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Helping Zimbabweans to understand and write their own Constitution –

with help from WOZA and MOZA

Introduction

Zimbabwe's current Constitution was written in 1979 as a cease-fire agreement. In 2000 consultations on a new constitution were carried out across the country but Zimbabweans rejected the draft constitution for two main reasons.

- People did not have confidence that the words they had spoken in the consultation process had been respected and written into the constitution. The draft presented did not seem to capture the spirit of the people's views.
- The draft did not reduce the president's powers, the presidential age limit or his term of office.

By rejecting the 2000 draft by voting **NO**, Zimbabweans voted to continue on with the Lancaster House Constitution that has now been amended 19 times and has increased the presidential powers.

Almost 10 years later we are once again beginning a constitutional reform process, but this time it is because of a political agreement signed between political parties. In the deal politicians are supposed to lead the constitution-making process. You will hear of the **'KARIBA DRAFT'** that politicians want to be the starting point and we will explain some of the points in this draft to help you see that the Zimbabwean people can write something better. **WOZA** and **MOZA** would like to help Zimbabweans to participate so that they can take charge of the process and help to write their own constitution. We believe that we should help to write our own constitution from the first sentence to the last and so we have written this booklet to help you do exactly that.

Please study the list of questions at the end of this document; they will help you understand the main issues about the Constitution.

9. International Law

a) Who signs treaties and agreements with other countries or international bodies presently?
b) How do these become part of Zimbabwean law?
c) What are the disadvantages of the present provision?
d) Do you think we should change the way we adopt international agreements into our law? If yes, what should we do?

10. Amendment of the Constitution

a) What is the current provision for amendment of the constitution?
b) What is the disadvantage of the present arrangement?
c) What alternative would you like to suggest?

f) What problems occur as a result of the President's power to make appointments of almost all high officials?
g) What alternative methods would you like to see of appointing ambassadors, commissioners, heads of parastatals, permanent secretaries, governors etc?
h) Should the constitution put a limit on the size of the cabinet?

5. Elections

a) Should we have a fixed term for Parliament, with no one having the power to dissolve it, or should the head of the executive have the power to dissolve Parliament and call for new elections?
b) What provisions can be made to ensure that the Electoral Commission is genuinely independent?

6. Judiciary

a) What is meant by an independent judiciary?
b) Why is it important for the judiciary in a democracy to be independent?
c) What can be put in the constitution to ensure that the judiciary is independent?
d) What solution do you think would work best to guarantee independence?

7. Devolution of power

a) What is the main problem regarding local government in the present constitution?
b) Do you think it is a good idea to have elected provincial governments? Why?
c) If you have answered "yes" to (b), what powers do you think provincial governments should have?
d) Should provisions for local council elections and a statement of their powers be included in the constitution?
e) What do you think should be included in the constitution to ensure that local councils effectively represent the voters and raise and spend money in a responsible way?

8. Constitutional Commissions

a) What three different types of commissions can be included in the constitution?
b) What are the three important issues which we need to think about in regard to these constitutional commissions?
c) What specific commissions do you think should be included?
d) How do you think the members should be appointed?

A: GENERAL INFORMATION ON CONSTITUTIONS

1. What is a constitution?

- It is the most important law in any nation.
- It is a law which says who shall govern us and how they shall govern. It includes our rights as citizens.
- It overrules any other law which contradicts it.
- It overrules any action by any part of government which contradicts it.
- It is normally written through a consultative process involving as many of the people in a country as possible because it is their way to say how they shall be governed.

2. What is included in a constitution?

The present constitution of Zimbabwe contains sections which deal with:

- Citizenship
- Our rights
- The Executive (President, Vice-Presidents, Ministers and Cabinet, civil service and their functions)
- Parliament, including elections
- The Judiciary
- The Police and Defence Forces
- Independent Commissions, and
- Finance.

3. How do we know what to put in our constitution?

There are various ways in which any country might be governed. In Zimbabwe, since 1980, we have always said that we want to be democratic. Our present constitution contains sections which make it difficult for us to be democratic. That means that we need to make some changes which will allow us to build democracy.

