magaisa ‘Constitutionality versus constitutionalism: Lessons for Zimbabwe’s constitutional reform process’ 51, 52, available at <http://kar.kent.ac.uk/30495/1/Submission4.pdf>, accessed on 30 April 2012.

¹⁹⁹ *Ibid* at 52.

²⁰⁰ *Ibid*.

²⁰¹ Hatchard op cit note 24 at 2.

adjudicatory functions; presidential term limits; independent oversight bodies and a cumbersome constitutional amendment process.

V CONCLUSION

James Madison once remarked that: ‘If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary’.²⁰² The reality however, is that men govern over men, and thus the perennial problem has been how to create controls on the power of those who govern while at the same time ensuring that government is not rendered impotent. This dissertation has shown that constitutionalism provides the answer. Constitutionalism ensures equilibrium between two desires, namely that the government does not become tyrannical and that it is not pushed to paralysis.

In summary, this dissertation has considered the fundamental tenets which have crystallised into the core elements of constitutionalism. The core elements of constitutionalism have been identified in chapter III as including, (i) the provision for the recognition of fundamental human rights; (ii) the separation of powers; (iii) presidential term limits; (iv) the independence of the judiciary; (v) the review of the constitutionality of laws; (vi) controlling amendment of the constitution; and (vii) establishment of oversight bodies. Further, the dissertation has highlighted that rule of law is a *conditio sine qua non* for constitutionalism. In the same vein, an argument to the effect that constitutionalism and democracy are interdependent has been made.

After the core elements of constitutionalism were identified and discussed, an analysis of the Constitution of Zimbabwe was conducted. Although the Constitution has the veneer of constitutionalism, it was found in substance to lack these attributes. It was found that the current constitution undermines the doctrine of separation of powers. Ideally, the balance of power between the three arms of government has to be maintained at equilibrium. However, the Constitution of Zimbabwe does the exact opposite of this. Power has been skewed in favour of the executive arm of government. In analysing the constitution it has been noted that not incorporating a presidential term limit in the constitution has provided a breeding ground for a system of government based on patronage. The analysis has found that the dearth of constitutionalism in Zimbabwe has been as a result of the accumulation of the absence of constitutional provisions entrenching the independence of the judiciary; lack of a

²⁰² Federalist Papers no. 51, available at <http://avalon.law.yale.edu/medieval/magframe.asp>, accessed on 19 July 2012.

fortified process in amending the constitution; and the non-existence of independent oversight institutions monitoring the exercise of public power.

Therefore, if the new constitution is ‘to create the preconditions for a well-functioning democratic order’²⁰³ it must make a number of salient constitutional reforms. First, the anticipated constitution should provide for a system of separation of powers which entrenches checks and balances. The constitution should curb the excessive powers arrogated by the president allowing for impunity and patronage. This can be done through limiting the powers of the president in making key appointments. Another way through which unbridled executive powers could be controlled is by term limiting the tenure of the President. It is submitted that entrenching two terms as the maximum number of terms an incumbent may be in office as President, curbs the proclivity to cling to power which accentuates autocracy. Also, the principle of legality which has been used in South Africa can be adopted. The principle of legality will ensure that the power to pardon or the exercise of any other public power is transformed from being based on personal favour to being one sourced in accordance with the injunctions of the constitution.

Secondly, to ensure that the judiciary is not the hand-maiden of the executive, the body responsible in the appointment process should be independent of political interference. This can be ensured through reducing the number of political appointees in the body. The independence of the judiciary can be augmented by allowing the judiciary to control its own administration and finances. Currently, the judiciary has to go cap in hand to the government seeking alms. This greatly undermines the prospects of judicial independence. Therefore, it is submitted that the new constitution should provide the judiciary with administrative and budgetary autonomy.

Thirdly, oversight bodies which foster constitutionalism should be established. To ensure the independence of these institutions and curb political meddling, their powers should be entrenched in the constitution. The appointment and removal process of commissioners staffing these bodies should at the very least be removed from the terrain of the Presidency. Furthermore, the provisions dealing with the powers of these institutions must be couched in both positive and negative imperatives. That is, the other arms of government should be enjoined to assist these institutions in fulfilling their mandate. This provides scope for the

²⁰³ C Sunstein ‘Designing Democracy. What Constitutions Do’ 1 ed (2001) 6.

entering into of Memorandum of Understandings between the institutions and government departments with the latter pledging not to impede the former in fulfilling its objectives.

Lastly, to prevent the constitution from being a play-thing in the hands of the government, the process providing for the amendment of the constitution should be more cumbersome.²⁰⁴ Towards this end, the constitution could provide that certain provisions can only be amended if a threshold of voters approve of it in a referendum. Further, the Constitution could explicitly embrace the basic structures doctrine. This will ensure that constitutional amendments which undermine the structure of the constitution do not pass constitutional muster.

Certainly, three decades after Zimbabwe attained independence, a ‘constitution without constitutionalism’²⁰⁵ is now anachronistic. What is needed is a constitution which fosters constitutionalism by recognising that there are fundamental tenets which are foundational in a democratic political order. Ultimately, for constitutionalism to take root, what is required is a new mindset on the part of those in government.²⁰⁶ This new mindset should hold dear the fundamental tenets of constitutionalism. Otherwise failure to do that will mean that the country will continue to wobble under political conundrums in perpetuity. This is because it is only ‘[o]nce a country has crossed the constitutionalism Rubicon [that] the chances of backsliding into anarchy or dictatorship are considerably reduced’.²⁰⁷

²⁰⁴ J Hatchard et al *Comparative Constitutionalism and Good Governance* (2004), 321.

²⁰⁵ H Okoth-Ogendo ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’ in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3, 3.

²⁰⁶ T Hwalima ‘The Rule of Law and Separation of Powers in South Africa and Zimbabwe, a Comparative Study’ 34, available at http://www.africalegalbrief.com/attachments/article/176/Constitutional_Law_Paper.pdf

²⁰⁷ C Fombad ‘Post-1990 Constitutional Reforms in Africa A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism’ in A Nhema & P Zeleza (eds) *The Resolution of African Conflicts* (2008) 179,196.

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