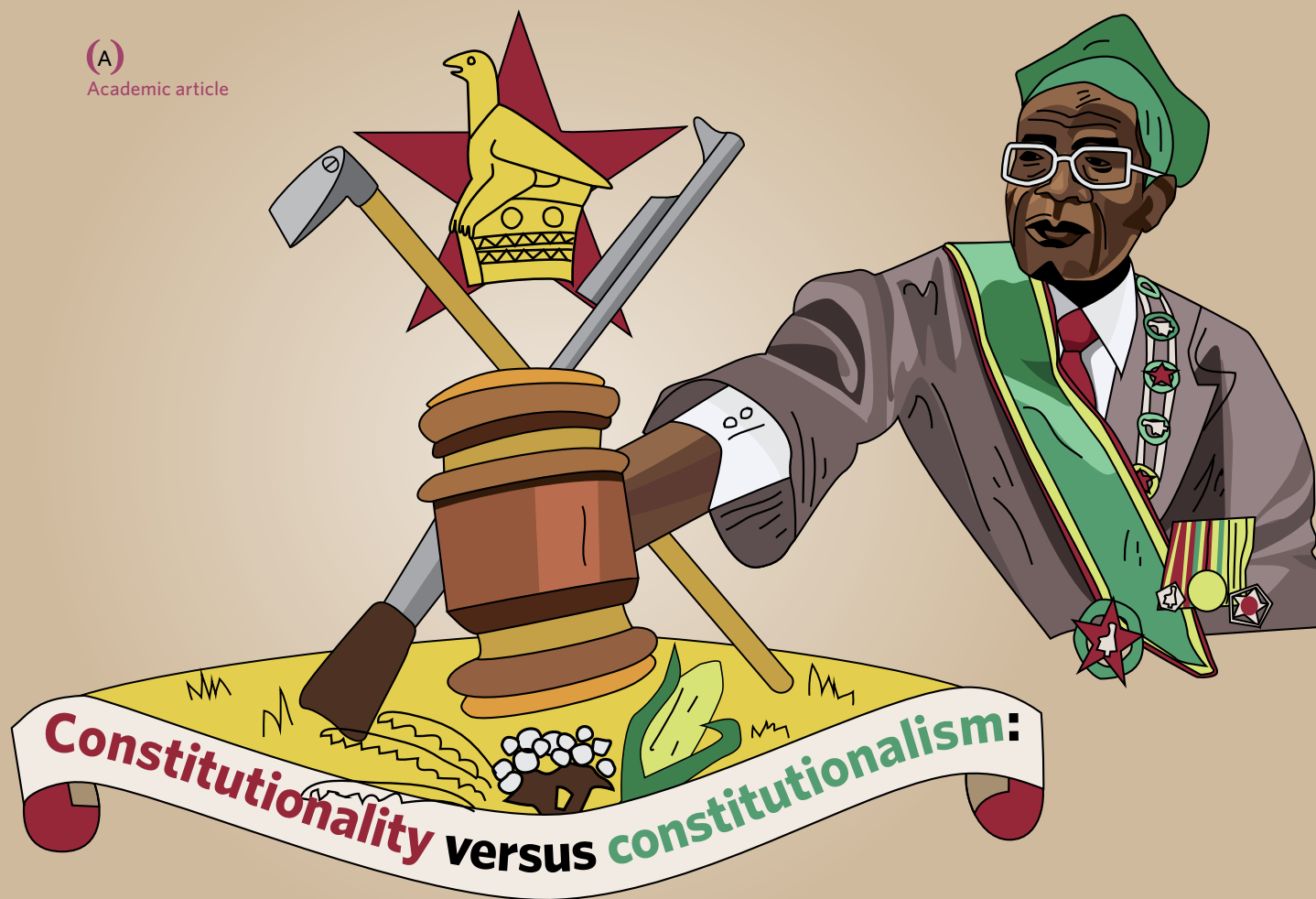




Lessons for Zimbabwe's constitutional reform process

Dr Alex T. Magaisa

Having inherited a constitution negotiated between the colonial and liberation forces at the dawn of independence (the Lancaster House Constitution) in 1979 and having amended that constitution 19 times in the last 30 years, Zimbabwe is trying for the second time in just over a decade to completely overhaul its constitution. The first attempt to create a new constitution failed when voters at the referendum rejected the proposed constitution in February 2000. The major grievance was in regards to the process of making the new constitution, which civil society groups criticised as dominated by, and intended to advance, government interests. The current process, which is led by a Parliamentary Committee (Copac), is part of the agreed package of reforms in the Global Political Agreement (GPA) that should culminate in a referendum in 2011.



