



Assessing Independent Commissions in the COPAC Draft Constitution of Zimbabwe





ASSESSING INDEPENDENT COMMISSIONS IN THE COPAC DRAFT CONSTITUTION OF ZIMBABWE

by Professor Jeremy Sarkin

Extraordinary Professor of Law, University of South Africa (UNISA),
Member (Chair/Rapporteur 2009–2012) United Nations Working Group
on Enforced or Involuntary Disappearances

edited by Bryan M. Sims

Political Analyst, States in Transition Observatory, Idasa

2012

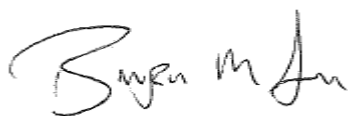
Foreword

Democratic transitions involve a raft of reforms that, of necessity and in the short term, privilege the establishment of constitutional principles and guidelines for the holding of free and fair elections. Where there is scope for a longer-term agenda, a focus on broad restoration of national institutions allows a nation to re-vision itself both as a state and from the perspective of a set of constitutionally-enshrined principles upon which to build a more inclusive society.

On the strength of our role in reviewing and monitoring of the Chapter 9 institutions that support constitutional democracy in South Africa, Idasa has decided to place an emphasis on monitoring the strength, independence and potential effectiveness of constitutionally-mandated institutions as provided for in the Constitution Select Committee (COPAC) Draft Zimbabwe Constitution of 18 July 2012. These will be key national institutions that will frame and oversee a democratic Zimbabwe. They must be seen as legitimate, non-partisan and free from executive and parliamentary interference.

This research was commissioned by Idasa to enhance meaningful engagement by Zimbabweans in the process of transition in the country. The intention is to examine the role of constitutionally-mandated institutions in terms of demarcating, limiting and overseeing the powers of the state. These structures are especially critical in the context of the absence of human rights and the need to entrench a human rights culture to act against state repression, corruption and anti-democratic practices. We hope that this analysis will serve to inform and assist both civil society and political stakeholders engaging in the constitutional negotiations as they advocate for strengthened provisions governing independent institutions and commissions.

Idasa's States in Transition Observatory would like to thank Professor Jeremy Sarkin for sharing his significant expertise.¹



Bryan M. Sims
Idasa, an African democracy institute

Introduction

The role of the State is limited and defined in a Constitution.² Constitutionalism is, essentially, the demarcation and circumscription of the authority of the State so as to protect citizens. It defines the social values and objectives that ought to underpin the State and the way it functions. It can also describe the relationship between the State and the individual, as well as the rights of the individual. Some of the limitations placed on the State are exercised by independent institutions that play an oversight role. For this reason, how the institutions are established, who is appointed to them, their powers and their resources all play a critical role in determining their effectiveness.³ In fact, national institutions supporting democracy and human rights have been established in more than 100 countries.

The role of the courts and the manner in which the courts exercise judicial review is also critical to a constitutional State. Together, these are the basis for determining the effectiveness of checks on state fiat. In this context the creation of independent institutions to promote observance of human rights and to protect people from abuse of government power is a significant achievement in Zimbabwe's transition to a constitutional democracy. The COPAC draft Zimbabwe Constitution of 18 July 2012 establishes a number of institutions to promote democracy and human rights.⁴ These structures are critical against the background of the absence of human rights and the need to entrench a human rights culture and act against state repression, corruption and anti-democratic practices.

In relation to independence and the appointment process of national institutions, the Paris Principles are the universal principles that are accepted as laying out the principles that such institutions should follow. In this regard they state:

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights...⁵

According to a United Nations (UN) Centre for Human Rights document on National Human Rights Institutions,⁶ “an effective national institution will be one which is capable of acting independently of a government, of party politics, and of all other entities and situations which may be in a position to affect its work”.⁷ The document notes “any institution can only ever be as independent as the individuals of which it is composed”⁸ and “the method by which members of national institutions are appointed can be critical in ensuring independence”.⁹ It also states that the “founding legislation of the institution should specify all matters relating to method of appointment, including voting and other procedures to be followed. Criteria for appointment should set out the prerequisites (including nationality, protection, qualifications, etc) for appointment to a national institution”.¹⁰

In an Organisation for Security and Co-operation in Europe (OSCE) paper it was noted that:

The greatest guarantee of the impartiality and fairness of national institutions is the selection of an Ombudsman or human rights commissioner widely respected across political, economic, social and cultural lines as wise, impartial, fair and someone who

seeks the broadest guarantees of respect for human rights. The quality of the selection process ensures the quality of the candidate chosen. Because these institutions greatly depend on the people who head them, one of the most important factors in the institutions' effectiveness and success is how the people who head them are chosen.¹¹

This paper examines the role and function of various commissions that are contained in the 18 July 2012 draft Constitution submitted by the Constitution Select Committee. These include:¹²

- The Judicial Service Commission (Chapter 8 part 3)
- The Civil Service Commission (Chapter 10)
- The Independent complaints mechanism for the Security Services (Chapter 11 part 1)
- Defence Service Commission (Chapter 11 part 2)
- Police Service Commission (Chapter 11 part 3)
- Correctional Service Commission (Chapter 11 part 5)
- Zimbabwe Electoral Commission (Chapter 12 part 2)
- Zimbabwe Human Rights Commission (Chapter 12 part 3)
- Zimbabwe Gender Commission (Chapter 12 part 4)
- Zimbabwe Media Commission (Chapter 12 part 5)
- National Peace and Reconciliation Commission (Chapter 12 part 6)
- Zimbabwe Anti-Corruption Commission (Chapter 13 part 1)

Appointments to commissions

Appointment processes have a major effect on commissions or institutions.¹³ For example, individuals from a non-human rights background may be unwilling to be as forceful and robust when it comes to raising concerns about human rights transgressions involving the State. Re-appointment or future appointments may also be an issue which undermines independence. Weak appointments severely hamper the manner in which commissions function. Negative perceptions around appointments can disrupt public faith and trust in an institution to such an extent that all work done by the institution is undermined.¹⁴

Besides the issue of independence and the stance that the individuals on the commission and the commission as a whole takes on human rights, the way appointments to these structures are made have a critical impact on their potential strength or weakness. Therefore, experience and expertise in human rights or the specific issue that the commission is responsible for, should be a prerequisite for anyone appointed. Can someone with little or no background in the field oversee the promotion and protection of human rights, or another function, at a national level? Individuals who are appointed with little or no experience will have to learn the necessary principles and may in fact not be sufficiently dedicated, or willing, to do so.

Individuals appointed must be seen to be leaders in the field so as to ensure respect and a following from the public and groups such as the non-governmental organisations (NGOs) with which they will be working. Poor appointments reduce the esteem that is accorded the institution. Unknown individuals, or individuals with little appropriate background or experience, will be negatively perceived by the public.

