PRESIDENTIAL POWER AND THE DRAFT CONSTITUTION

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The position and powers of the President under the constitution have been a matter of some controversy since the introduction of an executive presidency by way of a constitutional amendment in 1987. It was a prominent issue in the constitutional referendum in 2000 (excessive presidential power has been cited as a key factor leading to the rejection of the proposed constitution in that referendum); it was a major sticking point in negotiations leading to the constitutional amendment (No. 19) which established the current Inclusive Government; and it was a focal point in negotiations around the present draft. The ZANU PF negotiators argued for a powerful executive presidency, while the MDC formations, though accepting an executive presidency, argued that Parliament ought to exercise some powers concurrently with the President to check and balance executive authority. As will be seen in the outline which follows, it is the ZANU PF approach which has largely prevailed.

The Post of President.

a) Qualifications

The person occupying this post is the Head of State and Government and the Commander-in-Chief of the Defence Forces, and receives such salary, allowances, and pension as may be set by an Act of Parliament. To qualify as an aspirant to this position, a person must be a citizen of Zimbabwe by birth or descent, have attained the age of forty years, and be ordinarily resident in Zimbabwe. These provisions are repeated in the draft constitution and supplemented by two additional requirements. One is that the aspirant must be a registered voter; the other is that the prospective candidate must not have already held office as President under the constitution for two terms (section 91).

The question of term limits for state Presidents is controversial. On the one hand it is argued that term limits restrict democratic choice and may be against the clear wishes of an electorate which may want a highly popular and exceptionally competent President continue in office. On the other hand, proponents believe that the longer a person remains in office as president, the greater the danger that the incumbent will use the considerable powers vested in this post to entrench him or herself in the position through the development of a web of patronage and other abuses of power. The essence of the rule of law is that good governance is determined more by the constitutional machinery in place than the nature of the person who pulls the levers.

The draft constitution proposes term limits only for a person who has held office as president "under this constitution" for two terms. The reasoning behind term limits is unaffected by the constitution under which they are served. It is clear that the clause has been drafted specifically to allow the current president, Robert Mugabe, to stand in the next election, even though, having been head of state for over 30 years, the reasoning behind terms limits applies *a fortiori* to him. Since constitutions are usually intended to last for generations, it is generally considered to be unwise to craft a document around the needs of a specific individual. The explanation offered by the drafters is that Mugabe was accommodated because the law ought not to operate retroactively to exclude him from standing as president in the next election. However, this is to distort what is meant by the general rule against the retroactive operation of the law.

The rule against retroactivity is to prevent the application of a law to events that took place before the law was enacted. Hence the law would be retroactive in operation if the provision came into effect before the next election and Mugabe was asked to step down as president before that election because he does not meet the qualification requirements of a presidential candidate set by the new constitution, and is thus held (retroactively) disqualified as a candidate in the 2008 election. However, the proposed term limit provision would not retroactively affect Mugabe's qualification as a candidate in the last election, and render his candidacy in 2008 invalid. The provision will only affect those seeking to stand for election as president in the next and future elections. There is nothing retroactive about a law which sets the qualifications for candidates in future elections, and laws setting new qualifications for people seeking to take up particular posts are validly and frequently enacted in all jurisdictions. Similar considerations apply to the proposal that a person should be disqualified from standing for election as president if over the age of 70. This suggestion likewise seems to have been excluded from the draft to accommodate Mugabe, again wrongly using the claim concerning retroactivity.

b) Term of office.

As with the present constitution, the draft proposes synchronised elections for local government, the Houses of Parliament and the Presidency (section 158). The term of office of the President is coterminous with the life of Parliament, which in the normal course of events will remain as five years (section 95). The draft proposes a change as to the date of assumption of office by the President following an election. Whereas under the current constitution the President enters office on the day he is declared the winner of the election, or in any event no later than 48 hours thereafter, the draft proposes a delay of nine days between the announcement of the election result and the assumption of office (section 94). The intention is to delay entry into office until the expiry of the seven day period allowed for any aggrieved party to lodge a petition challenging the election of the President. The Constitutional Court must determine a presidential election petition within 14 days (section 93).

If the petition is unsuccessful the President must assume office within 48 hours of the ruling by the Constitutional Court. The incumbent President remains in office until the assumption of office by the next president. If the Constitutional Court upholds the petition, but rather than declaring a winner, invalidates the election, a fresh election must be held within 60 days (section 93). Accordingly, an incumbent President who "wins" an election subsequently ruled invalid may nonetheless remain in office for 74 days following the vitiated election. The possibility also exists that the second

election (and subsequent elections) is likewise ruled invalid. Throughout this period the incumbent will remain in office. While stipulating that the election of the President must take place concurrently with every general election of Members of Parliament, the draft constitution does not, as it perhaps ought, add the proviso that this provision does not apply to any re-run of an election ordered by the Constitutional Court.

