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The Law & the Devolved System of Governance

EDITORIAL

Chapter 14 of the new Constitution of Zimbabwe introduces a 'devolved system' of governance for the first time in the country's history. This system, at least conceptually, is different from the 'centralized system' of governance that existed previously. Under a devolved system, it is expected that certain aspects of political, administrative, and fiscal management powers will be transferred and shared between the central government and the newly constitutionally-established Provincial/Metropolitan and Local Authority tiers of government.

According to Section 264 of the new Constitution, the devolved system is anticipated to: give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them; promote democratic, effective, transparent, accountable and coherent government; preserve and foster the peace, national unity and indivisibility of Zimbabwe; recognise the right of communities to manage their own affairs and to further their development; ensure the equitable sharing of local and national resources; and to transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority.

These are the noble ideals of a devolved system that the people of Zimbabwe overwhelmingly endorsed in the March 2013 Constitutional Referendum. While the significance of these broad ideals cannot be questioned, it is always the question of 'detail' that determines whether

they will transcend the realm of theoretical idealism to practical reality.

Research and experiences from other jurisdictions has shown that the success of a devolved system of governance is dependent on various factors, chief of which is the design of policy, legal and institutional instruments that are intended to achieve the set constitutional objectives. The new Constitution establishes the constitutional legal framework. However, this framework has to be supported by carefully designed policies, legislation and institutions that are intended to achieve the desired objectives.

The constitution alludes to some of these pieces of legislation, which include inter alia, an Act of Parliament to facilitate the coordination between central government, provincial/metropolitan councils and local authorities (S. 264(3)); an Act of Parliament to establish and provide for the functions of Provincial/Metropolitan Councils (S. 267 (2) and 270 (2)); and an Act of Parliament to establish and confer powers and functions upon local authorities (S. 276 (2)).

The content and effect of these laws should ordinarily be gleaned from the

essence of what was intended by the Constitution. This means that they ought to be designed in a manner that reflects not only the letter of the Constitution but also the spirit of Chapter 14. This would mean for instance that they ought to extensively espouse the principle of subsidiarity which is the cornerstone of any devolved system of governance. The principle of subsidiarity requires that certain government matters ought

to be handled by the smallest, lowest, or least centralised authority capable of addressing those matters effectively.

According to the United Nations Development Programme (UNDP), this principle speaks to the need to restructure or reorganise government authority so that there is a system of co-responsibility between institutions of governance at the central,

provincial/ metropolitan and local levels, with the objective of increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels. This is intended to result in: enhanced democracy by bringing government closer to the people; protecting democracy by establishing vertical checks and balances between the three tiers of

government; and enhancing public service delivery by distributing authority of fiscal management and improving efficiency in resource allocation.

The significance of 'getting it right' at the stage of policy, legislation and institutional design is emphasized by the fact that an ill-designed system may lead to negative and unintended results. Experiences from other jurisdictions reveal that a devolved system may, if not properly planned, reduce the ability of the government to re-distribute national resources thereby aggravating provincial/metropolitan disparities in public spending and economic outcomes. In some instances, it can foster corruption at local level if there are no rules and systems to address local political hegemony, amongst other ills.

This edition of the CALR Law and Development Bulletin focuses on the 'Devolved System of Governance' as outlined in the country's new Constitution. It contains four articles that try to shed some light on some of the conceptual and legal niceties required to make the system functional. The articles touch on the definitional aspects of devolution; the structure of a devolved system of governance; the expected developmental benefits in terms of service delivery and resource allocation efficiency. These articles are not exhaustive, by themselves, to provide a comprehensive depiction of what a devolved system of governance will look like in Zimbabwe. Rather they provide insights into some of the issues, with the purpose of promoting further debate and attention on the matter by government, the private sector, academics, civil society, and the general public. ■

The success of a devolved system of governance is dependent on aspects such as the design of policy, legal and institutional instruments that are intended to achieve set constitutional objectives

Decentralization & Devolution: *A Conceptual Understanding*

The concept of 'decentralization' is usually given different meanings by different scholars. The definitional confusion usually arises from the interchanging use of its broad and narrow definitions. As a concept however, decentralisation originates from the centre. This means that if there were no centre, there would be no decentralisation but two or more separate entities. In broad terms decentralisation incorporates three categories: de-concentration, delegation and devolution.