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Experience since independence has demonstrated the government's pre-occupation with the constitution as a means of legitimising its power and less as a mechanism for limiting such powers. A number of the 19 amendments have served to reverse the effect of decisions made by the courts of law and some have even ousted the jurisdiction of the courts leading effectively to the concentration of power within the executive branch of government. The government appears to have been interested only in legality/constitutionality and paid scant regard to constitutionalism by which principles governmental power must be limited.

This article demonstrates the dearth of constitutionalism by analysing some court decisions and constitutional amendments that have effectively eroded the limits on governmental power. This article also warns that a narrow focus on constitutionality can mean that instead of the constitution being the supreme legal document controlling the exercise of state power, it simply becomes an instrument for autocratic control, legitimising rather than preventing arbitrary power – the very antithesis of constitutionalism. This article demonstrates that constitutionality is not enough and that to promote democracy, it is necessary to implement the principle of constitutionalism. The article draws heavily on Zimbabwe's recent constitutional history to illustrate shortcomings in regards to constitutionalism. It will argue that through the colonial period and most of the post-independence era there has been an erroneous focus by successive governments on mere constitutionality (or simple legality) at the expense of constitutionalism.

Overall, this article advocates a serious re-evaluation of the collective attitude and approach towards the constitution; that in making it, concern is not only in defining what is constitutional but also in ensuring that those constitutional clauses conform to and advance the principles and values that underpin constitutionalism. The hope is that as Zimbabwe undertakes the drafting of a new constitution, those tasked with drawing up the draft can learn some lessons about the critical elements that are necessary for this purpose.

CONSTITUTIONALISM

It is a basic tenet of constitutionalism that a constitution is not simply a collection of rules and institutional arrangements regarding the use of state power but it is, in addition, about placing limits on that power (Belz 1998). It is the idea that government should be legally limited¹ and that the authority of government is dependent on the enforcement of such limitations against itself (Wormuth 1949). The principle says that a constitution not only describes but also restrains government. The core idea of constitutionalism is probably best encapsulated in the words of one of the Founding Fathers of the United States Constitution, James Madison, who wrote in *The Federalist* No. 51,

“In framing government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government but experience has taught mankind the necessity of auxiliary precautions.”²

This passage confirms three critical points:

- First, that a government is necessary and that its power must be facilitated to enable it to have control and to fulfil the interests of the governed;
- Second, that government cannot be completely trusted with power and that this power must therefore be restrained (Allen & Thomson 2005); and,
- Third, whilst acknowledging the role that people may play in controlling government it says that this is inadequate and unreliable and therefore that it is necessary to create ‘auxiliary precautions’ to control governmental power. As Wormuth (1949) states, constitutionalism is synonymous with these ‘auxiliary precautions’.

According to Kay, “The special virtue of constitutionalism ... lies not merely in reducing the power of the state, but in effecting that reduction by the advance imposition of rules.”³ Furthermore, as asserted by Wormuth, the legitimacy of governmental authority turns on its enforcement of the rules limiting its authority. In this regard, it may be said that constitutionalism is synonymous with the rule of law, which is the more commonly used terminology.

CONSTITUTIONALITY

Having captured the essence of constitutionalism it is important to elaborate on the concept of constitutionality and draw the distinction between them and in the process show the significance of constitutionalism.

Simply defined, constitutionality is synonymous with legality but in a very mechanical sense. In determining constitutionality, one looks at the words of the constitution and then considers the conduct of the state, the question at all times being whether the state has complied with the constitution. If the conduct of the state conforms to the words of the constitution that is the end of the enquiry for the answer would be that it is constitutional. It does not matter that the powers provided for in the constitution are excessive. In this regard, the constitution is not serving the purpose of limiting power but simply facilitating the exercise of power, however excessive it might be.

The following example sheds more light on the problems of a narrow focus on the question of constitutionality:

Suppose the constitution includes a clause that provides that the state may expropriate shares held in companies operating in industries regarded as critical and that in all such cases the courts of law shall have no jurisdiction to hear any challenges against expropriation.

Suppose further that the state proceeds on this basis to expropriate shares in companies operating in the mining industry. By this act, all shareholders will lose their property. Ordinarily they should, like other property owners, challenge the expropriation in a court of law on the basis of the right to private property. However, in this case that right has been removed.