The draft proposes no change to the manner in which the President's office becomes vacant prior to the end of the presidential term. The vacancy may occur through death, resignation, or removal from office (section 101). The last will occur if the Senate and the National Assembly (the House of Assembly under the current constitution) resolve, by a joint resolution passed by at least two-thirds of their total membership, that the President should be removed from office. The grounds for removal (which must be recommended by an investigative joint committee of Parliament formed for this purpose) are:

- serious misconduct;
- failure to obey, uphold or defend the Constitution;
- wilful violation of the Constitution;
- or the inability to perform the functions of the office because of physical or mental disability (section 97).

Since synchronised elections are maintained under the draft, it is improbable that two-thirds of the Members of both Houses of Parliament will belong to a different party to that of the President. Accordingly, a president will not be removed from office in this manner unless a substantial number of Members of Parliament from the same political party as the President become disaffected. Furthermore, since upon removal a Vice-President (chosen by the President) will take over, the impeachment of the President in this way may not result in a major policy shift.

It is worth noting that under the current constitution the President may choose to resign after a vote of no confidence in the Government supported by two-thirds of the members of both Houses. The draft removes this option, restricting the choices of the President after a vote of no confidence in the Government to removing every Vice-President, Minister and Deputy Minister from office, or dissolving Parliament (and thus facing the electorate). Although this seems to tip the balance of power between a democratically elected president and a mostly democratically elected Parliament (some members, traditional chiefs, hold office *ex officio*) in favour of the former, recall that the President may be removed from office if members are able to muster the same two-thirds majority required for the vote of no confidence.

As under the current constitution, the draft proposes that the President enjoy immunity from any criminal or civil suit against him in his personal capacity while in office (section 98). This provision is reasonable in that it prevents political opponents from hindering the President in the function of his duties through extensive and vexatious litigation. The protection falls away once the President leaves office. A President may then be sued for things done or omitted to be done during his or her term of office. However, following objections from ZANU PF, this will not apply to acts and omissions done in an official, as well as personal, capacity as was provided for in earlier drafts.

The President and Executive Authority

a) General Executive Authority

Many of the general executive powers of the President set out in the current constitution have been retained in the draft. The draft includes the following powers:

- to assent to and sign Bills;
- to make appointments which the Constitution or legislation requires the President to make;
- to call referendums on any matter in accordance with the law; to confer honours and awards;
- to receive and recognise foreign diplomatic and consular representatives;
- to conclude or execute conventions, treaties and agreements with foreign states and governments and international organisations;
- to summon the National Assembly, the Senate or Parliament to an extraordinary sitting to conduct special business;
- to call elections in terms of the Constitution; to deploy the Defence Forces; to exercise the prerogative of mercy and to declare a state of emergency (section 110).

b) The Declaration of States of Emergency

The draft makes a small change to the power of the President to declare a state of emergency. As with the current constitution, the need for Parliamentary approval of states of emergency within 14 days of the declaration is retained, though the approval must now be by both Houses and not just the National Assembly. However, the draft further provides that the Constitutional Court, on the application of any interested person, may determine the validity of a declaration of a state of public emergency or any extension thereof and any court may determine the validity of any legislation enacted, or other action taken, in consequence of a declaration of a state of public emergency (section 113).

c) The Prerogative of Mercy

The draft does not alter the presidential prerogative of mercy in any way. This prerogative, exercised after consultation with the cabinet, includes the power to grant pardons and to substitute a less severe punishment or suspend the punishment imposed on any person convicted of an offence (section 112).

d) The Power to Conclude International Treaties

International treaties concluded by the President do not bind Zimbabwe until approved (unless exempted from approval) by Parliament and do not form part of the law of Zimbabwe unless incorporated into the law through an Act of Parliament. The draft does not propose any change to Presidential power in this respect (section 327(2)).

e) The Nature of Presidential Executive Authority

There was some debate during negotiations over the draft about the general nature of the executive authority of the President. This is reflected in the different formulations

appearing in prior drafts. The final draft provides that "*The executive authority of Zimbabwe vests in the President who exercises it, subject to this Constitution, through the Cabinet*".

In both the current constitution and the draft, in the exercise of his or her executive functions, unless otherwise stated, the President must act on the advice of the Cabinet (section 110(6)).

However, under the current constitution, the courts are precluded from enquiring into the nature of any advice or recommendation tendered to the President or the manner in which the President has exercised his or her discretion after receiving such advice (section 31K). The President can thus effectively ignore the requirement of acting on the advice of cabinet. The draft constitution omits this provision suggesting that the courts will be able to enquire into the manner in which the president exercises his or her discretion and thus suggesting the possibility of greater presidential accountability in this regard.

f) Presidential Powers of Appointment.