4. What principles should be reflected, in a democratic constitution?

- ***Representation:*** those who govern the country must be elected by the people, and must represent the wishes of the people.
- ***Accountability:*** those who govern the country must tell the people what they are doing and the people must have the power to correct them if they are not doing what the people want.
- ***Separation of powers:*** the different powers of government must be separated between different people or groups of people; no one person or group should be allowed to have too much power.
- ***Peoples' rights:*** the constitution must state what rights the people have and must make sure there is a way for them to be fully respected and protected.

5. What types of power are described in a constitution?

There are three types of power which a government must have:

a. **Legislative power** – the power to make laws
b. **Executive power** – the power to carry out or implement the laws
c. **Judicial power** – the power to enforce the laws, or ensure that they are obeyed.

In a democracy, these powers must not be held by one person or one body; they must be held by separate bodies, one must not be able to interfere with the other, and each one should be able to ensure that the others do their job properly and hold them accountable.

B: THE MAIN PROBLEM IN ZIMBABWE WHICH NEEDS TO BE CORRECTED

1. The executive has acquired too much power and abused it

The people holding executive power have been too strong and have dominated all parts of government.

- ☒ They have manipulated the legislature to pass laws they want;
- ☒ They have controlled judges by threatening those they don't like and appointing those who will do as they wish, even if it is the wrong thing to do;
- ☒ Because they control the judicial power they have broken the laws and abused peoples' rights.

This has produced serious abuse of power by the executive, which has finally led to the complete collapse of the economy.

2. What can a new constitution do?

Some of this can be prevented by re-writing the constitution. When we re-write the constitution our first concern will be to make sure that the executive is not able to hold as much power and that the legislature and judiciary are able to function independently, without being controlled by the executive.

This requires

- ✓ The powers to be clearly separated
- ✓ Ways for the executive to be controlled if they abuse their powers
- ✓ Better protection for our rights
- ✓ Better control of the electoral system so that we can elect people who will properly represent us and respect our needs

g) What provisions would you like to see included in the constitution which could help us to protect our rights from being violated?

3. Legislative Power (Parliament)

a) What is the primary function of Parliament?
b) What is the major problem that we have with our present Parliament?
c) How many houses of Parliament does Zimbabwe have at present?
d) Has the addition of the Senate since 2005 improved law-making in Zimbabwe?
e) Do you think it is worthwhile having two houses of Parliament or would we be better off with only one?
f) What is meant by the constituency system of voting?
g) Explain how proportional representation works.
h) Which system do we have now in Zimbabwe – constituency or proportional representation?
i) Which system do you think will give us a better Parliament? Why? (Remember the function of Parliament when working out what you think)
j) Do we need to have any appointed (that is, non-elected) MPs?
k) Do you think we should include chiefs in the national Parliament? If yes, how could we include them, if no, why not?
l) What do you think would be an appropriate number of MPs, bearing in mind that in 1980 we had only 100, while today we have more than 300?
m) Should members of Parliament be allowed to keep their seats if they change to another party after being elected?
n) Do you think the idea of recall is a good one, and could it work to make MPs represent their people more effectively?
o) What means could we use to enable the Parliament to remove a President or Prime Minister who misuses executive powers?

4. **Executive Power**

a) Do you prefer to vote directly for the head of the executive (i.e. have an executive President) or have a Prime Minister who is the leader of the party with the largest number of members of Parliament?
b) Is there any reason why cabinet ministers need to be MPs? Who else might be suitable to be cabinet ministers?
c) Should there be a limit on the number of years an individual can hold the office of chief executive?
d) Does the chief executive need to have special privileges which put him or her above the law?
e) How could the constitution prevent the head of the executive from taking decisions on his or her own?

12. DISCUSSION QUESTIONS FOR CONSULTATIONS ON THE CONSTITUTION

A. GENERAL INFORMATION ON CONSTITUTIONS

1. Why is the constitution the most important law in any country?
2. What are the key principles in a constitution which will ensure that we have democratic government?
3. A constitution states which bodies will hold each type of governing power. What are those three types of power?