If individuals are appointed for their ideological or political beliefs rather than their skill, commitment, passion or human rights background, this will impact on their decisions, and therefore on the credibility of the institution. It will also impact on the willingness of the institution to criticise the State on a human rights matter and the timing of any criticism it may voice. Any reticence to criticise the failings of the State is also more likely to be expressed when political issues are at stake. Removing party politics from a selection process improves the chances of incumbents serving independently and effectively.

It is clear that, on its own, even a properly-constructed appointment process cannot serve to ensure independence and legitimacy. Pivotal concerns for determining how well the public good is served are the way in which appointments are made and where the power to ratify appointments lies.

A general section on appointments, section 18(3), for all commissions in the draft Constitution provides that every member of a commission is appointed for a term of five years, which is renewable for one additional term only. Reappointments make it likely that these individuals will be at pains to be reappointed, which may limit the robustness of their actions. The draft also provides that members of commissions, other than the independent commissions and the Judicial Service Commission, hold office at the pleasure of the President. This will weaken the effectiveness of these bodies because “at the pleasure of the President” gives an indication that they serve because the President wants them to and that they must do the President’s bidding.

The draft states that members of Parliament and members of provincial or metropolitan councils, local authorities and government-controlled entities are not eligible to be appointed as members of a commission.¹⁵ Usefully, to promote gender equality,¹⁶ it is provided that where a commission has a chairperson and a deputy chairperson, they must be of different genders.¹⁷ Regarding all commissions, section 2.9, part 1(b)(ii) of the draft Constitution provides that half of all the commissioners must be women. Another useful provision that should be replicated for all commissions is a provision found in Section 16.9(3) concerning the Zimbabwe Land Commission. It provides that the commission must “reflect the diversity of Zimbabwe’s population, in particular its regional interests and gender balance”. While gender balance is contained in the general clause, the notion of population diversity is not. The draft should promote the notion of population diversity whilst appointing commissioners as a way to make the process more legitimate and likely to be successful. If the commissions are widely representative they are more likely to be approached by all Zimbabweans regardless of affiliation. Therefore, they will be more likely to be perceived as useful tools to promote democracy and allow people with grievances to resolve them within the system rather than resorting to extra-democratic means and violence.

The draft Constitution permits an Act of Parliament to confer additional functions on a commission.¹⁸ This is useful if it is used to enhance the scope and authority of the commission. Unfortunately, the section also provides that the Act may regulate the manner in which a commission exercises its functions, provided that the commission’s independence or effectiveness



is not compromised. It is difficult to imagine cases in which a commission's independence is not affected when it is told how to exercise its functions. In a similar vein the draft Constitution provides that an Act of Parliament may provide for the procedures to be adopted by a commission. Again, this will compromise the independence of the commission.

A major issue that determines both the independence and effectiveness of commissions is the allocation of financial resources as well as the methodology for such appropriation. In section 18.5 the draft provides that "Parliament must ensure that sufficient funds are appropriated to the commissions to enable them to exercise their functions effectively". In section 18.5 it is stated that the government must ensure that adequate funds are provided to the commissions and other institutions established by this Constitution, to enable them to perform their functions effectively. "The Commissions and other institutions established by this Constitution must be given a reasonable opportunity to make representations to a parliamentary committee as to the funds to be allocated to them in each financial year."¹⁹ These provisions need to be strengthened by adding more detail to assure the smooth functioning and independence of these bodies. For example, an independent mechanism could be created to assist the allocation of funding to such bodies to reduce the political effects such a process could have on the role the institutions play.

As far as reporting is concerned, the independence of the commissions could be compromised by the provisions in the Constitution to report annually to Parliament. The draft provides that every commission must submit to Parliament, through the responsible Minister, an annual report and that an Act of Parliament may require a commission to submit further reports and may prescribe the way in which such reports are to be submitted.

To conclude, the draft Constitution can be strengthened by including the following recommendations:

- Appointments ought to occur purely for reasons of experience and skill in the requisite areas;
- The political influences on the appointment processes ought to be reduced as much as possible;
- No appointments ought to be made from those who have held high political or high party political office;
- Appointments ought to occur for one period only and no reappointments ought to be permitted;
- Appointments to the commissions ought to ensure that they widely represent the diversity of Zimbabwean society;
- The independence of the commissions ought to be enhanced by allowing them to determine their own procedures;
- More powers and greater access to and control over funds ought to be given to the commissions to enhance their effectiveness and independence; and
- The reporting provisions ought to be strengthened.

Judicial Services Commission (Chapter 8 part 3)

Chapter 8 of the draft Constitution is concerned with the judiciary and the courts. In this section, the analysis focuses only on the role and function of the Judicial Service Commission (JSC). Many countries have created independent processes to appoint judges, realising that an independent judiciary is a hallmark of a democratic society.²⁰ Judicial Service Commissions are common institutions in such systems.

Usefully, the role of the Zimbabwe JSC is to tender advice to the government on matters relating to the judiciary or the administration of justice, to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and with the approval of the Minister responsible for justice may make regulations for such purposes. In this regard it is problematic that the approval of the Minister is required as it could allow political interference in the process. The regulations ought not to be subject to ministerial approval.

The draft allows an Act of Parliament to confer on the JSC functions in connection with the employment, discipline and conditions of service of persons employed in the various courts. This is important as the courts ought to be independent from the Ministry of Justice and this permits this to occur. More functions could be given to the JSC to strengthen the independence of the judiciary.

The JSC ought to be involved in the appointment of all judges and be responsible and oversee all the work of the judiciary. The role that this institution will play is crucial as it is against the Bill of Rights that legislation enacted by Parliament or other bodies will be tested by the courts when its constitutionality is at issue.²¹ The power of judicial review will enable the courts to limit the power of the State, including the manner and degree in which organs of government may intrude into the lives of individual citizens.²²

For this reason independent and impartial adjudication is essential to a free and democratic society. A judge's political independence is crucial in the outcome of a particular case, particularly in constitutional adjudication. Without the safeguard of a system where the government does not appoint and control the judiciary the risk of political patronage remains high. Without the independence of the judiciary the rule of law and the protection of fundamental rights will be jeopardised as the government will most likely appoint people who will carry out its will. In these circumstances any attempt to hold the State accountable will be meaningless. Thus, appointments and the appointment process are critical.

The question of how, and by whom, judges are appointed is therefore of utmost significance. An appointment process will be criticised if it lacks transparency and accountability. It will cloud merit selection. Judges must enjoy security of tenure. Legitimacy and respect for the courts must be nurtured, for without it the rule of law cannot operate. Where governments do not respect the judgments of the courts, human rights will not exist. Independence must preclude any interference by the executive, legislature or political parties, because the safety and happiness and peace of every community largely depend on the confidence that people have in the courts and the judges. Citizens should feel that their rights are safe under the law, and that the judiciary hand down wise and impartial judgments. If the courts are not independent it will undermine public faith in their credibility.