Many of the extensive powers of the President under the current dispensation derive from the President's power to make appointments to the many arms of government. This power is located not only in the Constitution, but also in various Acts of Parliament – for example, the Governor of the Reserve Bank is appointed by the President in terms of the Reserve Bank of Zimbabwe Act.

The interim constitutional clauses establishing the inclusive government attempted to dilute this unfettered power by providing that appointments the President is required to make under the Constitution or any Act of Parliament must be made after securing the agreement and consent of the Prime Minister. There is no equivalent provision in terms of the draft, and the generally unfettered discretion of the President is restored. However, there is a stipulation that appointments "*to offices in all tiers of government, including government institutions and agencies and government-controlled entities and other public enterprises, must be made primarily on the basis of merit*" (what factors other than merit may thus be taken into account is not stated), and to require that persons considered for appointment to particular positions hold particular qualifications. Furthermore, in most instances when making an appointment to a public office, the President must do so only "*after consultation with*" the Minister under whose purview the appointment may fall. The definition of "after consultation with" which appeared in earlier drafts has been removed. The definition held that the phrase meant that the President need not act on any advice tendered or recommendation made during the consultation, but must inform the person or body to be consulted, in writing, what he or she proposes to do, allow the person or body an opportunity to make recommendations or representations about the proposal and give careful consideration to the response.

Under the draft constitution, in addition to appointments made under other statutes, the President will appoint: the Vice-Presidents all Ministers, the Cabinet, Permanent Secretaries, Ambassadors and Diplomats, Judges, the Attorney-General, the Prosecutor-General, the Auditor-General, all Commissioners to all Commissions; the Citizenship and Immigration Board, Traditional Chiefs, and the Heads of all Security Services.

i) Vice-Presidents

For the first ten years after adoption of the draft, the current provisions in relation it the appointment of vice-presidents is retained (Sixth Schedule, Part 4 Paragraph 14). In terms of these provisions, the president must upon election appoint "not more than" two vice-presidents. Furthermore, during this ten year period "if a vacancy occurs in the office of the President" it "must be filled by a nominee of the political party which the President represented when he or she stood for election". The nomination must be made within 90 days and the nominee is then sworn in as President by the Chief Justice. There is no indication as to what is to be done if no nomination is made in this period. This provision is unsatisfactory, as it indirectly imports the internal succession provisions of political parties into the constitution. If these party succession provisions are unsatisfactory or unclear, the succession will not proceed smoothly.

After this ten year period, the draft proposes that each presidential candidate for election as President must nominate two persons to stand for election jointly with him or her as his or her Vice-Presidents, and must designate one of those persons as his or her candidate for first Vice-President and the other as his or her candidate for second Vice-President. The First Vice-President will succeed the President in the event that the President dies, resigns or is removed from office and serve out the remainder of the President's term, making this appointment of considerable importance. It is somewhat anomalous that that the Vice-President will succeed the President, not only on death or resignation, but also upon removal by Parliament, as it may be the policies of the presidium as a whole which motivated the impeachment. In the event of removal in this manner, it would be more congruous that an election should follow.

ii) Ministerial Appointments

The constitutional provisions establishing the Inclusive Government restrict the President's powers over ministerial appointments. The current Constitution provides that 31 Ministers shall be appointed of whom 15 must be from ZANU PF and 16 from the MDC formations – though the current limitation on the number of ministers has been ignored and 41 have been appointed. The draft constitution neither proposes a limit upon the number of ministers the President may appoint nor, reasonably, prescribes their political affiliation. However, in appointing ministers the President must be "guided by considerations of regional and gender balance" (section 104(4)). Ministers generally must be Members of Parliament (as is currently provided), though up to three may be appointed from outside Parliament. The draft also requires that specific Ministers be appointed with responsibility for the defence forces, police service, intelligence service, correctional service and civil service. From the Ministers appointed the President must appoint a cabinet, though not all ministers must be cabinet ministers (section 103).