Considered through the narrow lens of constitutionality, it may be concluded that the state has acted constitutionally by following the terms of the law. Yet clearly, such conduct is sure to cause serious concern given that the power accorded to the state is arbitrary and prone to abuse. The removal of access to the court means there is virtually no scrutiny of governmental action and no protection of the law for individual shareholders.

In this instance, it might be said that whilst the conduct meets the test of constitutionality in the mechanical sense of complying with the terms of the constitution, nevertheless considered through the broader and more qualitative lens of constitutionalism, such conduct falls short of the expected standards as there is no limit whatsoever on the power of the state.

So in conclusion, we see that even though constitutionality may be satisfied, there can be a huge gap when considered through the lens of constitutionalism.

In this regard, it is important to recognise that any form of the state, whether liberal or authoritarian, can have a constitution. Indeed, many dictatorships ranging from Hitler's Nazi Germany, European colonies in Africa, Apartheid South Africa and more recently, post-independence one-party states in Africa have been governed through constitutions of one sort or another. These constitutions gave them authority to govern – in the majority of cases unlimited authority over the governed. Retrospective laws were permitted, the jurisdiction of the courts was ousted in some cases, civil rights were abrogated under the law, and discrimination, exploitation and other wrongs were justified under these constitutions. Yet in all cases, the dictators and colonisers would argue that they were acting in terms of their respective constitutions. They would state that their conduct was legal simply because they were complying with the letter of the law. True, the constitutionality test would probably have been met in most cases but it could not be said with any degree of seriousness that there was constitutionalism as there were no limits at all on state power.

Proponents of constitutionalism argue that the whole idea of a constitution is premised not simply on granting power to the state but controlling and restraining the exercise of this power. Constitutionalism is, in the words of Allen and Thomson, “set in contradistinction to arbitrary power” (2005: 13). They argue that government is established in order to promote and protect certain values that society cherishes – justice, freedom, liberty, due process, etc – but it is necessary to control government power so that its exercise does not destroy the very values that it was intended to promote. Therefore, constitutionalism does acknowledge a role for government but requires mechanisms to ensure that it is brought under control. When power is unrestrained, the risk of arbitrary action is high and consequently, it becomes difficult to protect the rights of the governed.

A document that facilitates an authoritarian regime may be labelled a constitution but it does not necessarily follow that it upholds constitutionalism. It is important at this stage to turn to a historic example that demonstrates a failure of constitutionalism in Zimbabwe. This illustration shows the consequences of the lack of such ‘auxiliary precautions’ and why constitutionalism is necessary.

CONSTITUTIONAL AMENDMENT No. 17 OF 2005

In September 2005, the parliament of Zimbabwe passed Constitutional Amendment (No. 17). This amendment dealt with a number of issues, including property rights, freedom of movement and also re-introduced the Senate as the upper chamber of Parliament. The amendment is a perfect example of the government's obsession with constitutionality, while negating the principles of constitutionalism.

The amendment raises questions regarding the purpose of a constitution and brought to the fore a need to distinguish constitutionality from constitutionalism. Rather than the constitution being the supreme law controlling the exercise of state power, it became an instrument for government control and the legitimisation of arbitrary actions.

RETROACTIVITY

The memorandum to the Bill introducing Amendment No. 17 stated that one of its principal aims was to insert a new provision to:

“confirm the acquisition of land for resettlement purposes which took place pursuant to the Land Reform Programme beginning in 2000, and provide for the acquisition in the future of agricultural land for resettlement and other purposes.”

Under the new section 16B of the Constitution, title to all agricultural land was vested in the state regardless of whether it had been acquired before or after the amendment. Section 16B (2) (a) also stated that the state would not pay compensation for such acquired land except for improvements on the land.

It is clear from the language that the proposed amendment was intended to apply retrospectively to ‘confirm’ land acquisitions that had already taken place since 2000. In other words, there was a tacit recognition that what had happened had not fully complied with the constitution and that this amendment was designed to give legitimacy to those acquisitions. However, one of the key tenets of constitutionalism is that law must be general and prospective as opposed to targeted at a specific section of society and retrospective. This amendment was not only retrospective but also specifically targeted white commercial farmers, who were the dominant landholders and who had been most seriously and negatively affected by the land reform programme since 2000.

OUSTER OF JUDICIAL JURISDICTION

Probably more significant is the provision under section 16B which states that:

“(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land:

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.”