For this reason it is clear that in a democracy judicial appointment procedures should be designed to prevent undue political influence. Political parties clearly have an interest in which judges are appointed. While the political process is important it should not dominate appointments. Civil society should also play a role in appointments and this role should be constitutionalised. The public's involvement in the process is crucial for the legitimacy and professionalisation of the process. Holding appointment proceedings in public ensures that appointments are conducted openly and transparently without fear, favour or prejudice and constitutes a fundamental check to the exercise of power. In practice, the public should be given the opportunity to make nominations, attend interviews, recommend questions and lodge objections to proposed candidates. This would enhance the process. While a new Parliament may encourage public participation, the principles should be constitutionalised to ensure that they are adhered to at a later stage when the euphoria of the transition subsides.

The draft Constitution provides that the JSC is to be composed of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court, the Attorney-General, the chief magistrate, the chairperson of the Civil Service Commission, three practising legal practitioners, one professor or senior lecturer of law, a chartered public accountant or auditor, and a person experienced in human resources management.

Unfortunately, the role of the President in the appointment process to the JSC is a large one. This reduces the independence of the body. While the draft usefully provides that the one professor or senior lecturer of law is designated by an association representing the majority of the teachers of law at Zimbabwean universities, it regrettably provides that if there is no such association the person is to be appointed by the President. The draft also provides that one person is to be appointed to the JSC who has at least seven years' experience in human resources management. Unfortunately, the person too is appointed by the President, reducing the independence of the JSC. Critically, as well, there are many existing members of the judiciary and many lawyers on the JSC. There is no representation from the broader civil society other than representatives from the various professions.

As far as appointments are concerned, the JSC sends a list of three nominees to the President to choose from. If the President is not happy with the three choices a further three names can be requested. This allows too great a role for the President in judicial selection and has the potential to further politicise the process. The role of the President in the process ought to be drastically reduced.

Where judges are to be removed from office, if their conduct reaches a level where there is such a need, the JSC is problematically excluded from the process. The draft provides that if the President considers that the question of removing the Chief Justice from office ought to be investigated, the President must appoint a tribunal to inquire into the matter. This authority ought to be in the hands of the JSC. As far as all other judges are concerned, the JSC can advise the President if there is an issue which may cause a judge to be removed from office. If this occurs the President must appoint a tribunal to inquire into the matter. The role of the President is again far too great in the process and ought to be reduced. It is the JSC that ought to establish the tribunal and appoint its members. The present draft provides that the members of the tribunal are appointed by the President. This will have a great effect on the independence of the judiciary and may allow for political interference in the judicial process.

Finally, on the way the JSC operates, the draft Constitution provides that, “The Judicial Service Commission must conduct its business in a transparent manner and, in particular, must ensure that all interviews of candidates for judicial office are conducted in public.”²³ How this works in practice remains to be seen, but it is the deliberative process which also needs to be transparent. Usefully, the members of the Judicial Service Commission who do not hold specific state appointments are appointed for only one non-renewable term of six years. This allows for more independent decision-making and for regular change to occur to membership of the JSC. However, the independence of the JSC will be affected by its lack of broad representativeness. This ought to be rectified to ensure that the judicial process is made as apolitical as possible both in reality and in the way the process will be perceived.

To conclude, the Judicial Service Commission can be strengthened by including the following recommendations:

- Public participation should be constitutionalised;
- There ought to be a greater civil society role on the JSC and its independence and transparency ought to be enhanced;
- The role of the President in the process ought to be reduced;
- The JSC should be able to make its own regulations without ministerial approval; and
- The process to remove judges ought to be amended to give the JSC a greater role.

Civil Service Commission (Chapter 10)

The Civil Service Commission consists of a chairperson and deputy chairperson and between two and five other members that are appointed by the President. The fact that they are appointed by President means the appointees will be appointed on a political basis rather than purely on their skills and experience in the civil service sector. While the appointees must be chosen for their knowledge of or experience in administration, management or the provision of public services this may be a less of a factor when the President weighs up who to appoint.

The functions of Civil Service Commission are to appoint qualified and competent persons to the civil service, fix and regulate conditions of service for it, exercise control and discipline its members, investigate and remedy grievances, implement measures to ensure its effective and efficient performance, ensure that its members carry out their duties efficiently and impartially, advise the President and the Minister on any matter concerning the civil service and to promote the values and principles of the Constitution in the civil service.

To carry out its functions it may make regulations. Unfortunately however, it needs the approval of the Minister to do so. Again its role is circumscribed by the fact that it must exercise its functions in accordance with any general written policy directives given to it by the Minister. Regarding salaries, allowances and other benefits, the commission can only act with the approval of the President given upon the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the civil service.

To conclude, the Civil Service Commission can be strengthened by including the following recommendations:

- The independence and role of the institution ought to be enhanced;
- The role of the President in the process ought to be reduced; and
- The skills needed for appointment to the commission ought to be tightened up.

The independent complaints mechanism for the Security Services (Chapter 11 part 1)

Zimbabwe's violent past and the role of the security sector in those violations means that control and supervision over the security forces is vital. It is also important that a complaints mechanism exists to allow complaints by the public to be properly and independently investigated. Unfortunately, the draft Constitution only contains a provision which reads: "An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct."²⁴ In this regard it would be far better to constitutionalise such a mechanism to allow it to be part of the Constitution rather than leaving such an important matter to the political process. Usefully, the draft ensures that the mechanism needs to be "effective" and "independent" and an institution that is established that does not meet these criteria could be challenged.

To conclude, the independent complaints mechanism for the Security Services can be strengthened by including the following recommendation:

- By giving clarity in the Constitution on its functions and powers.

Defence Service Commission (Chapter 11 part 12)

The draft Constitution provides for a Defence Service Commission consisting of a chairperson and between two and six other members who are appointed by the President. Again this means the appointments, as with the other commissions appointed in this manner, will most likely include individuals on the basis of political considerations rather than purely on merit. The draft provides that the members must be chosen for their knowledge or experience in administration, management, military affairs, and their professional qualifications. It does however provide "or their general suitability for appointment".²⁵ The "or" in the provision could allow members to be appointed who do not have the requisite military background or specific skills.

The draft further provides that at least half the members must be persons who are not and have not been members of the Defence Forces, while at least one of them must have held senior rank in the Defence Forces for a minimum of five years. This is useful provision that attempts to ensure that there is civilian oversight, but also some military knowledge among members of the commission. How this will work in practice remains to be seen, but having as many civil-

ians as possible to provide a high degree of accountability and oversight is essential. Members of the Commission are appointed for five years which can be renewed once. Renewal reduces the independence of the incumbent. Unfortunately, however the draft Constitution provides that the commissioners serve at the pleasure of the President; in other words, for as long as the President wants them to be members. This will also reduce the effectiveness of the process.