De-concentration is the distribution of powers and responsibilities among different units or levels within central government. Under de-concentration some discretion is allowed to the 'field agents'. However these field agents are ultimately accountable to the central government. The most significant aspect of de-concentration is that the allocation of responsibility occurs within the hierarchy of central government.

Delegation on the other hand refers to the transfer of responsibility for specifically defined functions to structures that exist outside of central government. In this arrangement central government has indirect control with the subnational governments allowed

wide discretion. For delegation to take place, the power must have originally resided in central government which then transfers it to the subnational government. While the central government can withdraw the delegated power it cannot exercise the same power while it has been delegated.

Devolution is another category of decentralization. It implies the location of decision-making power with autonomous subnational governments. It is different from delegation in that it is always meant to be a permanent placement of a power at a particular level.

For this reason it is normally done by way of a Constitutional provision or in framework legislation. When power is devolved, it becomes 'original' power in that it resides with the subnational government. Where this happens the central government is deprived of the discretion it has when it delegates because it has to adhere to principles laid down in the Constitution. Central government retains supervisory powers only. The subnational governments are not accountable to central government. They have their own rules and systems that are independent of central government.

The 2013 Constitution of Zimbabwe does not define the word "devolution". However, reading through Chapter 14 it is clear that devolution means the transfer of governmental powers and responsibilities from the central government to the provincial/metropolitan councils and local authorities. It must be understood in the context of a Zimbabwean State that is unitary (Section 1) and is indivisible (Section 264 (c)). Provincial/Metropolitan councils and Local authorities to which governmental powers and responsibilities have been devolved may have their own legislative procedures but they are not independent of central government.

The Preamble to Chapter 14 of the Constitution gives a background to the provisions on devolution. It acknowledges the desirability of ensuring the preservation of national unity and the prevention of all forms of disunity and secessionism; the need for democratic participation in government by all citizens and communities and the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas; and the need for devolution of power and responsibilities to lower tiers (levels) of government in Zimbabwe.

There are generally two requirements that must be met before governmental powers and responsibilities are devolved to provincial and metropolitan councils and local authorities. First, it must be appropriate to do so and; secondly, the provincial and metropolitan councils and local authorities to whom governmental powers and responsibilities will be devolved must be competent to carry out the responsibilities efficiently and effectively as provided for in Section 264 (1).

In essence a decision must first be made on the propriety of devolving governmental powers and responsibilities to the lower tiers of government as well as on the competency of the lower tiers of government to carry out the devolved governmental powers and responsibilities efficiently and effectively. In practical terms therefore the devolution of governmental powers and responsibilities to lower tiers

of government must take place when it is considered appropriate to do so i.e. when the lower tiers of government have been adjudged to be competent to carry out the governmental powers and responsibilities effectively and efficiently.

Chapter 2 of the Constitution sets out the objectives that must guide the State and all institutions and agencies at every level in the discharge of their obligations in terms of the Constitution. The objectives are intended to help them formulate and implement laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives. As stated in Section 9 (1) (a) the State is enjoined to adopt and implement policies and legislation to develop efficiency, competency, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution in making appointments to public office which must be based on merit and in the fight against all forms of corruption and the abuse of power.

The recently adopted Constitution compels the State to promote fair representation of all the country's regions in all institutions and agencies of government at every level. This they will do by taking practical measures to ensure that all local communities have equitable access to resources to promote their development, with local communities benefitting from resources available in their areas. It will be seen that the above in essence, is a series of statements of intent that do not create any legal rules. However, in interpreting these and other obligations of the State as provided for in the Constitution, regard must be had to the objectives set out in Chapter 2, i.e. the State's obligations in terms of the Constitution will be interpreted bearing these statements of intent in mind.

The Constitution of Zimbabwe in Section 264 (2) (a-f) lays out the objectives of devolution of governmental powers and responsibilities to provincial and metropolitan and local authorities.

