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CONSTITUTION-FLASH: SOME FACTS AND FIGURES IN THE DRAFT CONSTITUTION THAT YOU SHOULD KNOW – APPOINTMENTS TO INDEPENDENT COMMISSIONS

This is part of a series of papers highlighting key areas of the draft Constitution. It is also the second part of the paper on procedures for appointment to constitutional bodies. It deals mainly with appointments to senior positions in the security services and independent commissions such as the Zimbabwe Electoral Commission. Comparing the draft Constitution to the current Constitution, the paper identifies the differences and finds some positive development but also some key areas that are in need of improvement. The principal concern in constitutional appointments is to ensure that there are sufficient checks and balances to prevent politics of patronage, bias and to promote meritocracy in the appointment process and therefore facilitate better quality of governance.

Organ: Zimbabwe Electoral Commission

Current Constitution • Chairperson is appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.

- 8 other members appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
- At least 4 members apart from the chairperson must be women.
- ♦ Maximum Term Limit: 2 terms of 6 years each.

Draft Constitution • Chairperson is appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.

- If the appointment of a chairperson is not consistent with a recommendation of the Judicial Service Commission, the President must inform the Committee on Standing Rules and Orders.
- 8 other members are appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
- Maximum Term Limit: 2 terms of 6 years each.

Change: There are two significant differences:

1. i. First, there is no minimum quota for women in the draft Constitution which is provided for in the current Constitution. It is not clear whether the omission was deliberate or inadvertent. However, we note that one of the national objectives on gender balance, Clause 2.9 (1)(b)(ii) states that the State must take all measures needed “to ensure that ... (ii) women constitute at least half the membership of all Commissions ...” (my emphasis). The collective effect of these clauses probably achieves the same purpose as the provision in the current Constitution. Note that this applies to all commissions and therefore applies equally and with the same effect to other parts of this paper. There is also Clause 18.3(4) which requires that the Chairperson and Deputy Chairperson of every commission must be of different genders.

1. ii. Second, although both constitutions only require the President to consult the Judicial Services Commission and the Committee on Standing Rules and Orders, the difference is that the draft Constitution has added an incentive for the President to follow the recommendation of the Judicial Services Commission by requiring him or her to inform the Committee on Standing Rules and Orders if his or her chooses not to follow that recommendation.

Unfortunately, this too, may be futile because it is not clear what happens after the President has informed the Committee on Standing Rules and Orders. The President can inform the Committee on Standing Rules and Orders and still stick to his or her choice. In effect, the President still has all the power to choose whomsoever he or she wants as the Chairperson of ZEC.

Alternatives:

1. A better approach would have been to require the nominees for the Chairperson’s position to be interviewed by the Judicial Services Commission following procedures for selecting judges, after which President is given a list of suitable candidates from which to choose.
1. Another approach would be to require the President to make an

appointment on the advice of the Judicial Services Commission which would mean that the President is obliged to follow the recommendation. Selecting the Chairperson is the body that conducts and supervises elections is critical and should never be left in the hands of one office. The checks and balances must be robust.

Interestingly, the appointment procedure for the 8 other commissioners has not been changed and is more robust than the procedure for the appointment of the Chairperson. The different approach for the Chairperson and other commissioners is unwarranted, especially because the procedure for selecting the Chairperson is weaker and has less checks and balances.

Organ: Zimbabwe Human Rights Commission

Current Constitution • Chairperson is appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.

- If the appointment is not consistent with any recommendation of the Judicial Service Commission the President must inform Senate.
- 8 other members are appointed by the President from a list of 16 nominees submitted by the Committee on Standing Rules and Orders.
- ♦ 4 of the 8 other members must be women.

Draft Constitution • Chairperson is appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.

- If the appointment of a chairperson is not consistent with a recommendation of the Judicial Service Commission, the President must inform the Committee on Standing Rules and Orders.
- 8 other members are appointed by the President from a list of at least twelve nominees submitted by the Committee on Standing Rules and Orders.
- ♦ Maximum Term Limit: 2 terms of 5 years each (Clause 18.3(1)).