The Defence Service Commission is established to appoint qualified and competent persons, to fix and regulate conditions of service, to ensure the general well-being and administration of the Defence Forces, to foster harmony and understanding between the Defence Forces and civilians, to advise the President and the Minister and to exercise any other function conferred or imposed on the commission. While the Defence Service may make regulations it needs the approval of the appropriate Minister. This undermines the independence of the commission. While the commission is able to fix salaries and other benefits, it has to obtain the approval of the President given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the Defence Forces.

To conclude, the Defence Service Commission can be strengthened by including the following recommendations:

- Tightening up the provisions on the skills and background experience needed for appointment;
- Enhancing the independence of the commission in a number of ways including by removing the provision that commissioners serve at the pleasure of the President;
- Tenure of commissioners ought to be for one term only and no renewal of appointment ought to be permitted; and
- Removing the need for ministerial approval for regulations.

Police Service Commission (Chapter 11 part 3)

The draft Constitution provides for the establishment of a Police Service Commission. Its functions are to appoint qualified and competent persons to the Police Service, to fix and regulate conditions of service, to ensure its general well-being, administration and efficiency, to foster harmony and understanding between the Police Service and civilians, to advise the President and the Minister and to exercise any other function conferred or imposed on the commission.

As with the Defence Force Commission, a Police Service Commission is established consisting of a chairperson and at least a further two and a maximum of six other members appointed by the President. Thus the commission will have between three and seven members. They must be chosen for their knowledge or experience in the maintenance of law and order, administration, or their professional qualifications or their general suitability for appointment. Merit may suffer in the process of selection. Again, as with the Defence Force Commission, at least half the members must be persons who are not and have not been members of the Police Service and at least one of them must have held a senior rank in the Police Service for one or more periods amounting to at least five years. As with the other similar commissions, members of



this commission can serve two five-year terms. Unfortunately, they serve at the pleasure of the President. This will reduce the effectiveness of the institution.

As with the other similar commissions, this commission may only make regulations with the approval of the appropriate Minister. Similarly, the commission is only able to fix salaries and other benefits with the approval of the President given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the Police Service.

To conclude, the Police Service Commission can be strengthened by including the following recommendations:

- Ensuring that those appointed have the necessary skills and experience;
- Enhancing the independence of the commission in a number of ways including by the removal of the provision that commissioners serve at the pleasure of the President;
- Commissioners ought to be for one term only and no renewal ought to occur; and
- Ministerial approval for issuing of regulations ought to be removed.

Correctional Service Commission (Chapter 11 part 5)

The draft Constitution also provides for the establishment of a Correctional Service Commission. It has been given the same functions as the Defence Force Commission and the Police Service Commission and, as with the other commissions, it will consist of a chairperson and at least a further two, and a maximum of six, other members, appointed by the President.

The rationale set out for appointment is the same: their knowledge or experience in the maintenance of law and order, administration, or their professional qualifications or their general suitability for appointment. Merit may suffer in the process of selection. Again, as with the other commissions, at least half the members must be persons who are not and have not been members of the Correctional Service and at least one of them must have held a senior rank in the Correctional Service for one or more periods amounting to at least five years. Members of the commission may serve two five-year terms as commissioners. They do however serve at the pleasure of the President, reducing the usefulness of the commission. Again, as with the others, this commission may only make regulations with the approval of the appropriate Minister. Similarly, the commission is only able to fix salaries and other benefits with the approval of the President given on the recommendation of the Minister responsible for finance and after consultation with the Minister responsible for the Correctional Service.

To conclude, the Correctional Service Commission can be strengthened by including the following recommendations:

- Appointees have the necessary skills and experience;
- The independence of the commission ought to be enhanced; and
- Ministerial approval for issuing of regulations ought to be removed.

Independent commissions (Chapter 12)

The following are termed independent Commissions in the draft Constitution.

- (a) the Zimbabwe Electoral Commission (Chapter 12 part 2);
- (b) the Zimbabwe Human Rights Commission (Chapter 12 part 3);
- (c) the Zimbabwe Gender Commission (Chapter 12 part 4);
- (d) the Zimbabwe Media Commission (Chapter 12 part 5); and
- (e) the National Peace and Reconciliation Commission (Chapter 12 part 6).

It is commendable that various independent Commissions are appointed. Critically, they will need to be fully resourced if they are to have the necessary impact. The continuation of the Media Commission is a problem and will continue to have an adverse effect on media freedom.

General provisions

All the independent commissions are given the same general objectives. These are to support and entrench human rights and democracy, to protect the sovereignty and interests of the people, to promote constitutionalism, to promote transparency and accountability in public institutions, to secure the observance of democratic values and principles by the State and all institutions and agencies of government, and government-controlled entities and to ensure that injustices are remedied.

As far as independence of the commissions is concerned, the draft Constitution provides that the commissions are independent and are not subject to the direction or control of anyone. They must act in accordance with this (draft) Constitution and must exercise their functions without fear, favour or prejudice although they are accountable to Parliament for the efficient performance of their functions. The draft provides that the State and all institutions and agencies of government must assist the commissions and protect their independence, impartiality, integrity and effectiveness and that no person may interfere with the functioning of the commissions. It also provides that members of the commissions may 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.

To further enhance independence, people who are members of a political party or organisation on their appointment to a commission must relinquish that membership and if a member of an independent commission becomes a member of a political party or organisation that person will cease to be a member of the commission. However, this does not solve the problem of politics within the commissions. Such commissions should be devoid of political affiliation. Thus, persons that have held senior political party or high political office positions ought not to be permitted to serve on such commissions. If this occurs these links will undermine public trust and credibility. The Constitution should forbid those who have held senior political party positions or senior state positions from being members of these commissions.



The draft Constitution makes it difficult to remove a commissioner without proper cause. It provides that a member of a commission may be removed from office only if the person is unable to perform the functions of his or her office because of physical or mental incapacity, is grossly incompetent, guilty of gross misconduct or has become ineligible for appointment to the commission concerned. Unfortunately, the procedure for the removal of an independent commissioner is the same as that for removing a judge. This process ought to be revised to make it more independent and less susceptible to the political process.

To conclude, the general provisions of the Independent Commissions can be strengthened by including the following recommendations:

- The independence of the commissions ought to be strengthened by revisiting the appointment process;
- The possible role of politics in the appointment process ought to be reduced as far as possible; and
- The process of removal of commissioners ought to be revised to make them less susceptible to political influence.