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How will the Devolved System Function?

Issues of Structure

When the people of Zimbabwe endorsed the new Constitution in March 2013, they effectively voted for a new structure of governance. The structure, which is embedded on the principle of subsidiarity, consists of three tiers of government i.e. the national/central government, provincial/ metropolitan councils and local authorities. These structures are expected to function, cooperate and coordinate through specific institutional frameworks. With regards to Provinces, the Constitution establishes a 'Provincial Council' for each of the country's provinces, except for Bulawayo and Harare which are established as Metropolitan Councils.

Membership of Provincial Councils

- Chairperson of the council (The chairperson is elected from a list of at least two qualified persons submitted by the political party which gained the highest number of National Assembly seats in the province; or if there is no such party as stated above, the political party which received the highest number of votes cast in the province in that general election for members of the National Assembly.);
- The senators elected from the province concerned;
- The two senator chiefs elected from the province concerned;
- The President and deputy President of the Council of Chiefs where their areas fall within the province;
- All the members of the National Assembly whose constituencies fall within the province;
- The women members of the National Assembly; and
- Ten persons elected by a system of proportional representation

Membership of Metropolitan Councils

- In the case of Bulawayo, the mayor for the city of Bulawayo who is the chairperson of the Bulawayo Metropolitan Council;
- In the case of Harare, the mayor of the City of Harare who is the chairperson of the Harare Metropolitan Council; and the mayor or chairperson of the second largest urban local authority within the province, who is the deputy chairperson of the Harare Metropolitan Province;
- All the members of the National Assembly whose constituencies fall within the province concerned;
- The women members of the National Assembly who are elected in terms of section 124 (1) (b) from the metropolitan province concerned;
- The senators elected from the metropolitan province concerned; and
- The mayors and deputy mayors and the chairpersons and deputy chairpersons of all local authorities in the metropolitan province concerned.

With regards to Local Authorities, the Constitution establishes urban and rural authorities. The membership of these local authorities consists of councillors elected by registered voters in the areas concerned. In terms of functions, the Constitution stipulates the various functions for Provincial/Metropolitan Councils and Local Authorities respectively. Provincial/Metropolitan Councils are expected to: plan and implement social and economic development activities; coordinate and implement governmental programmes; plan and implement measures for the conservation, improvement and management of natural resources; promote tourism; and monitor and evaluate the use of resources. It is also expected that members of these councils will be collectively and individually accountable to the residents of their respective provinces and to the national government.

The functions of local authorities are outlined under 276 (1) of the Constitution. It bestows a local authority with the 'right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and [with]... all the powers necessary for it to do so'. A similar provision is found in the South African 'Local Government: Municipal Systems Act'. This provision has been interpreted to mean that local authorities will not be exercising powers delegated to it by the national or provincial governments. Rather, they will become 'democratic assemblies exercising original authority'.

Unlike Provincial/Metropolitan Councils, this provision establishes the autonomy of local authorities, bestowing upon them a Constitutionally-guaranteed independent existence, powers and

functions. The constitutionally-entrenched autonomy is expected to be supported by a high level of financial independence. Section 276 (1) (b) bestows local authorities with the power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and

responsibilities. This fiscal autonomy and function is also not given to Provincial/Metropolitan Councils. Instead Provincial/Metropolitan Councils (including local authorities as well) are financed by annual capital grants from the national government. The Constitution also establishes a set

of principles that are intended to guide Provincial/Metropolitan Councils and Local Authorities in the function. They essentially seek to differentiate between those functions meant for the national government, provincial/ metropolitan councils and local authorities.

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Decentralization & Devolution: A Conceptual Understanding

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These are:

- To give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them;
- To promote democratic, effective, transparent, accountable and coherent government as a whole;
- To preserve and foster the peace, national unity and indivisibility of Zimbabwe;
- To recognise the right of communities to manage their own affairs and to further their development;
- To ensure the equitable sharing of local and national resources; and

- To transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority.