The legal and practical implication of this provision is that it ousted the jurisdiction of the courts of law in land acquisition matters. In so doing, parliament and the executive thwarted the role of the third arm of the state, the judiciary, and thereby violated another key principle of constitutionalism – namely the separation of powers. They also attempted to legitimise the abrogation of the individual right to the protection of the law by denying access to the courts, which is enshrined under section 18 of the same Constitution. Overall, this was contrary to the principle of constitutionalism that requires checks and balances between the organs of the state in order to safeguard individual freedoms. Judicial review is a well established mechanism to control the executive's power, enabling individuals to challenge the conduct of their government before an impartial and independent judiciary. By ousting the jurisdiction of the courts, this amendment was therefore eliminating a core tenet of constitutionalism.

Amendment No. 17 not only sought to legitimise arbitrary conduct carried out since 2000 but also opened the way for future arbitrary action by preventing access to the courts and the mechanisms such as judicial review that would normally act as ‘auxiliary precautions’ against abuse of state power.

The executive branch of the Zimbabwean state was pre-occupied with constitutionality in that it merely sought to clothe with legality the conduct that it had condoned since 2000 in respect of land acquisitions even though

there was insufficient constitutional authority at the relevant time. It sought, retroactively, to use the constitution to correct the serious legal anomalies of that period. More seriously, however, it sought to wreck the checks and balances that the judiciary would have provided against the use of this power.

As I wrote at the time while critiquing Amendment No. 17, this process demonstrated that the constitution was seen by the government as an instrument to grant state power and legitimise excesses in the application of that power, but “when the constitution is created [or amended] to legitimise state actions and validate its exercise of power and remove limitations [to that power], the result is a constitution without constitutionalism. Legal constitutionality as opposed to constitutionalism is as dangerous as arbitrary rule.”

JUDICIAL CHALLENGE AGAINST AMENDMENT NO. 17

The removal of judicial jurisdiction in land acquisition matters was successfully challenged in the Southern African Development Community (SADC) Tribunal.

In the case of *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe*⁴ the SADC Tribunal held that the Government of Zimbabwe had violated the SADC Treaty by denying access to the courts and engaging in racial discrimination against white farmers whose lands had been compulsorily acquired.

However, the Supreme Court of Zimbabwe had in January 2008 delivered judgment in a case also brought by the Mike Campbell and other white farmers⁵. The applicants before the Supreme Court had argued that the relevant parts of Amendment No. 17 violated the essential features or core values of the constitution regarding the constitution’s provisions as to security and protection of fundamental rights⁶.

The Supreme Court dismissed this legal challenge. It confined itself to the question of whether parliament had followed the special procedure required under the constitution because section 52(1) of the constitution permitted parliament to effect constitutional amendments. It held that parliament had complied with the special procedure and it was at liberty to amend the constitution.

Of key significance for present purposes is the fact that the Supreme Court was simply making a procedural enquiry to determine the constitutionality of the amendment process. It refused to make a qualitative assessment of the content of the amendment to determine its effect on the core foundations of the constitution. The

Supreme Court had a choice whether to confine itself to the question of constitutionality – in amending the constitution did the government follow the letter of the law? Or constitutionalism – did the amendment uphold and comply with the values and principles of the constitution? The Supreme Court elected to confine itself to the first question and steered away from making an enquiry that would have tested the amendment’s performance against the standards of constitutionalism. To the Supreme Court satisfying the procedural requirements was sufficient.

It is remarkable that in coming to that conclusion, the judicial arm of the state appeared to celebrate its own dismemberment by the other two arms of the state since the effect of Amendment No. 17 was to oust its jurisdiction in land acquisition matters. The judicial attitude in this case has been attributed by various commentators to the absence of judicial independence in Zimbabwe, particularly in land-related cases. Some members of the judiciary had themselves been beneficiaries of the land reform programme and were being asked to pass judgment in cases where they had an interest and could be said to have been compromised. Delivering the judgment for the Supreme Court, Malaba JA stated that the ouster of judicial jurisdiction was narrow and did not offend the principle of separation of powers. He argued that:

“Taking into account the narrow ambit of the application of the provisions of 16B(3) of the Constitution, I do not find attractive the argument that the provision undermines the balance of powers of the State between the Legislature and the Judiciary. The taking away of the functions of judicial power and giving them to a tribunal which is not a court of law is as valid an exercise of legislative power as the taking away of the functions and letting them lie dormant without giving them to any other body to discharge. What is objectionable as being in violation of the principle of separation of powers is for the Legislature to take the functions of judicial power and exercise them itself under the guise of a legislative judgment over facts and circumstances of a particular case.”