The requirement that ministers must be members of Parliament, the removal of Presidential appointments to the Senate, and the limited number of persons who can be appointed as Ministers from outside Parliament, will make it unlikely that party leaders (and hence possible future Presidents) will stand aside from the process of determining the party lists for the reserved seats and the seats in the Senate. In this way they will ensure that favoured party cadres can be considered as Ministers.

iii) Permanent Secretaries

The pre-Inclusive Government constitution made no provision for the appointment of Permanent Secretaries. The draft provides that permanent secretaries are to be appointed by the President after consultation with the Civil Service Commission (section 205), as currently pertains in practice, though the draft seeks to restrict the currently unlimited term of office of each permanent secretary to two five year terms.

iv) Ambassadorial appointments

The draft makes no change to the pre-Inclusive Government position that the President may appoint persons to be ambassadors or other principal representatives of Zimbabwe in other countries or to be accredited to international organisations, and may, at any time, remove those persons from their posts (section 204) (under the Inclusive Government the agreement or consent of the Prime Minister must be secured before making these appointments).

v) The Attorney-General

In terms of the current constitution, the Attorney-General is appointed by the President after consultation with the Judicial Services Commission. For the period of the Inclusive Government, the Prime Minister's agreement and consent must be secured for this appointment. The Attorney-General is the principal legal advisor to the government, is in charge of all criminal prosecutions, and may direct the Commissioner-General of Police to investigate specific offences.

The draft proposes that the Attorney-General is appointed and holds office entirely at the pleasure of the President, but that this post is reduced to that of legal advisor to government only (section 114). Prosecutorial powers will vest in a newly created post of a Prosecutor-General who will be appointed by the President "*on the advice of the Judicial Service Commission following the procedure for the appointment of a judge*" (section 259(3)). However, the Judicial Service Commission does not advise the President as to who ought to be appointed as a judge, but rather tenders a list of three from which he or she must make a single selection. The draft is thus contradictory and requires amendment in this regard. Nonetheless, the comments below pertaining to the appointment of judges are equally applicable here.

The term of office of the Prosecutor-General will be a six year term renewable once. Lest these provisions seem to be specifically designed to remove the prosecutorial powers of the incumbent Attorney-General (who was controversially appointed without the consent of MDC leader Morgan Tsvangirai in violation of the Inter-Party Political Agreement which established the Inclusive Government and who has admitted political partisanship), it should be noted that the incumbent Attorney-General will assume the post of Prosecutor-General (Sixth Schedule, Part 4 Paragraph 19(2)).

vi) The Auditor-General

Under the draft, the Auditor-General is appointed by the President with the approval of Parliament (section 310) for a period of six years, and a person must not be appointed as Auditor-General after he or she has served for one or more periods, whether continuous or not, amounting to twelve years. If the Parliamentary committee responsible for public accounts informs the President that the question of

removing the Auditor-General from office ought to be investigated, the President must appoint a tribunal to inquire into the matter.

vii) Traditional Chiefs

While in terms of the draft the appointment, removal, and suspension of Chiefs must be done by the President, the President must act on the recommendation of the Provincial Council of Chiefs and through the Minister responsible for traditional leaders. Any action taken in this regard must be in accordance with the traditional practices and traditions of the communities concerned. Similarly, disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the Provincial Council of Chiefs through the Minister responsible for traditional leaders. The President's proposed powers in this regard differ from those in the Traditional Leaders Act, where the President was not obliged to make appointments on the recommendation of the Provincial Council of Chiefs, nor was this Council involved in removal and disciplinary matters. The powers of the Provincial Council of Chiefs have thus been increased and that of the President reduced in this regard.

viii) Citizenship and Immigration Board

The draft provides Act of Parliament must establish a Citizenship and Immigration Board consisting of a chairperson and at least two other members, appointed by the President (section 41).

ix) The Civil Service Commission

The draft proposes that the Public Service Commission be renamed the Civil Service Commission. The President has plenary powers to appoint this body, though the number of Commissioners is reduced to a maximum of six rather than the current eight members (section 202). The chairperson, appointed solely at the discretion of the President, is *ex officio* chairperson of all service commissions.

x) The Independent Commissions.

The draft constitution provides for five "independent commissions": the Zimbabwe Electoral Commission; the Zimbabwe Human Rights Commission; the Zimbabwe Media Commission; the Zimbabwe Gender Commission and the National Peace and Reconciliation Commission (the last two of which do not exist in terms of the current constitution). The Commissions all comprise nine members: a chairperson appointed by the President "after consultation with" with either the Judicial Services Commission – in the case of the Zimbabwe Electoral Commission, Human Rights Commission and National Peace and Reconciliation Commission – or the Parliamentary Committee on Standing Rules and Orders, and eight other members appointed by the President and selected a from a list of 12 submitted to the President by the Parliamentary Committee on Standing Rules and Orders. The National Council of Chief supplies one nominee for appointment in the case of the Gender Commission. The term of office for Commissioners on the Zimbabwe Electoral Commission is six years. Other Commissioners hold office for five years, renewable once, and may be removed from office in the same manner as judge; that is, by a Tribunal established by the President to investigate fitness of a Commissioner for office. This method of appointment to the Commissions repeats a procedure introduced during the course of legislative reforms made at the end of 2007 in

anticipation of the 2008 elections. The National Peace and Reconciliation Commission will only last for the ten years after the draft comes into effect.