From the above principles one can draw the conclusion that the people will have more say in the making of decisions that will affect them; that they will manage their own affairs and can expect an equitable distribution of national resources. In addition State powers and responsibilities will be shared with provincial and metropolitan councils and local authorities. While these constitutional provisions, to some extent, approximate the conceptual idealism of a 'devolved system' of governance, there are some aspects that are not as clear yet. A critical issue is the degree of 'autonomy' and 'original

power' that will be accorded to Provincial Metropolitan Councils in particular. In other words, how 'autonomous' will these tiers of government be in practice, bearing in mind that such autonomy should be conceptually different from that exercised through 'delegation' and 'de-concentration'.

Furthermore, how will the discretion to determine whether it is appropriate to devolve powers to lower tiers of government be exercised, and how will central government determine whether these tiers are competent to receive devolved powers and responsibilities. As debate begins on the design of policy, institutional and legal framework for a devolved system of governance, these are some of the conceptual questions that may need to be addressed in order to have a workable system that reflects the ideals espoused in the constitution. ■

The Role of Devolution in Development

One of the key elements of the new Constitution that has aroused enthusiasm among the people of Zimbabwe is the inclusion of a 'devolved system of governance' in the country's new Charter. The aspirations of the populace, which still exist today, are that a devolved system of governance will bring enhanced development. But what is the development that is expected?

The concept of 'development' itself is not easily understood. Some scholars view 'development' as purely economic growth. However the United Nations Development Programme (UNDP) provides a broader definition which states that it is the status that 'leads to long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community.' The UNDP therefore equates it to empowerment, where local people are able to take control of their own lives, expressing their own demands and finding their own solutions to their problems.

This definition and its application has been the centre of discussion relating to the new 'State Concept'. The new State Concept provides that the State must guide and facilitate development rather than directly manage it. However, in order for this to happen, the State must be open, adaptive, accountable and responsive. One of the features

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of that State is the decentralisation of responsibilities to lower levels of government. This has been recognized by various countries as a critical aspect for enhanced delivery of the development dividend. President Yoweri Museveni of

Uganda, for instance, noted that:

'... centralisation is inherently anti-development because it denies people (especially the disadvantaged who form the bulk of African society) access to institutions that allocate goods and services... Central government can only be pretentious if it claims to have the capacity to provide and oversee development at the grassroots level. Central government should act just as a facilitator, because sustainable development can only be locally driven and supported'.

The new constitution does not provide a ready definition of what 'development' is. Rather, it contains various provisions that can provide an understanding of what is expected. For instance, the Preamble to Chapter 14 states that devolution is important to ensure the equitable allocation of national resources and the participation

of local communities in the determination of the development priorities within their areas. Section 264 establishes one of the objectives of devolution as to recognise the right of communities to manage their own affairs and to further their development. Section 270 states that the major function of provincial and metropolitan councils is to be responsible for the social and economic development of [their] provinces. The same section specifically states that these councils will be responsible for, inter alia, planning and implementing social and economic development activities; planning and implementing measures for the conservation, improvement and management of natural resources; and promoting tourism and developing facilities for that purpose.

These references to 'development' are broader than economic growth alone. They embrace all aspects of socio-economic development for the betterment of peoples' livelihoods in line with the UNDP definition. *Continued on page 5*



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It therefore appears that the new Constitution recognizes a nexus between the equitable allocation of national resources on one hand, and the right of communities to participate in decision-making processes concerning the use of these resources for purposes of advancing their socio-economic wellbeing on the other. This approach adopted by the new Constitution is consistent with popular arguments that have been advanced in favour of devolution. The most compelling argument is premised on the proposition that preferences for citizens differ from province to province and that a centralised government may never be able to meet local developmental needs of the provinces. In devolution therefore, government is brought closer to the people and their developmental needs, improves accountability and responsiveness and gives people a more direct say in matters affecting them.