The final words of this quote show the judge’s desperate struggle to justify the ouster of judicial jurisdiction because he is acknowledging in effect that taking the power to exercise judicial functions from the judiciary would violate the principle of separation of powers although he makes an exception in this instance. But parliament had in effect taken this power by pronouncing both retrospectively and prospectively that the land acquisitions were perfectly legal. The legislature may not have directly stated that it was taking over the judicial role but by removing the judiciary from that function and pronouncing finality on the question of land acquisi-

tions, the legislature, and through it, the executive had effectively taken over the judicial role⁷.

Although the SADC Tribunal later ruled in favour of the applicants, the Government of Zimbabwe refused to comply with the judgment arguing that the SADC Tribunal lacked jurisdiction over the matter – a position echoed by the Deputy Chief Justice of Zimbabwe, Malaba DCJ. The matter has dragged on since then but the key point to note in respect of the SADC Tribunal is that a judicial body, which can be

“The chief aim of constitutionalism is to prevent the concentration of power in one arm of the state.”

said to have more neutrality in the matter, recognised that the changes effected through Amendment No. 17 were inconsistent with constitutionalism. The grounds upheld by the Tribunal demonstrated two critical aspects of constitutionalism – namely that law must be general and prospective and not deliberately target a specific group of the population and secondly, that access to the courts is an essential right that must be constitutionally protected. In effect, the SADC Tribunal ruling challenged the legitimacy of Zimbabwe’s constitutional provision, which prevented access to the courts of law.

WHAT ARE THE ‘AUXILIARY PRECAUTIONS’ THAT PROMOTE CONSTITUTIONALISM?

In light of the above discussion, it is pertinent to identify and highlight what Madison referred to as the ‘auxiliary precautions’ that are required to ensure control of state power and in that way promote constitutionalism. It is these ‘auxiliary precautions’ that provide the necessary mechanisms to engender and promote the spirit of constitutionalism. It serves as a reminder to those charged with drafting the new Zimbabwe constitution to pay specific attention to these fundamental features, which will help to establish a framework to promote the full realisation of constitutionalism. The list is by no means exhaustive but it is indicative of the general principles that may guide the process.

SEPARATION OF POWERS

The principle of the separation of powers as expounded by French philosopher, Montesquieu, is simply that power must be divided between the three arms of the state: the Legislature, the Executive and the Judiciary. Parliament makes the laws, the executive executes the laws and the judiciary interprets those laws. The chief aim of constitutionalism is to prevent the concentration of power in one arm of the state. The separation of powers is meant to provide effective checks and balances so that, for

example, what the executive does is subject to judgment by the courts to ensure that it is in compliance with the laws made by parliament. In a constitutional democracy, parliament itself is free to make laws but only to the extent that such laws are in compliance with the constitution, that being the supreme law.

Parliament may of course amend the constitution but only by following a special procedure. To prevent parliament abusing its power to amend the constitution in a manner that is contrary to the values upon which the constitution is based, one must look not to the inherent goodness of representatives that sit in parliament but to other ‘auxiliary precautions’ within and outside the constitution. One of these is to ensure that amendment of the constitution can only be done through the authority of a super-majority, usually a minimum of two-thirds of parliamentarians voting in favour of such an amendment. Where a political party has an overwhelming majority this safeguard can be of limited effect, which means it may be necessary to entrench some essential provisions of the constitution – placing them beyond the powers of parliament and allowing amendment only through a referendum.

The current constitution contains loopholes that threaten the principle of separation of powers. This article has already demonstrated the problems emanating from Amendment No. 17, which ousted the jurisdiction of the courts in specific instances relating to land acquisition matters. The role of the judiciary is even more important in contexts where the separation between parliament and the executive is blurred because the president’s party has an overwhelming majority in parliament. This usually means that there are no effective checks and balances between the two bodies and often parliament is no more than a rubber-stamp for the executive’s will. This article makes the case that in such scenarios an independent judiciary is even more critical to act as a check on both parliament and the executive.

Another loophole that has been much-criticised is the Presidential Powers (Temporary Measures) Act (Cap 10: 20)⁸, which allows the Executive President to make temporary laws subject to parliamentary approval at a later stage. Properly used, it could be a useful legal instrument – such as in situations of extreme emergency – but experience has shown that it is too prone to abuse. It has, for example, been used at critical times such as election periods when the freeness and fairness of the elections have been compromised since the person making the laws is also a contestant. According to the *Standard* newspaper in 2004, alleged abuses of this power include banning industrial action after a series of successful strikes, amending land regulations and allowing police to detain people for 30 days if accused of economic or political crimes.