xi) The Land Commission

Unlike the "Independent Commissions", the President is given plenary discretion to appoint Commissioners to the Land Commission and the formula for appointments of Commissioners to the Independent Commissions (adopted in earlier drafts) has been eschewed for this Commission. One of the functions of the Land Commission is to conduct periodical audits of agricultural land. An unfulfilled provision of the Inter-Party Political Agreement (commonly referred to as the GPA) is that a non-partisan land audit be conducted. The President's unfettered powers in this regard leave ample the possibility for the appointment of a partisan commission, and it is thus significant that presidential powers of appointment in regards to this Commission differ considerably from the Independent Commissions. The Land Commission is also empowered to make recommendations to government pertaining to land usage, land acquisitions, and compensation for land acquisitions. The intention is to allow government (ultimately, through the President) to control the acquisition of land by governmental directives as pertains at present. It is not surprising that the Land Commission is not included as part of Chapter 12 in which appear the "Independent Commission Supporting Democracy".

The President and the Security Services

a) Appointments.

In terms of the draft constitution, the President appoints the Commander of the Defence Forces, and every Commander of a service of the Defence Forces; the Commander of the Intelligence Service; the Commissioner-General of Police; and the Commissioner-General of the Correctional Service (under the current constitution, Commissioner-General of Prisons). All appointments are to be made "after consultation with" the responsible Minister and are for terms of five years, "renewable once". In the case of the Defence Forces the wording is that "a person must not serve …. for more than two terms" (section 216(3)).

Unlike the provisions relating to presidential term limits, the phrase "under this constitution" is omitted, leaving considerable ambiguity as to the position pertaining to the incumbents in these posts. The transitional provisions of the draft stipulate that any person holding public office when the new constitution comes into force shall continue in that office on the same conditions of service until the expiry of his or her term of office under those conditions of service (Sixth Schedule, Part 4 Paragraph 13). This suggests that the incoming President will retain the power to dismiss any service chief from his post, since this power is part of the conditions of service. However, the question may also nonetheless arise whether previous terms in office will be taken into account should any of these incumbents be considered for appointment under the provisions of the draft. Previous drafts gave Parliament considerable influence over all these appointments. Parliamentary involvement has been removed from the current draft leaving the President's plenary powers in this regard intact, other than the term limits placed upon the heads of the security services. Since the President is similarly

subject to the same term limits, it is only if an incoming President wishes to extend the term of office of an incumbent who has served two terms that this restriction will be of any effect.

Each head of a service must exercise his or her command in accordance with any general written policy directives given by the Minister responsible. Since each Minister is under the authority of the President, this requirement does not diminish Presidential power in any way, as it might at first seem. The proposed changes to the present dispensation in regard to the heads of the security services are thus marginal and insignificant.

The draft proposes a Service Commission for each security service, except the Intelligence Service, and, as under the current Constitution, the Commissioners for each will be appointed by the President and the chairperson of each will be the chairperson of the Civil Service Commission who is also appointed by the President. Each Service Commission must have a minimum of two and a maximum of six other members. The Commissioners must be chosen for their knowledge or experience in administration, management, knowledge of the service, their professional qualifications or their general suitability for appointment. However, passing regard is had to the notion of civilian control by a requirement that at least half the members of each Commission must be persons who are not and have not been members of the relevant security service – though there is nothing to prevent a member of the Police Service from being a member of the Defence Force Commission, and vice-versa. The Commissioners hold office for a five year term renewable once and hold office at the pleasure of the President.

A function of each Service Commission is to ensure that:

- the service for which each is responsible does not act in a partisan manner;
- further the interests of any political party or cause;
- prejudice the lawful interests of any political party or cause or violate the fundamental rights and freedoms of any person.

The means by which this is to be accomplished is not stated, though an Act or Acts of Parliament may be passed to this end. A further function of each Commission is to appoint qualified and competent persons to hold posts or ranks in the service for which each is responsible. It is unclear whether this is intended to remove the current power of the President to confer rank upon members of the Defence Force and Police Service established by statute. The Commissions must submit annual reports on their activities to Parliament (section 323).

b) The Intelligence Service

In most constitutional democracies, a country's intelligence services are subject to some form of civilian oversight and are regulated by legislation. The initial drafts of the Constitution attempted to bring Zimbabwe's Intelligence Service into conformity with this principle. Presently, Zimbabwe's Intelligence Service is merely a department within the President's Office, and its operations, controlled directly by the President, are unregulated and opaque. Its budget, forming part of the appropriation for the President's Office, is unaudited. To the initial drafts providing that the Intelligence

Service "*must be established in terms of a law*", the current draft has added "*or a Presidential or Cabinet directive or order*" thus allowing the Intelligence Service to continue its operations completely unregulated by statute (section 224(1)).