Change • First, there is no minimum quota for women in this part of the draft Constitution which is provided for in the current Constitution (However, please see above explanation in regards to ZEC)

- In respect of the Chairperson, there is no substantive difference except that where the President is currently required to inform Senate in the event of an inconsistency in his appointment and the recommendation of the Judicial Service Commission, in the draft Constitution, he or she is required to inform the Committee on Standing Rules and Orders. However, as with the procedure on the appointment of the Chairperson of ZEC above, there is no direction as to what happens after the President has informed Senate. The President may consult the Judicial Services Commission and ignore its recommendations. All he or she has to do is to inform the Committee on Standing Rules and Orders but what happens thereafter is unclear. It effectively leaves the President with all the power to choose whoever he or she wants as the Chairperson of the important Human Rights Commission.

- As with ZEC, a better approach would be follow the same procedures used for the selection and appointment of judges, a procedure that involves public interviews by the Judicial Services Commission, after which President is given a list of suitable candidates from which to choose the Chairperson.

- Another approach would be to require the President to make an appointment on the advice of the Judicial Services Commission which would mean that the President is obliged to follow the recommendation. This would be different from appointing after consultation with which imposes no obligation at all on the President.

- Selecting the Chairperson is the body that monitors the observance of human rights by the state is critical and should never be left in the hands of one office. There must be robust checks and balances to ensure independence of that office.

- As with ZEC, the appointment procedure for the 8 other commissioners has not been changed and is more robust than the procedure for the appointment of the Chairperson. The different approach for the Chairperson and other commissioners is unwarranted, especially because the procedure for selecting the Chairperson is weaker and has less checks and balances. *Continued on page 5.....*

Plan To Usurp Copac A Recipe For National Disaster

Coordinator's Note 95



Dr. Phillan Zamchiya

Media reports that indicate that Principals in the inclusive government met and agreed to side-step Copac and take over the constitution making process are disturbing to all sundry. In as much as some of the media reports are sensational, a finer balanced analysis would convincingly reveal that: (1) The Principals, President Robert Mugabe, Prime Minister Morgan Tsvangirai and Deputy Prime Minister Arthur Mutambara met without Welshman Ncube and discussed the possibility of usurping Copac in the process (2) the Principals could not substantively agree without seeking legal advice (3) As a consequence, the Principals invited Patrick Chinamasa and Erick Matinenga to seek legal opinion (4) The legal advisors could not agree as Chinamasa was for whereas Matinenga was unequivocally against the usurpation of Copac.

The sober conclusion one draws is that the Principals did not conclude the matter. However, one cannot deny the Principals harbour ambitions to stage a Copac 'coup' but nothing is cast in stone yet. However this is a clarion call for democrats to apply pressure on the powers that be *visa vis* the democratic route to a new democratic constitution. The advice should be clear that what the Principals are seeking to do is a clear abrogation of the GPA and an affront to Parliament and other stakeholders. They are literally trying to rewrite and renegotiate the GPA. For the GPA in article 6 is clear that:

- 1) the draft Constitution and the accompanying Report shall be tabled before Parliament within 1 month of the second All Stakeholders Conference;
- 2) the draft Constitution and the accompanying Report shall be debated in Parliament and the debate concluded within one month;
- 3) the draft Constitution



From left, Arthur Mutambara, Deputy Prime Minister, Robert Mugabe, President, Morgan Tsvangirai, Prime Minister and Thabo Mbeki, former South African president and Zimbabwe facilitator

emerging from Parliament shall be gazetted before the holding of a referendum; 4) a referendum on the new draft Constitution shall be held within 3 months of the conclusion of the debate

The above procedure gives no space for Principals

pects that they might not be happy with in the Copac draft constitution. This might be tempting to other Principals but the consequences will be disastrous for the nation.

If there are matters of principle that either Principal is not happy with, which are against the values and aspirations of

making process and erode its legitimacy to the marrow.

The trio must realise people have compromised to let Copac drive the process, albeit deep seated concerns and people have compromised to participate for the sake of taking the nation toward the next step in the transition but that is not meant to signal people can be taken for granted. Any attempts by the Principals to take people for granted might be the final nail on the constitution. Some stakeholders like the NCA have since abandoned this process. Civil society will be frustrated, SADC will frown and other political parties will charge on, setting the stage for the 'constitution Waterloo battle'.

It is time for other more reasonable Principals to reign in the President and alert him that the days of unilateral executive powers and authoritarian spasms are gone unless the other Principals are prepared to be tainted with the same brush and definitely history and posterity will judge them harshly. However, with enough civic and regional political pressure I believe common-sense and logic will prevail over suicidal positions.