Furthermore, the people are able to take charge of their government by monitoring and reviewing its performance as well as reacting to underperformance. But will this really be the case in practice? There have been numerous counter-arguments to the proposition that devolution will necessarily lead to enhanced development. One popular counter-argument is that devolution may promote development in some provinces at the expense of others that have no resources. According to this argument, a centralised system is preferable because it is able to collect resources and redistribute them according to need and not necessarily according to geographic locality. It has also

been argued that devolution may also result in the 'decentralisation of corruption' when local bureaucrats establish unhealthy relationships with local interest groups.

These observations highlight some important factors that may need to be taken into account in order for devolution to be successfully implemented to achieve the desired developmental benefits. The first factor has to do with establishing a conducive politico-legal environment that, amongst other things, recognizes and addresses provincial variations in resource endowment. In practice it will mean that the laws that will establish aspects of fiscal autonomy of provincial/metropolitan councils and local authorities in relation to revenue use from local resources will have to be considered in light of the need to avoid provincial developmental disparities. In South Africa, for instance, where a similar devolved system of governance exists; this challenge was addressed by establishing a centralized fiscal system for devolved institutions. The national government is in charge of the major revenue sources (i.e. value-added tax, income tax, corporate tax etc.).

Like with Zimbabwe's Provincial/Metropolitan Councils, the South African Provinces have no taxing powers. However, local authorities control property taxes and revenue from services such as electricity, water and sanitation. As a result, Provinces in South Africa only generate 3% of their revenue while local authorities generate 70%. The balance of the revenue for both

Allocation of revenues between provincial and local tiers of government

Section 301 of the Constitution:

(1) An Act of Parliament must provide for—
(a) the equitable allocation of capital grants between provincial and metropolitan councils and local authorities; and (b) any other allocations to provinces and local authorities, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) must take into account, amongst other factors—
(a) the national interest; (b) any provision that must be made in respect of the national debt and other national obligations; (c) the needs and interests of the central government, determined by objective criteria; (d) the need to provide basic services, including educational and health facilities, water, roads, social amenities and electricity to marginalised areas; (e) the fiscal capacity and efficiency of provincial and metropolitan councils and local authorities; (f) developmental and other needs of provincial and metropolitan councils and local authorities; and (g) economic disparities within and between provinces.

(3) Not less than five per cent of the national revenues raised in any financial year must be allocated to the provinces and local authorities as their share in that year.

Provinces and local authorities is received from a share of distributed consolidated revenue that is under the control of the national government.

Although Zimbabwe still has to come up with an Act of Parliament on the fiscal aspects of devolution, the Constitution establishes the basis an approach that is similar, but not identical, to the South Africa approach. Reading Section 264 (1) (f) of the Constitution, it appears that there is a deliberate intention to confer devolved institutions with some level of financial independence. Section 264 (1) (f) of the Constitution, for instance, states that one of the objectives of devolution is to transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority. While the Constitution does not give taxing authority to Provincial Councils, it provides that provinces and local authorities are entitled to an equitable allocation of capital gains grants. It further provides that provinces and local authorities are entitled to not less than 5% of the country's annual national revenue per year. In addition to this, local authorities are bestowed with the power to levy rates and taxes and other revenue required for them meet their service delivery mandate.

The second factor has to do with putting in place strong devolved institutions that are capable of exercising their powers responsibly and that are inherently accountable to the people they serve. Presently the local government structure consists of various institutions

that somewhat mirror what is envisaged by the Constitution. However, these institutions were established through Acts of Parliament. These include Provincial Councils consisting of Provincial Governors and Councils (Provincial Councils and Administration Act); Local Authorities consisting of Urban Councils and Rural District Councils (Urban Councils Act and the Rural District Councils Act); and to some extent Traditional Leaders consisting of Chiefs and Headmen (Traditional Leaders Act). These institutions are presently not devolved institutions.

The provincial councils and traditional leaders' powers are derived from de-concentration of responsibilities under the Ministry of Local Government, while local authorities' powers are derived from delegation of responsibilities by the same Ministry. They do not exercise original powers derived from the constitution. These institutions will have to be transformed into autonomous devolved bodies in line with the new Constitution.