The power means the executive can take over legislative functions and, even if parliament may later refuse to extend the temporary legislation after the prescribed six months, it may by then have achieved its intended effect. It may be argued that such executive powers are necessary at times and that properly applied, such powers make sense. Nevertheless, unless supported by specific conventions, the risk of abuse remains too high. The constitutional provisions enabling these presidential powers to legislate require careful review during the drafting of the new constitution.

BILL OF RIGHTS AND ENTRENCHMENT PROVISIONS

A Bill of Rights is an essential pillar of constitutionalism for in those provisions can be found guarantees for the protection of fundamental civil (and socio-economic) rights. It is the standard against which governmental conduct is adjudged in so far as safeguarding individual (and community) rights is concerned. It may, as some have argued in the case of the US Constitution, be referred to as a ‘Bill of Prohibitions’ because the provisions demarcate areas where the government is prohibited from encroaching. This view is best captured by the words of Hornberger (1999) who states, “[T]he first 10 amendments to the Constitution... should more appropriately have been called the ‘Bill of Prohibitions’ rather than the Bill of Rights...because a careful examination reveals that they are express restrictions on government powers rather than a grant of rights to the citizenry.” To the extent that such rights are safeguarded from encroachment by government through the judicial arm of government, this becomes a key plank in building constitutionalism.

Nevertheless, Amendment No. 17 shows how it is possible in the context of weak constitutional structures to expose fundamental rights to changes by the execu-

tive through the agency of parliament. The political merits or demerits of land reform are not within the purview of this article. What is of concern, however, is the manner in which Amendment No. 17 interfered with the Bill of Rights and the impact of this as a precedent. Power had already been used in circumstances where the legitimacy of that power was seriously questionable. Staunch supporters of the land reform programme may argue that the end justified the means, but still one must be wary of an approach where the constitution is used simply to clothe otherwise arbitrary conduct with legality and legitimacy. It makes a mockery of the protections available in the Bill of Rights if they can be abrogated at the whim of the state with a view to covering legal shortfalls through later constitutional changes.

One way to protect a Bill of Rights or indeed the constitution generally from easy amendment is to provide for entrenchment provisions⁹. These provisions ensure that certain provisions of the constitution are entrenched so that they cannot be amended by parliament unless they have been put before a referendum. They represent very fundamental parts of the constitution that only the direct authority of the people can amend. If provisions that were affected by Amendment No. 17 and challenged by Campbell had been entrenched, the Supreme Court would not have been able to rely on the thin ground that section 52(1) of the constitution allows for amendments as long as special procedures are followed. The entrenchment of specific provisions, in particular the Bill of Rights, is something the current drafters should consider in order to protect the principle of the supremacy of the constitution and fundamental rights even from parliament itself, which may be compromised by the executive and act simply to rubber-stamp executive decisions.

INDEPENDENT JUDICIARY AND JUDICIAL REVIEW

The importance of an independent judiciary as a means of controlling executive power has already been stated as part of the discussion of the principle of separation of powers. However, it requires separate attention in the current context because of the problem that is often encountered in polities where the distinction between elected representatives in parliament and the executive is in practice blurred. Experience in Zimbabwe has demonstrated that where the governing party has an overwhelming parliamentary majority, the ease with which the executive can push through laws, including constitutional amendments, exposes the constitution to easy and sometimes detrimental changes.

The problem is that if the judiciary is also compromised, then all controls on executive power become redundant.

An independent judiciary would have strongly resisted the usurpation of its powers but instead the Zimbabwean judiciary acquiesced very easily. Anthony Gubbay, the former Chief Justice of the Supreme Court of Zimbabwe, who was hounded out of office by the Zimbabwe government, said: "It is a matter of concern that during the eight-year period preceding the recent formation of the coalition government in Zimbabwe, the avowed policy of the executive was to appoint as judges to both the Supreme and High Courts, persons known to be sympathetic to its political ideology. In this it has been successful."¹⁰

The contrasting judgment of the SADC Tribunal demonstrates what an independent judiciary might have done in those circumstances. If constitutionalism is about the control of state power, then surely an independent judiciary is an essential structure for this purpose. This article does not provide scope to discuss all elements that would support the principle of an independent judiciary but it suffices to highlight its importance and ensure that in the drafting process mechanisms regarding the appointment, tenure of office, removal, remuneration and resourcing of the judiciary are given proper and necessary attention to promote the spirit of constitutionalism.