By Phillan Zamchiya, Regional Coordinator, Crisis in Zimbabwe Coalition

It should be clear to the Principals that the constitution making process is a hot political potato and to get where it is; there has been a lot of compromise from various quarters.

The Principals must therefore show collective leadership and wisdom in dealing with this very delicate process.

pals to amend the constitution. Why then should the Principals seek to subvert this process? It is obvious that the person who is initiating this idea is President Robert Mugabe, who finds himself in a quandary, under fire from hardliners within his party after he connived with the Copac team to embrace reforms in the draft constitution. President Mugabe needs a gateway to amend the draft and factor in changes to appease his radical wing and manage factional politics in his party ahead of the crucial general election. Being the Machiavelli that he has always been, the President is masking dishonesty, trying to collectively lobby the Principals that they will get an equal opportunity, as the executive, to revisit certain as-

their political parties, they can use the Parliament, where they have enough representation to push forward their positions. That will be more transparent, more democratic and in line with the GPA under the guarantor of SADC. Anything threesome is synonymous with broad-day-light coup and risk threatening the constitution.

It should be clear to the Principals that the constitution making process is a hot political potato and to get where it is; there has been a lot of compromise from various quarters. The Principals must therefore show collective leadership and wisdom in dealing with this very delicate process. Their intentions to usurp the Copac process will threaten the constitution

Contemporary African Leaders Must Cherish The Mandela Legacy

By Takura Zhangazha

Reading Nelson Mandela's autobiography in late 1997, I remember being struck by one particular paragraph that somewhat shocked me out of my messianic deification of the African icon. In it, he writes as if to make sure that the readers of his life story would understand that his decision to join the liberation struggle of South Africa was one based on pragmatism and necessity. The specific paragraph reads, 'I had no epiphany, no singular revelation, no moment of truth, but a steady accumulation of a thousand slights, a thousand indignities, and a thousand unremembered moments provoked in me an anger, a rebelliousness, a desire to fight the system that imprisoned my people.' He also makes sure to insist, 'there was no particular day on which I said, 'Henceforth I will pursue the liberation of my people, instead, I simply found myself doing so, and could not do otherwise'.

It was a bit of a dampener because my then eager mind had been expecting a messianic narrative, even a 'Saul on the road to Damascus' moment for Mandela to make that 'final' decision to 'join' the struggle. Well it turns out he did not have that singular moment, a development that seems to be true for most African liberation movement leaders. Their leadership and participation in liberation struggles seems to have been driven by the sum total of their complete and repressive encounter with the inhumane apparatus that was the settler/colonial state at both personal and societal levels. Add to this the fact that the repression also had a Manichean character to it, then it is easier to fathom how and why not only the leaders but also thousands of Africans chose to join various liberation struggles across the continent. It was the 'age of resistance' by necessity and by the dictate of the common desire for equality and human dignity.

It is however the aftermath of these same said struggles and the decisions made by our liberators that is now problematic. Contemporary leaders of not only Zimbabwe but also in most parts of Africa no longer understand the primary challenges of leadership and why they choose or are chosen to lead. This is because most of our leaders, even if they admire the courage needed to have undertaken the liberation struggle, have tended

to be lost on why they are now in leadership proper. They do not see the thousand slights that the Mandela's and others experienced because they think that sort of leadership was only suited to era of anti-colonial movements and therefore assume the same leadership rules don't apply. This is probably a direct result of the fact that they believe the era of 'revolutionary Africa' is definitively over and as a direct result thereof, tend to

investment in their personal welfare. In other words, African leadership is now increasingly for sale. There are fewer and fewer leaders that find themselves pursuing the liberation of their people for lack of an option and as a fundamental necessity. Not that we expect them to be Mandelas or Cabrals but it would help if they demonstrated the requisite consciousness of the historic task of democratically pursuing the continuing

not easy even though analyzing their challenges was much more straightforward; they had to dismantle the apartheid/settler state and establish sovereign and democratic ones. After that, they had to pass on the leadership baton not necessarily to leaders that would mimic them, but those that would understand the revolutionary and founding vision of the people's struggles for emancipation. And it is in this regard that our contemporary leaders have failed dismally (inclusive of those that participated in liberation struggles and still hold on to power). A number have gotten into or close to power on phenomenally popular waves, only to betray majorities in favour of mimicry of the West or East and in the process undermining historical opportunities for progressive and people centered democratic change.