Zimbabwe Electoral Commission (Chapter 12 part 2)

The functions of the Zimbabwe Electoral Commission are to prepare for, conduct and supervise elections to the office of President, to Parliament, to provincial, metropolitan councils, governing bodies of local authorities, to the office of President of the Senate and the Speaker, for members of the Councils of Chiefs, and referendums. It must ensure that elections and referendums are conducted efficiently, freely, fairly and transparently. It must register and supervise the registration of voters, compile voters' rolls and registers, or supervise the compilation of those rolls and registers by those charged with that responsibility. It must ensure the proper custody and maintenance of voters' rolls and registers, delimit constituencies, wards and other electoral boundaries, design, print and distribute ballot papers, approve ballot boxes, establish and operate polling centres, conduct voter education, accredit observers, give instructions to ensure efficient, proper, free and fair conduct of any election or referendum, receive and consider complaints from the public and take action regarding complaints.

The Electoral Commission is composed of a chairperson appointed by the President after consultation with the JSC and the Committee on Standing Rules and Orders. The eight other members of the commission are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. These processes rely heavily on the roles of Parliament and the President and thus are likely to be very political processes with too little focus on the skills and experience of the candidates. For this reason they are likely to reduce the independence of the commission. It would be far better to have a process which reduces the role of the executive and legislative. Having an Electoral Commission that is independent, particularly in a country where elections have been marred consistently by violence, is critical.

Providing for a role for civil society is fundamental in such circumstances. In addition to the usual persons mentioned in section 18.3(3) that may not be members of commissions

(members of Parliament, members of provincial or metropolitan councils, local authorities and government-controlled entities) public officers, other than judges, employees of provincial and metropolitan councils and local authorities and members and employees of statutory bodies and government-controlled entities are not permitted to be members of this commission. It would make sense for this provision to be applicable to all the commissions and not the Electoral Commission only.

To conclude, the Zimbabwe Electoral Commission can be strengthened by including the following recommendations:

- Enhancing the independence of the institution;
- The role of the legislature and executive in the appointment process ought to be reduced; and
- The skills and experience needed to be a commissioner ought to be spelled out in greater detail.

Zimbabwe Human Rights Commission (Chapter 12 part 3)

The draft Constitution provides for the Zimbabwe Human Rights Commission. It has a chairperson appointed by the President after consultation with the JSC and the Committee on Standing Rules and Orders. Eight other members are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. This appointment process ought to be amended to reduce the enormous role of the President and the legislature. This places the power of appointment in the hands of parliamentarians from different parties who comprise the Committee on Standing Rules and Orders. The makeup of the parliamentary committee might see horse-trading occurring that ensures that candidates are appointed because of their political beliefs rather than their abilities in the human rights field. The fact that the President can choose from a list of candidates further exacerbates the influence of politics in the process. The role of the President ought to be simply to appoint those candidates sent to the Office of the President. If the President is able to pick and choose from a list it is likely that the choices will be made on the basis of political affiliation. This will reduce the independence of the commission and affect the credibility of the institution in the eyes of the public. An institution that does not enjoy the trust of all sectors of the community will not be trusted and called on. This will therefore negatively affect the position and role that this institution can and will play.

It is provided that the chairperson of the Human Rights Commission must be a person qualified for at least seven years to practise as a legal practitioner in Zimbabwe. As with the other independent commissions, the status of legal practitioner is set as a requirement. However, while it is important to have lawyers in the process, it is not necessary for a lawyer to chair the commission. As far as appointment considerations for the other members are concerned, the draft provides that members of the Human Rights Commission must be chosen for their integrity and their knowledge and understanding of, and experience in, the promotion of human rights.



The functions of the Human Rights Commission as provided in the draft are to promote awareness of, respect for, and the protection, development and attainment of human rights and freedoms. It must monitor, assess and ensure observance of human rights and freedoms, receive and consider complaints, protect the public against abuse of power and maladministration by State and public institutions, and investigate the conduct of any authority or person where it is alleged that human rights and freedoms have been violated. The commission must also secure appropriate redress, including recommending prosecution, and direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the commission, recommend to Parliament effective measures, conduct research, visit and inspect prisons, places of detention, refugee camps and related facilities, and places where mentally disordered or intellectually handicapped persons are detained to ascertain the conditions there and make recommendations regarding those conditions to the Minister responsible. It is provided that the Commissioner-General of Police must comply with any directive given to him or her by the Zimbabwe Human Rights Commission. It is to be noted that the commission has very wide authority, including that of the Office of the Ombudsman which was contained in a previous draft.

Giving the commission so many functions will dilute its abilities with respect to its core human rights functions. It may be useful to once again establish an Ombudsman, but also an office that inspects prisons and other places of detention. However, the protective mandate of the commission also needs to be strengthened as well as the powers that the commission has to carry out its mandate. More attention ought to be given to promoting human rights through a variety of methods: education and raising community awareness, making recommendations to Parliament, reviewing legislation and, importantly, investigating alleged violations of fundamental rights and assisting those affected to secure redress.

Usefully, the Constitution determines that the commission may require any person or institution to inform it about measures taken to give effect to human rights and freedoms and to provide the commission with information it needs to prepare any report required. The powers of the commission ought to be more fully contained in the Constitution.

The Human Rights Commission must submit an annual report to Parliament but may submit reports to Parliament on particular matters. Weakening its independence, the commission must submit the report through the appropriate Minister. This is problematic as the Minister may be able to delay or even halt a report being sent to Parliament for any reason. Thus, the commission should be able to send any report it wishes to Parliament without any political interference whatsoever.

To conclude, the Zimbabwe Human Rights Commission can be strengthened by including the following recommendations:

- Enhancing the independence of the commission;
- Revisiting the appointment of the chairperson provision;
- Reducing the role of Parliament and the President;
- Providing greater powers to the commission in the Constitution;

-
- Revisiting the functions to determine whether other bodies ought to have some of the roles assigned to the commission, such as those dealing with the protection of the public against abuse of power and maladministration by State and public institutions, which ought to be given to an Ombudsman; and
 - Amending the reporting to Parliament process provisions.

Zimbabwe Gender Commission²⁶ (Chapter 12 part 4)

As with the other independent commissions, the Zimbabwe Gender Commission consists of a chairperson appointed by the President, after consultation with the Committee on Standing Rules and Orders. While similar to the other commissions in that it has eight other members, seven are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. Unlike the other commissioners, one member is nominated by the national Council of Chiefs, appointed by the President. Why this is the situation for this commission only is uncertain but must be to some extent to bring issues of customary practices into the work of the commission. It is somewhat discriminatory to have such a provision for this commission alone. However, the most important issue is the role of the President in the appointment process. This ought to be revisited, as with the other commissions, to reduce this role.

The draft provides that members of the Gender Commission must be chosen for their integrity and their knowledge and understanding of gender issues in social, cultural, economic and political life. Little guidance is further provided on the skills and experience needed to be members of the commission. It is provided that the two genders must be equally represented on the commission.

The Gender Commission is established to monitor issues concerning gender equality, to investigate possible violations of rights relating to gender, to receive and consider complaints from the public and to take action in regard to the complaints, to conduct research, to recommend changes to laws and practices which lead to discrimination based on gender, to advise public and private institutions on steps to be taken to ensure gender equality, to recommend affirmative action programmes to achieve gender equality, to recommend prosecution for criminal violations of rights relating to gender, to secure appropriate redress where rights relating to gender have been violated, and to do everything necessary to promote gender equality.