While in practice, they are likely to be the ones performing functions envisaged under the devolved system of governance (since the constitution establishes a single civil service for national and devolved units); the need for transformation is apparent. Institutional transformation is necessary to enable them to function as autonomous entities that are accountable to the people. This would require, inter alia, that the institutions' personnel acquire technical and management skills that are necessary for them to increase performance efficiency and accountability as autonomous institutions within a devolved system of government. ■

[Devolution] does not always have a positive impact on development - either for individual regions or for the country as a whole. Its impact on economic and social development is not guaranteed.

It depends on a number of factors. For example, if local governments are given the power to utilise the revenue from their own resources and there are major variations in resources from one region to another, devolution is likely to benefit the rich regions but not the poor, and thus to increase regional inequalities. Similarly, if regional or local governments lack the technical and management skills and/or integrity necessary to exercise their powers responsibly, devolution may have a negative impact on development.

This does not mean that politicians should not advocate devolution. Experience in Zimbabwe and elsewhere has shown that, if properly designed and supported, it can bring major developmental benefits. However, they should be aware of the conditions needed to make it a success and avoid raising false expectations.
Diana Conyers (2010)

Good governance in a Devolved System of Government

The concept of ‘good governance’ is increasingly becoming a buzz phrase in the development community. While its amplified use gives an impression that it is a well-understood concept, its varied application to different contexts (e.g. corporate governance, international governance, national governance and local governance) usually clouds its utility. However, within the context of national and local governance, the concept has clearly emerged as an important barometer to measure the health of the relationship between a government and its citizens.

In this sense it is a tool used to understand the process of decision-making and the process through which decisions are implemented. Scholars normally speak of eight major characteristics of good governance that are critical to assess decision-making processes. These are that the process should be: participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. Given this characterization of the concept, it is therefore not incidental that the success of a devolved system of governance is inextricably linked to good governance.

Devolution inherently involves the transfer of decision-making responsibilities from national government to autonomous devolved institutions.

*‘good governance
is perhaps the
single most
important factor in
eradicating poverty
and promoting
development’*

Kofi Annan

These responsibilities range from administrative to fiscal responsibilities. As such, devolved institutions ought to be guided by good governance principles in order for them to effectively discharge their functions and make the ‘devolved system of governance’

operational. Indeed as some scholars have observed, the lack of a good governance culture within devolved units will lead to the decentralisation of corruption and inefficiency, the very ills that the devolved system intends to curb.

What does Zimbabwe’s supreme law say about good governance in relation to devolution? Section 264 (1) of the Constitution states that: ‘Whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively’. This is a conditional provision that obligates national government to devolve powers ONLY IF the devolved institutions are competent enough to undertake the devolved functions and ONLY IF they can do so efficiently and effectively. The aspects of competence, efficiency and effectiveness are central to the concept of good governance. The constitution therefore extols the significance of good governance to an extent of making it a condition for the conferment of devolved status to provincial/metropolitan councils and local authorities. In practice, these institutions would have to

demonstrate their competence, efficiency and effectiveness either through past good governance practices or through established measures and mechanisms that will promote good governance.

Another provision is Section 265 (1) of the constitution which states that: ‘Provincial and metropolitan councils and local authorities must, within their spheres...ensure good governance by being effective, transparent, accountable and institutionally coherent’. The constitution also makes members of these devolved institutions accountable individually and collectively to residents they serve and to the national government. Furthermore, Chapter 9 of the constitution is wholly devoted to establishing principles of public administration and leadership which apply to all tiers of government (including the devolved institutions). These principles are core to good governance because they obligate these institutions, inter alia, to: uphold high standard of professional ethics; encourage the public to participate in policy-making; provide services impartially, fairly, equitably and without bias; be efficient and economical in the use of resources; be accountable to Parliament and to the people; and foster transparency

by providing the public with timely, accessible and accurate information.

The high soundness of these principles of good governance may give the mistaken impression that they are unenforceable in practice, based on past experiences of bad governance by some local authorities that are on record in the public domain. However, section 198 of the constitution allays such fears. It specifically provides for the creation of an Act of Parliament to enforce these principles. The provision states that:

An Act of Parliament must provide measures to enforce the provisions of this Chapter [9], including measures -

- (a) requiring public officers to make regular disclosures of their assets;
- (b) establishing codes of conduct to be observed by public officers;
- (c) specifying the standards of good corporate governance to be observed by government controlled entities and other commercial entities owned or wholly controlled by the State;
- (d) providing for disciplining of persons who contravene the provisions of this Chapter or of any code of conduct or standard referred to in paragraph (b).