As it is, we might need to have a contemporary African leadership that has a singular epiphany, one that remembers who we are and where we intend to go without falling prey to the easy and nefarious path of the politics of aggrandizement or unashamed neo-colonialism (be it from the East or West). And like Mandela, in his heyday, this singular epiphany will be on the basis that, while there is no particular day in which they will say 'Henceforth I will pursue the liberation of my people,' they will simply find themselves doing so because they cannot do otherwise.

Takura Zhangazha writes here in his personal capacity



"I simply found myself doing so, and could not do otherwise"
Nelson Mandela

apply themselves less in leadership roles and styles.

They no longer take time out to understand the societies and countries they lead, opting in-

socio-economic liberation of African peoples. And this beyond their politics of the belly.

At the risk of being accused of being nostalgic or even naive

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stead for prescriptions from international experts or transnational corporations who will promise temporary investments both into a specific corner of the countries they lead as well as an

about former leaders, the key issue is that leaders like Mandela make it clear that they knew what they were doing in their time, and seriously so. Their vision was apparent but

Criminalisation Of Journalism An Affront To Our Liberties



Journalists outside court with human rights lawyer Selby Hwacha

The editor of the privately-owned *Daily News*, Stanley Gama and his deputy Chris Goko, were arrested and detained at Harare Central Police station on Monday, 8 October 2012 over a story alleging that the disappearance of local businessman Munyaradzi Kereke's family was a hoax.

The two spent four hours at the police station before they were released after signing warned and cautioned statements in which they denied Kereke's criminal defamation charges. Gama and Goko were arrested after the *Daily News* published a news article which alleged that Kereke's report on his missing family was a plot used to deceive people in a bid to substantiate his claims that his life was in danger from a multiplicity of forces, including Reserve Bank of Zimbabwe Governor Gideon Gono and unnamed security

agents. Kereke is a former advisor to Gono.

Speaking to the Media Institute of Southern Africa (MISA), Gama described their arrest as worrisome but vowed they would continue to tell it like it is and discharge their duties without fear or favour. The story in question was reportedly lifted from online news service, *New Zimbabwe*. Kereke says the story is based on falsehoods and could jeopardise the manhunt for his wife, Joseline, and their four year-old daughter Tashinga. He is claiming US\$25 million in a criminal defamation lawsuit.

Kereke further alleges that the *Daily News* defamed him by publishing a story alleging that he raped a minor saying the publication had put on "legal tenterhooks".

Meanwhile, Kudakwashe Matura, a community news activist, was also arrested on Monday, 8 October 2012 following a complaint lodged by one Sam Mawuwa on allegations that a story reported in the *Kariba News* newsletter about him was defamatory. Kariba is a town located in Northern Zimbabwe. Matura was taken in for questioning before being detained overnight. A charge of criminal defamation as enshrined under section 96 of the Criminal Law Codification and Reform Act is being preferred against him. He appeared in court yesterday, (Tuesday, 9 October 2012) and was represented by lawyer Tapiwa Muchineripi under the auspices of the Media Lawyers Network.

MISA-Zimbabwe Comment

The arrest of these journalists proves the criminalisation of

journalism in Zimbabwe under the Criminal Law (Codification and Reform) Act and vindicates MISA-Zimbabwe's strident calls for the repealing of the law which infringes on media freedom. The African Commission on Human and Peoples' Rights is also on record urging members states, Zimbabwe included, to do away with criminal defamation laws, saying such laws tend to curb citizens' fundamental right to freely communicate.

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From page 1

Organ:Zimbabwe Gender Commission

Current Constitution There is no provision for a Gender Commission in the current Constitution.

- Draft Constitution**
- Chairperson is appointed by the President after consultation with the Committee on Standing Rules and Orders.
 - 7 other members are appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
 - There is specific provision for one nominee by the Council of Chiefs.
 - ♦ Maximum Term Limit: 2 terms of 5 years each (Clause 18.3(1)).

Change:

- The change is simply that the Gender Commission is a new creation under the draft Constitution. However, it is interesting to note that unlike for ZEC and the HRC above, there is no requirement for the President to inform any other person or authority should he or she not follow the recommendation of the

Committee on Standing Rules and Orders in the appointment of the Chairperson. The President can choose to ignore the recommendation of the Committee on Standing Rules and Orders without any consequences whatsoever making that check ineffective.