The head of the Intelligence Service is appointed by the President and must exercise his or her command in accordance with general written policy directives given by the Minister responsible for the Service (section 226). These provisions are unsatisfactory. Most democracies take extensive measures to try to ensure that the intelligence services are not used for partisan party political purposes. The draft exacerbates rather than ameliorates this problem. This observation is unchanged by the provision that "*[a]ny intelligence service of the State must be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority as established by this Constitution*" as no clauses are provided to ensure that this will be so.

c) The National Security Council

The draft provides for a National Security Council (section 209)) chaired by the President and comprising the Vice-Presidents and such Ministers and members of the security services as may be determined by an Act of Parliament (The current statute establishing the Zimbabwe National Security Council will lapse with the end of the Inclusive Government). Its function under the draft constitution is to inform and advise the President on matters relating to national security, though further functions, which may limit the powers of the President, may be established by statute.

d) Declarations of War and Peace

The previous unfettered power of the President to declare war is now subject to the limitation that the Senate and the National Assembly, by a joint resolution passed by at least two-thirds of the members present, may resolve that a declaration of war by the President should be revoked (section 111(2)). However, previous comments relating to the weak restraint that the two-third majority places upon on the President also apply here.

It is also worth recalling the words used by James Madison when determining that the power to declare war, under the American Constitution, should lie with Congress and not the President:

> *"The Constitution expressly and exclusively vests in the Legislature the power of declaring a state of war [and] the power of raising armies. A delegation of such powers [to the president] would have struck, not only at the fabric of our Constitution, but at the foundation of all well organized and well checked governments. The separation of the power of declaring war from that of conducting it, is wisely contrived to exclude the danger of its being declared for the sake of its being conducted."*

The President (as Commander-in-Chief of the Defence Forces) also has the power to deploy troops, and troop deployment may take place in the absence of a formal declaration of war – as manifested in Zimbabwe's involvement in the war in the

Democratic Republic of Congo. However, a deployment of troops outside Zimbabwe must be rescinded if the two-thirds majority of Parliament, referred to above, so resolves (section 213(5)).

The President and the Legislature

a) Legislative Power

The draft constitution retains the current egregious provisions pertaining to legislative authority, stipulating that "the Legislature of Zimbabwe consists of Parliament ***and*** the President" (section 116). It is anomalous that a constitution - which proclaims as one of its "founding values and principles" the "observance of the principle of separation of powers" - should give legislative authority to the head of the executive. The full import of the provision becomes apparent when it is appreciated that the purpose of this simple one line clause is to render constitutional the provisions of the Presidential Powers (Temporary Measures) Act (Chapter 10:20). This legislation allows the President to make Regulations which "*may provide for any matter or thing for which Parliament can make provision in an Act*". These Regulations prevail over any law made by Parliament.

The President ought only to use this power when a situation has arisen which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; the situation cannot adequately be dealt with in terms of any other law; and because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation. In the past the President has given a very broad interpretation to these provisions. The only restriction on this power is that the provisions may not be used to amend the Constitution or affect constitutional provisions pertaining to the handling of money held by the treasury. Once made by the President, the Regulations must be approved with eight days of the next sitting of Parliament. With the President's power to prorogue Parliament removed (see below), the concomitant power to delay the "next sitting" and extend the life of undesirable presidential legislation is likewise eliminated. However, if the President's party is compliant and holds a majority in Parliament, the President is essentially a one person legislature passing what are little different from decrees where the Parliamentary checks and the procedure of reading of Bills before the Houses and scrutiny for constitutionality by the Parliamentary Legal Committee are by-passed.

The President is also required to assent to legislation passed by Parliament before it becomes law (section 131(2)(b)). This requirement similarly intrudes upon the principle of the separation of powers and is a remnant of attempts by English monarchs in the early 17th century to retain some authority over the legislature. The need for executive assent, effectively giving veto powers over legislation passed by Parliament, is only formally retained in England. The veto was last used there by Queen Anne in 1707. The US Constitution, which purports to strongly uphold the principle of the separation of powers, contains similar provisions. However, the vesting of a power of a veto in the President over legislation passed by the American Congress was controversial at the time of its inclusion in the US Constitution. The compromise was to allow Congress to override the veto by a two-thirds majority vote. The Presidential veto in terms of Zimbabwe's Constitution may also be overridden by

a two-thirds majority of the National Assembly, provisions which are retained by the draft. However, as noted earlier, it is extremely improbable that two-thirds of the National Assembly in Zimbabwe will ever be at odds with the President, rendering the override provisions formal only.