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Mr Tendai Biti, Former Minister of Finance

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There are already several pieces of legislation that espouse what is intended by section 198 of the constitution. These include, amongst others, the Public Finance Management Act [Chapter 22:14], Procurement Act [Chapter 22:19], and the Prevention of Corruption Act [Chapter 9:16]. While these laws are an important starting point in establishing the legal architecture for good governance for the

devolved system of governance, it is apparent that they were designed for a centralized system of governance. They concentrate oversight powers in the national government, without recognizing the autonomy of devolved institutions to also play a similar or supportive role within the context of their own powers and responsibilities. In Kenya for example, where devolution was recently introduced, it was observed that one of the main reasons why

principles of good governance were not adhered to in the past system was because the highly centralized regime wielded too much power and this weakened all the systems which would provide checks and balances. This led to the failure to ensure accountability and transparency in leadership.

As the debate on designing devolution-related policies, legislation and institutions commences; it is important that

adequate attention be placed upon aspects of good governance. In such discussions it is imperative that good governance issues are not only assessed on the basis of whether or not they are included in enabling legislation. Rather, the assessment should go beyond the substance of the law, to embrace the concept of 'constitutionalism' by ensuring that good governance is accepted as an institutional culture in devolved institutions. ■

How will the Devolved System Function?

Issues of Structure

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Principles to Govern Provincial and Local Government Councils

- Ensure good governance by being effective, transparent, accountable and institutionally coherent;
- Assume only those functions conferred by the Constitution or an Act of Parliament;
- Exercise functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government;
- Cooperate with one another, in particular by - Informing one another of, and consulting one another on, matters of common interest; and Harmonising and coordinating activities.
- Preserve the peace, national unity and indivisibility of Zimbabwe;
- Secure the public welfare; and
- Ensure the fair and equitable representation of people within their areas of jurisdiction.

Each tier of government is expected to exercise only those powers that are provided for in the Constitution so that they do not encroach into the functional area of another tier. In explaining the meaning

of section 41 (1) (g) of the South African Constitution which contains similar principles, the Court in the case of Premier of the Province of the Western Cape v President of the Republic of South Africa 1999 (4) BCLR 382 (CC) at para.58.), noted that:

"Although the circumstances in which section 41 (1) (g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government".

In the spirit of cooperative governance, all tiers of government are therefore expected to cooperate with one another by informing one another on matters of common interest as well as harmonising their activities. However, the Constitution of Zimbabwe does not say what steps must be taken to resolve a situation where a tier of government has encroached into the geographical, institutional or

functional integrity of another tier of government. This was left to Parliament to develop appropriate mechanisms and procedures to facilitate coordination cross the different tiers i.e. central government, provincial and metropolitan councils and local authorities (Section 265 (3)). The equivalent of this provision in the South African Constitution is Section 41 (3) and (4) that requires an organ of State involved in an intergovernmental dispute to make every reasonable effort to resolve the dispute by other means and to exhaust all possible avenues of dispute settlement before approaching the courts for redress. To this end the South Africa law established a Mediation Committee (consisting of representatives from the National Assembly and provincial governments), mandated to mediate in cases of inter-tier disputes.

Although Zimbabwe, through the new Constitution, has established the constitutional basis for the functionality of a devolved system of governance; the specific 'nuts and bolts' that will see its operationalization are still to be determined by Parliament. It is matters such as the effective coordination and cooperation between the different tiers of government including dispute settlement mechanisms described above, that are most likely to take centre-stage in the 'devolution functionality' legal reform agenda. ■



Harare Metropolitan Province



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Our programme Areas

- a) Research & Legal Advisory Services
- b) Specialised Legal Training & Capacity Building
- c) Legal Knowledge Generation and Management

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