CONSTITUTIONAL CONVENTIONS AND VALUES

There is a view that there is more to a constitution than the written word. This line of thought looks to other factors that lie beyond the written constitution. Although writing in the context of the British constitution, which is widely regarded as unwritten, Dicey stated that beyond constitutional laws the system also includes conventions that play a part in effectively limiting governmental power. Therefore, even in the absence of a legal limitation, such conventions also control the use of power by the government. Conventions have been defined as 'social rules arising within the political community and which impose important but non-legal limits on governmental power'¹¹. Although not carrying the same weight as legal rules in terms of enforceability, such conventions are generally accepted and followed within the specific polities in which they have been developed and established. A common example is the convention regarding the Royal Assent to Bills passed by the British parliament. The monarch must give assent to every Bill before it becomes law but the convention established over the years is that such assent will not be withheld. Thus, in effect, the power that the monarch wields is ceremonial.

The power that the British monarch holds in this regard has been reflected in various constitutions, including Zimbabwe's. Under the Lancaster House constitution, the office of the president was effectively ceremonial and the president had similar powers to the British monarch

to give assent to Bills passed by parliament. Following the same convention established under the Westminster model, the president would customarily give assent to such Bills. Nevertheless, with the establishment of the Executive Presidency after the momentous amendments passed in 1987, the situation changed. The executive nature of the presidency effectively makes it different from the ceremonial role of the British monarch or the titular presidency between 1980 and 1987.

What can be observed is that conventions are really customs that are peculiar to each individual country or system of governance. They derive from the struggles and developments in each polity. If they are to be transplanted, similar conditions would have to be in place in the new jurisdiction. What may have worked well in the US in the wake of the American Revolution and the making of the Constitution in 1787 and thereafter may not necessarily work in the United Kingdom, which has a considerably longer history and different type of struggles and institutions. Similarly, conventions and customs developed in India may be considerably different from those that have developed in Zimbabwe. The question for consideration is whether there are any conventions, customs or practices that may be identified within the Zimbabwean polity that may be considered as part of the broader constitutional package¹². This is no easy task but one that nevertheless enables a more realistic look at governance in the country. Such conventions, if any exist, can reveal more about the nature of governance and how challenges can be overcome than a mere set of rules put together into a constitutional document.

CONCLUSION

This article has shown that it is possible for there to be a constitution without necessarily embracing constitutionalism. It is possible to justify the use of state power on the basis of what a constitution stipulates but that does not necessarily demonstrate constitutionalism, if powers granted in the constitution are unlimited and actually encroach on fundamental rights. Constitutionalism signifies limits on state power. It is the antithesis of arbitrary power. A constitution that enables, endorses or even encourages arbitrary conduct by the state fails the test of constitutionalism. Those acting under the constitution may be able to claim constitutionality but they would fall short on the measure of constitutionalism.

The article has demonstrated, through a study of Constitutional Amendment No. 17 and case law from Zimbabwe's Supreme Court and the SADC Tribunal, the distinction between mere constitutionality and constitutionalism. Amendment No. 17 went against key principles of constitutionalism, including the retroactive applica-

tion of legislation, the ouster of judicial jurisdiction, the executive's refusal to comply with court orders and the judiciary's lack of independence. The land issue may have been a politically sensitive issue requiring a particular solution but it is doubtful that this constitutional quick-fix was the appropriate remedy. In any event, the precedent set by this amendment raises great concern as it violated the fundamental division of powers between the three arms of the state and encroached on civil liberties in a manner that was not reasonably justifiable and could pave the way for similar conduct in future.

What Madison referred to as 'auxiliary precautions' constitute the mechanisms, principles and values that promote constitutionalism. This article has considered some but not all of these auxiliary precautions. Synonymous with the rule of law, constitutionalism is about upholding the values of society – many of which are now recognised to be universally applicable as enshrined in various international legal instruments. A constitution must therefore aspire as far as possible to meet the standards set out under international human rights charters and agreements since these contain universally accepted principles and values.

Yet after all has been said, for constitutionalism to endure, governments must learn to limit themselves. This is a challenge for the Zimbabwean government and its counterparts across Africa. As one of Zimbabwe's eminent constitutional scholars put it in a media interview,

"As a country, we need to develop a culture of constitutionalism so that people respect the constitution. The whole process of developing a culture of constitutionalism is where people practise what is in their constitution."¹³

As Linnington asserts in the interview, it is common knowledge that the Zimbabwean government has not always honoured judgments that are not favourable to its interests and sometimes legislation has been deliberately flouted for political expediency. All this undermines constitutionalism since it shows that the government is unwilling to stay within limits and that it will try – as it did with Amendment No. 17 – to set new limits to condone its excesses. Ultimately, as Madison said in that famous essay (Federalist No. 51), "ambition must be made to counteract ambition" – that the responsibility to promote constitutionalism lies with the men and women charged with the powers to govern. If they do not respect the constitution and especially the checks and balances within it, then constitutionalism is in dire straits.