Even if the National Assembly votes, by a two-thirds majority, to sustain the legislation notwithstanding the objections of the President, the matter may not end there. It is proposed under the draft to give the President a new power to refer any legislation to the Constitutional Court for advice on its constitutionality and he may adopt this procedure if the National Assembly has sustained legislation to which he or she objects. The President is then only obliged to assent to the legislation and sign it into law if the Constitutional Court upholds its constitutionality (section 131(8)).

A further difficulty around the issue of Presidential assent to Bills is not cured by the draft.

The President is required to give or withhold his or her assent to legislation passed by Parliament 21 days after it has been presented to him for signature. The draft adds a provision that the Speaker of Parliament must give public notice of the date upon which the Bill was sent to the President for assent. Unfortunately, the Speaker only has power over the dispatch of the Bill to the President. The draft does not attend to the problem that there may be a lengthy and unknown period between the time the Bill is sent to the President and the time it is "presented" to him or her for signature. It is only within 21 days of such presentation that it must be signed. Accordingly, although this 21 day time limit pertains under the current constitution, without knowing when a Bill is presented to the President it is impossible to determine whether there is compliance with this provision. A prime example of this dilemma concerned the Indigenisation and Economic Empowerment Act, passed by Parliament in October 2007, but not signed by the President until mid January, 2008. When it was presented for assent is not known.

The President also intrudes upon the legislative terrain in that his or her approval is required when an Act of Parliament sets the remuneration and benefits of civil servants, members of the security sectors and traditional leaders. The President's approval is "given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible..."

b) The Presence of the President in Parliament.

The President may at any time address either House of Parliament or a joint sitting of both Houses and may send messages to either House of Parliament which must be read out in the House. (section 140) The President is also required to give a "State of the Nation" address at least once a year to a joint sitting of both Houses of Parliament.

The draft proposes that the President be allowed to encroach further upon legislative territory by appointing two Ministers to the important Parliamentary Standing Rules and Orders Committee in addition to the Minister of Finance who will be part of the Committee *ex officio* (and who will also be appointed by the President) (section 151(2)(c)).

c) Presidential Appointments to Parliament.

The draft removes the power of the President to appoint 21 members of the Senate (ten provincial governors, five others and, during the course of the inclusive government, a further six from the MDC formations). The only members of Senate not elected by the populace as a whole will be 18 traditional chiefs, elected by the National Council of Chiefs. The current constitution requires that all Ministers must be members of Parliament. The ability of the President to make appointments to the Senate has assisted the President to appoint persons as Ministers who do not enjoy the confidence of the electorate. Although the power to appoint persons to the Senate has been removed, the draft specifically allows the President to appoint three members as Ministers from outside Parliament (see above).

The power given by statute to the President to appoint ten provincial governors who then become *ex officio* members of the Senate will thus removed by the draft. The Provincial Councils Act will require amendment, if not complete repeal, as a result.

e) Proroguing and Dissolving Parliament

One of the most important of the few changes to presidential power proposed by the draft affects the President's power over the sessions and sittings of Parliament. The general presidential power to dissolve and prorogue Parliament has been removed and replaced with the power merely to convene extraordinary sessions of Parliament (sections 143 and 146). The draft gives the power to determine the sessions and sittings of Parliament to Parliament itself, save that the date of the first session after an election is made by the President and must be within 30 days of the commencement of the life of Parliament (section 145).

One important consequence of this is that the President will no longer have the power to determine the timing of elections by dissolving Parliament ahead of the end of its five year life span. Under the draft, this power will lie with Parliament, and then only if a two-thirds majority in each House can be mustered for this purpose.

In this regard, it must be borne in mind that these proposals in the draft will not come into effect until after the next elections in 2013 and also that under the interim constitutional provisions of the Inclusive Government, the President is required to secure the agreement of the Prime Minister before dissolving Parliament ahead of elections.

The President and the Judiciary

The principle of separation of powers makes it important that there is some distance between the President and the judiciary, rendering the manner in which judicial appointments are made of vital importance. Under the current constitution the President appoints judges "*after consultation with the Judicial Services Commission*". There is no provision in the Constitution laying down how candidates for possible appointment as judges are selected for consideration by the JSC. The process is legally opaque, but it is commonly known that persons within the Ministry of Justice are tasked to find "suitable persons". Hence only candidates who are acceptable to Government are proposed to the JSC.

The composition of the JSC itself is also of obvious importance. It presently comprises:

a) the Chief Justice, or if there is no Chief Justice by the most senior available of the Supreme Court;
b) The Chairman of the Public Services Commission;
c) the Attorney-General; and
d) no less than two or more than three other members, with prescribed qualifications, appointed by the President.