- A better approach would be to require the President to make an appointment on the advice of the Committee on Standing Rules and Orders. The effect of this is that the President would be obliged to follow the recommendation. This would be different from appointing after consultation with which imposes no obligation at all on the President.
- ♦ The justification for a permanent seat for chiefs in the Gender Commission is not clear.

Organ:Zimbabwe Media Commission

Current Constitution Like all commissioners of the ZMC, the Chairperson is appointed by the President from a list of at least12 nominees submitted by the Committee on Standing Rules and Orders.

- Draft Constitution**
- Chairperson is appointed by the President after consultation with the Committee on Standing Rules and Orders.
 - 8 other members are appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
 - ♦ Maximum Term Limit: 2 terms of 5 years each (Clause 18.3(1)).

Change:

- This could be a significant change unless the procedure in practice is not transformed. As we have already observed, after consultation does not place an obligation on the President to follow the recommendations of the Committee on Standing Rules and Orders. The President can listen to the recommendations but ignore them. The current procedure is better because it confines the President’s choices to the candidates that are submitted to him or her by the Committee on Standing Rules and Orders. The change from the current to the draft Constitution appears to be in the negative. Far better would be to retain the current system.
- ♦ As with ZEC and the HRC, the appointment procedure for the 8 other commissioners has not been changed and is more robust than the procedure for the appointment of the Chairperson. It is difficult to find the justification for the different approach in appointing the Chairperson and other commissioners especially where the procedure for the Chairperson is weaker.

Organ:National Peace and Reconciliation Commission

Current Constitution There is currently no provision for this commission.

- Draft Constitution**
- Chairperson is appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders.
 - If the appointment of a chairperson is not consistent with a recommendation of the Judicial Service Commission, the President must inform the Committee on Standing Rules and Orders.
 - 8 other members are appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
 - ♦ Maximum Term Limit: 2 terms of 5 years each (Clause 18.3(1)).

Change

- The same points in regards to the newly created Gender Commission and for ZEC and the HRC above, apply to this commission. Appointing merely after consultation does not represent strong checks and balances. There is no indication of what happens when the

President informs the Committee on Standing Rules and Orders if his or her choice is inconsistent with the advice of the Judicial Services Commission.

- A better approach is for the President to make an appointment on the advice of the Judicial Services Commission. The effect of this is that the President would be obliged to follow the recommendation. This would be different from appointing after consultation with which imposes no obligation at all on the President.
- ♦ As with the above commissions, there does not seem any justifiable reason for appointing the Chairperson through a different and weaker procedure than that for other commissioners.

Organ:Zimbabwe Anti-Corruption Commission

Current Constitution Like all other Anti-Corruption Commissioners, the Chairperson is appointed by the President in consultationwith the Committee on Standing Rules and Orders (section 110K)

- Draft Constitution**
- Chairperson is appointed by the President after consultation with the Committee on Standing Rules and Orders.
 - 8 other members are appointed by the President from a list of at least 12 nominees submitted by the Committee on Standing Rules and Orders.
 - ♦ Maximum Term Limit: 2 terms of 5 years each (Clause 18.3(1)).

Change:

- As we have observed, the effect of in consultation/after consultation produces the same result that the President is not bound by the recommendations of the Committee on Standing Rules and Orders. A better approach would be to require appointment on the advice of the Committee on Standing Rules and Orders.
- ♦ Again, as we have observed in respect of other commissions, it is odd that the appointment procedure for the 8 other commissioners has been changed so that the President no longer merely appoints in or after consultation but appoints from a list submitted by the Committee on Standing Rules and Orders. This is more robust than the procedure for the appointment of the Chairperson. The different approach for the Chairperson and other commissioners is unjustified and the recommendation would be to use the same procedures for all commissioners, including the Chairperson.

Conclusion

I hope the paper has given you a bigger picture of the appointment process. There are some improvements but there are also critical areas, as pointed out that need attention to ensure that there are proper checks and balances in the appointment process. One critical oddity is that the procedure for appointing the various chairpersons of the commissions is less robust and subject to less checks and balances than the procedure for appointing the other commissioners. The justification for this differential treatment is unclear. If anything, appointment to the Chair’s position needs to be subjected to stringer checks and balances. A single procedure for all commissions, Where the Committee on Standing Orders or where appropriate, the Judicial Services Commission and Rules selects and recommends candidates to the President so that the President makes a choice from the list is simpler and more straightforward.



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