As with the Human Rights Commission, the Gender Commission must submit an annual report to Parliament and may submit reports to Parliament on other matters. As noted above for the Human Rights Commission, it is unfortunate that it can only submit a report through the appropriate Minister.

To conclude, the Zimbabwe Gender Commission can be strengthened by including the following recommendations:

- The role of the President and Parliament ought to be limited in the appointment process; and
- The reporting process to Parliament ought to be revisited.



Zimbabwe Media Commission (Chapter 12 part 5)

The role of the media in human rights issues is critical.²⁷ The draft Constitution provides for a commission known as the Zimbabwe Media Commission. There should not be a constitutional commission for the media. Rather, the media ought to be responsible for self-regulation and, where necessary, there ought to be an approach to the courts where the media has overstepped its mark. Democratic societies permit the media to play a critical role in an unfettered way. Setting up a process which limits the media's ability to play an independent role is to limit the role of a media in a society.²⁸ This is critical as a key requirement of a democratic society is a robust and independent media which provides the citizenry with information that is not controlled by the political process. This is important as it is the responsibility of the media to ensure that the democratic ideal flourishes. This it can do only if it not limited in its ability to so. A democracy can be safeguarded only where the free flow and dissemination of information, views, and opinions are allowed to occur. Where the State can affect that information flow the democratic system will suffer dramatically. Thus, a media commission will have a negative role and ought to be eliminated.

As with the other independent commissions (besides the Gender Commission) it will consist of a chairperson appointed by the President after consultation with the Committee on Standing Rules and Orders. Eight other members are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. Members of the Zimbabwe Media Commission must be chosen for their integrity and their competence in administration and their knowledge and understanding of human rights issues and best practices in media matters. Little guidance is further provided on the skills and experience needed to be members of the commission.

The Media Commission is established to uphold, promote and develop freedom of the press and other media, to promote and enforce good practice and ethics in the press and other media, to monitor broadcasting in the public interest, to ensure fairness and diversity of views, to formulate or encourage the formulation of codes of conduct, to receive and consider complaints and action, to ensure fair and wide access to information, to encourage the use and development of all the official languages, to encourage the adoption of new technology, to promote competition and diversity and to conduct research into issues relating to freedom of the press and of expression, and to promote reforms in the law.

The draft also permits an Act of Parliament to confer power on the Zimbabwe Media Commission to conduct investigations and inquiries into any conduct or circumstance that appears to threaten the freedom of the press as well as the conduct of the press, print and electronic media, and broadcasting. It has the power to take or recommend disciplinary action against journalists and other persons employed in the press and other media of communication who are found to have breached any law or any code of conduct applicable to them. The draft also provides in a very wide fashion that, "An Act of Parliament may provide for the regulation of the press and other media of communication."²⁹

As with the Human Rights and Gender Commissions, the Media Commission must submit an annual report to Parliament and may submit reports to Parliament on other matters. It too, unfortunately, must submit a report through the appropriate Minister.

To conclude, this commission ought to be abandoned as the tasks of promoting media freedom, freedom of expression and other similar tasks are those of a Human Rights Commission. The issues of media regulation, and other similar issues, should be done the media itself.

However, if it is not removed, it can be strengthened by including the following recommendations:

- The role of the President and Parliament ought to be limited in the appointment process;
- The reporting process to Parliament ought to be revisited;
- The commission ought to be as independent as possible and only those with extensive media experience ought to be appointed; and
- The functions and powers of the commission ought to be reduced so as to make it more advisory in nature.

National Peace and Reconciliation Commission (Chapter 12 part 6)

In countries emerging from periods of great political turmoil, particularly turmoil associated with gross violations of human rights, the question of how to deal with the past has been a crucial part of the transformation process.³⁰ The issue is: how does a society return to any sort of normality? Facing the tension between justice, truth, reconciliation and peace, transitional justice processes entail tremendous challenges. Post-conflict states have several options through which they may address these issues. Choices have to be made about whether to punish those responsible for human rights violations. Questions that need to be asked include:

- Does the society need an official account and acknowledgement of the wrongs of the past?
- How can the victims of human rights violations be assisted through the provision of reparations and have their dignity restored?
- Must there be a formal truth gathering process like a truth and reconciliation commission?

These are just some of the myriad questions that a society needs to address from a transitional justice perspective.

In this context, the draft Constitution usefully contains a National Peace and Reconciliation Commission. As with the other independent commissions established in the draft Constitution it will consist of a chairperson appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders. Eight other members are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. This is problematic as such processes need to be very inclusive and ensure that all sectors of the society buy into the process. As it is likely that the President will come from one of the three principal political parties, it is likely that the other parties will be unhappy with the choices made by the President.



If the commission is not seen as independent of the government it will affect the objectivity of the commission, at least in the perception of the population. For this reason, it is vital that a National Peace and Reconciliation Commission is set up by a credible and legitimate authority.³¹ Otherwise it will not be accepted by all parties and whatever results it arrives at will be questioned. Thus, the commission must have political legitimacy. In the absence of such legitimacy, whatever record of past human rights abuses the commission produces will be contested and reconciliation will remain a vain hope. For this reason other recent truth and reconciliation bodies have tried to find processes that will not be seen to advantage one political party over the other. Again, and problematically, the chairperson of the National Peace and Reconciliation Commission must be a person who has been qualified for at least seven years to practise as a legal practitioner in Zimbabwe. This is problematic as it makes more sense to have a person with a high degree of public support which would more likely occur if the person is independent and perceived not to have been chosen because of political bias.

The draft Constitution, as far as the criteria for membership is concerned, only provides that members of the commission must be chosen for their integrity and their knowledge and understanding of, and experience in, mediation, conciliation, conflict prevention and management, post-conflict reconciliation or peace-building. Commissioners, however, ought to be also chosen on the basis of their impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, and absence of a high party political profile. Those appointed ought to be fully representative of Zimbabwean society including its religious, ethnic, political, rural, gender and other components of its diversity. Membership needs to be carefully balanced to ensure all sides of the political spectrum are included. If balance is achieved, the commission will have greater credibility and it will be difficult to accuse it of being partisan or one-sided. If all sectors of Zimbabwean society feel represented on the commission, it is more likely to be widely regarded as credible and non-partisan and therefore legitimate. It is also more likely to achieve its goals.