The drafters of Zimbabwe's new constitution have the chance not only to create a new document but also to promote a constitutional culture that one might refer to as constitutionalism. They must seize this chance. ○

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Report on the State of Justice in Zimbabwe prepared by a team led by Desmond Browne QC, Chairman of the Bar Council of England and Wales, et al which is available at http://www.barhumanrights.org.uk/docs/2010/7351_BHRC_Zimbabwe_Report.pdf (last accessed on 8th January 2011)

Statement of the Seminar of the Reform of the Legal System in Zimbabwe 1 August 2009 available at <http://www.icj.org/dwn/database/ZIM-JudicialReform-FINALRESOLUTION-9August2009.pdf> (last accessed 11th January 2011)

• Case Law

Mike Campbell (Pvt) Ltd et al. v Republic of Zimbabwe [2008] SADCT 2

Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform and Resettlement [2008] ZWSC 1

Commercial Farmers Union & Ors v Min of Lands & Rural Settlement SC 31/10

Kesavananda v Kerala [1973] Supp. S.C.R 711 1

• Legislation

Constitution of Zimbabwe, 1980 (as amended)

Constitutional Amendment Bill (No. 17) 2005

Constitutional Amendment (No. 17) 2005

Constitutional Amendment (No. 7) 1987

Presidential Powers (Temporary Measures) Act (Cap 10: 20)

(E)

Endnotes

1. Some scholars like A. V Dicey have argued that there are also non-legal limitations on state power that appear in the form of conventions. In his book *The Law of the Constitution* (1889), he defines constitutional law as including “all rules which directly or indirectly affect the distribution or the exercise of the sovereign

power in the State”

2. *The Federalist* No. 51 published in *The Independent Journal* Wednesday February 1788 and available at <http://www.constitution.org/fed/federa51.htm>

3. R Kay, in Alexander (ed.) *Constitutionalism: Philosophical Foundations* CUP, (1998)

4. The judgment is available at <http://www.saflii.org/sa/cases/SADCT/2008/2.html>

5. *Mike Campbell (Pvt) Ltd. and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008] <http://www.saflii.org/zw/cases/ZWSC/2008/1.html>

6. In so doing the applicants placed reliance on the famous Indian case of *Kesavananda v Kerala* [1973] Supp. SCR 1 in which the Supreme Court of India developed the “Essential Features” Doctrine, to the effect that when changing the constitution, the legislature must have due regard to the core or essential values of the constitution.

7. The Supreme Court has most recently confirmed its approach in respect of ouster of jurisdiction in the case of *Commercial Farmers Union & Ors v Min of Lands & Rural Settlement SC 31/10*. It reiterated its earlier findings in the Campbell case stating that “In the face of the clear language of s16B(3) of the Constitution, a litigant can only approach the courts for a review and a remedy relating to compensation.”

8. Text available at <http://www.kubatana.net/docs/legisl/pres-powers-temp-measures-act-070424.pdf>

9. The dangers to which the constitution is exposed regarding easy amendments by a governing party were apparent in the 1990s when the government of Zimbabwe often responded to progressive judicial judgments expanding the scope of constitutional protection by amending the constitution to reverse the effect of those decisions. The cases are clearly articulated in an article by former Chief Justice of Zimbabwe, Gubbay CJ “The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience” *Human Rights Quarterly* - Volume 19, Number 2, May 1997, pp. 227-254

10. Speech to the Bar Council of England and Wales available at <http://www.newzimbabwe.com/opinion-1806-Gubbay+lecture+on+rule+of+law/opinion.aspx>

11. This definition is available at www.plato.stanford.edu/entries/constitutionalism

12. One could argue that there is a convention/custom across all political parties that there shall be at least one representative in presidium from the Matabeleland region. All political parties, including ZANU-PF and the MDC-T seem to adhere to this custom. Whether or not it can be called a ‘convention’ in the strict sense of the word is a matter for debate.

13. Greg Linnington teaches in the Political Science department at the University of Zimbabwe. <http://www.newsday.co.zw/article/2010-07-28-practise-what-is-law-lawyer>



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