The President appoints the Chairman of the Public Services Commission and the Attorney-General after consultation with the Judicial Services Commission. Hence, of the possible six members of the Judicial Services Commission, at least three and possibly four are directly appointed by the President. The remaining two are members by virtue of their office, and are themselves appointed to such office by the President after consultation with the JSC. The influence of the President over this process is thus extensive.

The draft proposes a greatly expanded JSC which will dilute the extent to which the President may influence the choice of Commissioners (section 189). Under the draft the JSC will comprise:

(i) the Chief Justice;
(ii) the Deputy Chief Justice;
(iii) the Judge President of the High Court;
(iv) one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court;
(v) the Attorney-General;
(vi) the chief magistrate;
(vii) the chairperson of the Civil Service Commission;
(viii) three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe;
(ix) one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President;
(x) one person who for at least seven years has practised in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and
(k) one person with at least seven years' experience in human resources management, appointed by the President.

The wording of the draft leaves it unclear whether, under (iv), one judge is appointed by the justices of all these courts, or whether five judges are appointed, one by each of the courts listed. Whatever the intended position, the majority of the members of the JSC will nonetheless be persons who have been appointed by the President and are members of the JSC by virtue of such appointment. Accordingly, while the independence of the JSC has been improved, it remains unsatisfactory.

The manner in which appointments are to be made under the draft has also been improved and diminishes Presidential influence in this regard. Rather than the opaque manner in which the JSC comes to consider prospective candidates which exists under the current constitution, the draft proposes that the JSC must advertise a vacancy in the judiciary, invite applications to the post, and invite the President and public to make nominations (section 180(2)). Thereafter the JSC must conduct public interviews of prospective candidates from which a list of three qualified and recommended persons must be prepared and submitted to the President.

If the section ended there the provision would be largely satisfactory - save for the ability of the President to propose nominees. Unfortunately it does not. The President is not obliged to appoint one of the three nominees from the submitted list. If the President considers that none of the three is suitable "*he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned*". This provision does not state (as perhaps it ought) that the list of the second three nominees is arrived at in the same manner as the first; that is, through the process of inviting nominations and a public interview process. The second three must merely be qualified to hold judicial office. This thus allows for the possibility that the second three nominees will be selected in the same opaque manner as provided for under the current constitution. The President may thus by pass the salutary changes the draft seeks to introduce and retain the current influence of the President over judicial appointments.

A few final points ought to be noted under this head. The number of judges on the Constitutional Court proposed by the draft is limited to seven (there is no limit to the number of judges on the current Supreme Court bench), preventing executive abuse by stacking or stuffing the court with new appointees to dilute the influence of sitting judges who might be deemed hostile.

Although the draft provides that "*appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe*", there is no means by which this provision might be enforced.

As with the current constitution, a judge may be removed from office under the draft if a tribunal finds that the judge is unable to perform the functions of his or her office, due to mental or physical incapacity, or on the grounds of gross incompetence or gross misconduct. The Tribunal is appointed by the President following a decision by the President or the JSC (the Chief Justice, under the current constitution) that a Tribunal investigate the question of removal from office. The President may thus secure the dismissal of a judge perceived as unsympathetic through the appointment of a compliant tribunal.

Conclusion

Most of the changes to presidential powers, particularly in relation to appointments, and especially those in the security sectors which appeared in earlier drafts of the proposed constitution, have been removed from the final COPAC draft under discussion here. The earlier drafts gave Parliament a key role in relation to these appointments. The structure of the executive and presidential powers under the draft

constitution are thus little changed from the present constitution. The changes that are of some significance are the removal of the power to dissolve Parliament and the dilution of the President's influence over the choice of judges and the head of public prosecutions – though considerable influence remains.

Arguably the most important change is the removal of the President's power to appoint Provincial Governors. In the past, Provincial Governors have been the President's "eyes and ears" in the rural areas and have played an important role in co-ordinating political control over rural subjects. Under the current dispensation, the appointment of Provincial Governors was a matter of some contestation, with President Mugabe refusing to comply with the constitutional requirement that he consult the Prime Minister on these biennial appointments, twice making the appointments unilaterally.

The President's plenary control over the security sector remains in place and little effective change has been made to security sector governance. Given that the need for reform to the manner in which the security sector is governed has been noted as the single most important factor in ensuring democratic elections in Zimbabwe and key to ensuring the rule of law, it is remarkable that this aspect of the constitution remains largely unchanged. In fact, the constitution has been carefully drawn to ensure that the current manner in which the security sector operates (marked by political partisanship) continues, and those who head the institutions which allow this to happen are able to remain in their posts if the draft is adopted.