The National Peace and Reconciliation Commission is given various functions. It is meant to ensure post-conflict justice, healing and reconciliation, to develop and implement programmes to promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes, to bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice, and to develop procedures and institutions at a national level to facilitate dialogue among political parties, communities, organisations and other groups, in order to prevent conflicts and disputes arising in the future. The commission is also meant to develop programmes to ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support, to receive and consider complaints from the public and to take such action in regard to the complaints as the commission considers appropriate, to develop mechanisms for early detection of areas of potential conflicts and disputes, and to take appropriate preventive measures, to do anything incidental to the prevention of conflict and the promotion of peace. The commission is also to conciliate and mediate disputes among communities, organisations, groups and individuals and to recommend legislation to ensure that assistance, including documentation, is rendered to persons affected by conflicts, pandemics or other circumstances.

Thus, the commission is given wide functions to promote transitional justice. It will, however, need to look at issues around truth, justice, reparations and guarantees of non-repetition in great detail.³² This permanent commission needs to determine whether a short-term and

specific truth and reconciliation process which allows victims from all political persuasions to have a platform to testify about their suffering and reclaim their dignity, allows perpetrators to come forward, and includes drafting a report with recommendations, should occur. This is needed to ensure that the cycle of violence that has plagued Zimbabwe comes to an end. Some type of accountability is necessary and therefore it is useful that no amnesty is contained in the draft.³³

To conclude, the Zimbabwe National Peace and Reconciliation Commission can be strengthened by including the following recommendations:

- Much more detail on transitional justice processes is needed including the non-availability of amnesty particularly for serious international crimes;
- The appointment process ought to be revisited to ensure the commission is as representative as possible of Zimbabwean society;
- The role of Parliament and the President ought to be reduced; and
- The appointment of the chairperson of the commission ought to be revised to allow any person of high standing to be appointed.

A semi-independent commission: the Anti-Corruption Commission (Chapter 13 part 1)

The draft Constitution contains provisions for an Anti-Corruption Commission. It is not determined to be one of the independent commissions. However, certain of the provisions that are applicable to all the independent commissions are made applicable to this commission as well. This includes the provision that the commission is independent and is not subject to the direction or control of anyone, that it must exercise its functions without fear, favour or prejudice and that no person may interfere with the functioning of the commission.

As with the independent commissions, the members of this commission are to be non-political and may 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 members of this commission, as with the independent commissions, may not be members of political parties. The only section of the draft Constitution that applies to all independent commissions but not to the Anti-Corruption Commission, is the removal from office section. This section provides that members of an independent commission may be removed from office only on the grounds that the member concerned is unable to perform the functions of his or her office because of physical or mental incapacity, is or was grossly incompetent, was guilty of gross misconduct or has become ineligible for appointment to the commission concerned. For all the independent commissions the procedure for the removal of judges from office applies to the removal from office of these members. This section does not apply to members of the Anti-Corruption Commission. This commission should however also be fully independent. This is the *de facto* situation, as all the provisions concerning independent commissions apply to this commission other than the removal from



office clause. However, a revised and stronger removal clause is particularly the clause that should be applicable to this commission. This commission will be subject to a great deal of pressure when it investigates corruption, particularly those in high public office. It is crucial to protect these members and allow them as far as possible, in this very necessary area, to operate independently and fearlessly, without concerns of easy removal from office. If they can be removed easily it will be like a Sword of Damocles hanging over their heads. Removal will be used as a tool to limit what the commission members do and could be used as an instrument to limit the work the commission does.

As far as the structure of the commission is concerned, it will have, as with the majority of the independent commissions, a chairperson appointed by the President after consultation with the Committee on Standing Rules and Orders and eight other members appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. This is problematic, probably more so than with the other commissions, as corruption is often carried out by senior state officials and senior politicians. There is a vested interest in societies where corruption occurs for those responsible for committing such acts to appoint people who are either pliable or less likely to be fearlessly independent in their work on these issues.

The draft Constitution provides that members of the Anti-Corruption Commission must be chosen for their integrity, their knowledge of and experience in administration or the prosecution or investigation of crime or for their general suitability for appointment. Again the “or for their general suitability” may see less qualified persons being appointed. At least one of those appointed must have been qualified for seven years to practise as a legal practitioner in Zimbabwe, at least one must have been qualified for seven years to practise as a public accountant or public auditor and at least one must be a person with at least ten years’ experience in the investigation of crime. These are useful requirements. However, other standards should also be incorporated so that all members are appointed for the right skills and experience. It may be useful to incorporate people who have been prosecutors, judges, investigators with the requisite years of experience. Therefore, minimum levels of skill and experience should be determined for all appointees. There also ought to be some type of vetting process.

The functions of the Anti-Corruption Commission as set out in the draft Constitution are to investigate and expose cases of corruption in the public and private sectors, to combat corruption, theft, misappropriation, abuse of power and other improper conduct in the public and private sectors, to promote honesty, financial discipline and transparency in the public and private sectors, to receive and consider complaints from the public and to take such action in regard to the complaints as the commission considers appropriate, to direct the Commissioner-General of Police to investigate cases of suspected corruption and to report to the commission on the results of any such investigation, to refer matters to the National Prosecuting Authority for prosecution, to require assistance from members of the Police Service and other investigative agencies of the State, and to make recommendations to the government and other persons on measures to enhance integrity and accountability and prevent improper conduct in the public and private sectors.

The Constitution usefully determines that the Commissioner-General of Police must comply with any directive given by the Anti-Corruption Commission and that the government must ensure, through legislative and other means, that the Anti-Corruption Commission has the

power to recommend the arrest and secure the prosecution of persons reasonably suspected of corruption, abuse of power and other improper conduct which falls within the commission's jurisdiction. It is the practical implementation of these measures that will determine their effectiveness. Measures to avoid delays and other practical obstacles being placed in the path of the commission should be established in legislation.

As with the other commissions, the Anti-Corruption Commission may only through the appropriate Minister submit reports to Parliament on matters relating to improper conduct in the public and private sectors which, in the commission's opinion, should be brought to the attention of Parliament. This commission may issue highly politically embarrassing reports and the Minister concerned may wish to delay or block them for political reasons. Such reports should not be subject to such embargos or deferrals. Such a commission should be able to present a report as quickly as possible without political interference. The reason for having such a commission and the fact that it is seen to be independent in almost all areas means that its input ought to be valued and not subject to political considerations.

To conclude, the Anti-Corruption Commission can be strengthened by including the following recommendations:

- This commission ought to be included among the independent commissions;
- The role of Parliament and the President ought to be reduced in appointments;
- The skills and experience needed for appointment ought to be tightened up;
- The process to remove the commissioners from this commission ought to be revised;
- The role of the Minister in the reporting-to-Parliament process ought to be revised; and
- The commission's functioning may be assisted by putting provisions in place that provide greater clarity on the commission's powers and that no one may hinder it in its work.

Conclusion

This paper highlighted the roles and significance that each independent commission performs in terms of demarcating, limiting and overseeing the powers of government and the State. Considering the poor performance, and even absence, of human rights institutions and values in Zimbabwe, these structures fill a critical gap that will entrench a human rights culture and act as a check on corruption and anti-democratic practices and end state repression.

The most critical elements of any independent commission, determining its effectiveness and ability to function, are: its independence, who is appointed to the institution, how the institution is established, the powers of the institution and the resources it has to function. The paper provides commission-specific suggestions to improve their functioning. There are, however, general recommendations pertaining to accountability, transparency and independence of the institutions mentioned in the COPAC draft.

General section 18(3) provides for a five-year term, renewable once. There is little or no direction on the level of expertise or independence of appointments save for the fact that Members



of Parliament and members of provincial or metropolitan councils, local authorities and government-controlled entities are not eligible to be appointed as members of a commission. Reappointment, lack of specific expertise and politically-influenced members of commissions weakens the independence of appointments. Weak appointments influence the public perception and faith in the institution, consequently affecting its ability to effectively carry out its mandate.

The Zimbabwe Gender Commission is a significant achievement. The chair and deputy chair, if relevant, must be of different genders, half of all commissioners must be women. Population diversity on the other hand does not have such protection and is not insisted upon in any institution other than the land commission. Should population and gender diversity be protected, legitimacy is further entrenched, increasing the likelihood that citizens use institutions and not extra-judicial means to address issues and challenges.

All appointees, except the JSC and independent commissions, hold office at the pleasure of the President. An Act of Parliament may be adopted to regulate the manner in which commissions exercise their functions. Both of these seriously curtail the actual and perceived independence of the institution.

In terms of funding and reporting, more power and greater access to and control over funds ought to be given to the commissions to enhance their effectiveness and independence. Reporting provisions must also be strengthened.

The ability of any constitutionally-mandated institution to limit and oversee the powers of the State relies as much on perception as its actual ability to do so. It is therefore imperative that all institutions provided for in the new Constitution of Zimbabwe are deemed to be, in the eyes of all under its protection, legitimate, free and independent from parliamentary and presidential interference.

Endnotes

- 1 Professor Sarkin writes in his personal capacity. He may be contacted by email at JSarkin@post.harvard.edu.
- 2 Jeremy Sarkin "The South African Constitution as Memory and Promise" in Charles Villa-Vicencio (ed) *Transcending a Century of Injustice* (2000) 72-84.
- 3 Jeremy Sarkin "Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures 1999 (4) *South African Journal on Human Rights* 587 - 613
- 4 COPAC is a select committee made up of 25 members, from the three principal political parties represented in parliament, appointed by the committee on standing rules and orders, the governing body of the parliament of Zimbabwe. The select committee is tasked with setting up relevant subcommittees, holding public hearings and consultations, convening an All Stakeholders Conference, table a draft Constitution and report to Parliament on its recommendations over the content of the New Constitution for Zimbabwe.

-
- 5 Paris Principles, 'Composition and Guarantees of Independence and Pluralism' Article 1.
 - 6 Professional Training Series Number 4.
 - 7 At 10.
 - 8 At 11.
 - 9 At 11.
 - 10 At 11.
 - 11 OSCE 'Ombudsman and Human Rights Protection Institutions in OSCE Participating States,' October 1998.
 - 12 The Land Commission is not dealt with.
 - 13 On appointment of judges see J Sarkin Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment 113 *South African Law Journal* (1996) 71. On appointments to Truth Commissions see Jeremy Sarkin 'The Truth and Reconciliation Commission in South Africa' *Commonwealth Law Bulletin* (1997) 528 and Jeremy Sarkin 'The Necessity and Challenges of a Truth and Reconciliation Commission in Rwanda' 21(3) *Human Rights Quarterly* (August 1999) 628.
 - 14 See Jeremy Sarkin "Examining and Enhancing the Role of National (Constitutional and Statutory) Human Rights Institutions in Developing a Human Rights Culture In South Africa" 2000 (2) *SA Public Law* 290 -330
 - 15 "Subject to this Constitution, members of Parliament and members of provincial or metropolitan councils, local authorities and Government-controlled entities are not eligible to be appointed as members of a Commission." Section 18(3)3.
 - 16 See further Jeremy Sarkin "How to Better Infuse Gender into the Human Rights Council's Universal Periodic Review Process" 2(1) *Jindal Global Law Review* 172-190
 - 17 Section 18(3)4.
 - 18 Section 18.4 provides that: "An Act of Parliament may confer additional functions on a Commission and may regulate the manner in which a Commission exercises its functions provided that the Commission's independence or effectiveness is not compromised.
 - 19 Section 18(8)(2).
 - 20 See further Jeremy Sarkin "Evaluating the Proposal to Amend the South African Constitution to Change the Length of Service of Constitutional Court Judges From a Fixed 12 Year Term to an Indefinite Term based on Age" in *The Administration of Justice: Comparative Perspectives* (Sarkin and Binchy eds 2004) 32-52
 - 21 See further Jeremy Sarkin "Examining The Competing Constitutional Processes In Burma/ Myanmar From A Comparative And International Democratic And Human Rights Perspective" 2001 2(2) *Asia-Pacific Journal on Human Rights and the Law* 42 -68.



-
- 22 See Jeremy Sarkin “Democratising the Courts in Post-Apartheid South Africa: The Structure and Role of The Courts” 7 *Journal of Constitutional Affairs* (April 2000) 9-22.
 - 23 Section 8.30
 - 24 Section 11.5
 - 25 Section 11.12.2
 - 26 Also see Mugadza, Teresa, *Gender Analysis of Zimbabwe’s Constitutional Draft*, Idasa, October 2012.
 - 27 See Jeremy Sarkin and Carly Fowler “The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learnt from the Role of the International Community and the Media During the Rwandan Genocide and the Conflict in the Former Yugoslavia” 33(1) *Suffolk University Transnational Law Review* 35-87 (Fall 2010)
 - 28 See Jeremy Sarkin “The South African Media in the Transition to Democracy” (1994) in Steytler et al (eds) *Free and Fair Elections in South Africa*.
 - 29 Section 12(18)3.
 - 30 See Jeremy Sarkin “Achieving Reconciliation in Divided Societies: Comparing the Approaches in Timor-Leste, South Africa and Rwanda” 3(2) *Yale Journal of International Affairs* (Spring/Summer 2008) 11- 28
 - 31 See further Jeremy Sarkin and Heather Sensibaugh “Why Reconciliation is Possible in Iraq” 23 *Fletcher Journal of Human Security* 5- 35
 - 32 See further Jeremy Sarkin and Erin Daly “Too many questions, too few answers: Reconciliation in transitional societies” 35 (3) *Columbia Human Rights Law Review* (2004) 101-168
 - 33 See further Jeremy Sarkin “An Evaluation of the South African Amnesty Process” in Audrey Chapman and Hugo van der Merwe (eds) *Truth and Reconciliation: Did the TRC Deliver* (University of Pennsylvania Press 2008) 93-115.



Idasa is an African democracy institute building sustainable societies in collaboration with African and global partners.