B. THE MAIN PROBLEM IN ZIMBABWE WHICH NEEDS TO BE CORRECTED

1. What is the main problem which may be corrected by introducing a new constitution?
2. What has been happening in Zimbabwe that shows we do not have a proper separation of powers?
3. What needs to be done in the new constitution to make sure the powers are properly separated?

C. ISSUES TO BE DECIDED IN THE NEW CONSTITUTION

1. Citizenship

a) Why might it be a good idea to allow everyone born in Zimbabwe to be a citizen automatically?
b) If everyone born here is not allowed to be a citizen, who should be allowed?
c) Would you be in favour of allowing a Zimbabwean citizen to hold another citizenship? Explain why or why not.
d) What would be the usefulness of including a section in our constitution which prevents the government from taking citizenship away from any Zimbabwean? Would you favour including such a section in the new constitution?

2. People's Rights

a) Which category of rights is not included in our present constitution?
b) What other problem exists regarding the rights in the present constitution?
c) What civil or political rights would you want to add to the rights we now have?
d) Would you want to make any changes to the civil and political rights which are now included in the constitution?
e) Of the economic and social rights listed, which would you want to guarantee in our new constitution?
f) What are the arguments for and against including these in the constitution? What is your view – should they be included?

C: ISSUES TO BE DECIDED IN THE NEW CONSTITUTION

The rest of this booklet looks at the different parts of the constitution, explains the choices we have to make about what to put in when we re-write, and shows how each choice might contribute to controlling the executive and guaranteeing the rights of the people. We will also mention points from the 'Kariba Draft' for you to compare.

1. CITIZENSHIP

What is the problem?

In recent years, government has changed the citizenship laws to take away people's right to be citizens. It looks as if they have done this in order to stop people who they think will oppose them from voting. We now need clear guidelines on who has the right to be a Zimbabwean citizen.

Who should be a citizen? Here are some of the different options we could choose:

a) Everyone born in Zimbabwe, whatever the nationality of their parents, has the right to be a citizen.

ADVANTAGES:

- ✓ Every child born here will have a citizenship; if every country could have this law there would be no one anywhere in the world without any citizenship; it would be our contribution to achieving the right to nationality, enshrined in many international human rights conventions.
- ✓ There would be no hassle, confusion and expense of getting documents as everyone who could produce a record of birth would automatically get birth certificates and I.D.; children would not grow up without documents.

DISADVANTAGES:

Children born in Zimbabwe simply because their parents or mother happened to be here at the time of birth would be Zimbabwean citizens even if they had no other connection to the country.

b) Everyone born in Zimbabwe, as long as one of their parents is a Zimbabwean citizen at the time of their birth, has a right to be a citizen.

c) Everyone, wherever they are born, as long as one of their parents is a Zimbabwean, has a right to be a citizen.

d) Anyone who marries a Zimbabwean and comes to live in Zimbabwe has the right to become a citizen.

Should we allow a citizen of Zimbabwe also to be a citizen of another country?
Many countries allow for dual citizenship, but Zimbabwe ended this privilege in 1985. The constitution could make dual citizenship possible. The 'Kariba Draft' gives no provisions for dual citizenship.

ADVANTAGES OF ALLOWING DUAL CITIZENSHIP:
- ✓ Those who have parents from different countries do not have to choose.
- ✓ Foreigners who marry Zimbabweans and come to live in Zimbabwe can become citizens without giving up their own citizenship; if they give it up they will have to apply for visas to enter their home country.
- ✓ Zimbabweans in the Diaspora who have taken the citizenship of their new countries will be able to return to Zimbabwe to work without applying for work permits or residence.

DISADVANTAGES: Some people have citizenship simply for convenience of travel or work, without any real commitment to the country; but this happens everywhere.

Losing citizenship: We could include a section which prevents the state from cancelling a person's citizenship.

ADVANTAGES:
- ✓ Politicians could not use deprivation of citizenship as a way of preventing people from voting.
- ✓ No Zimbabwean would become stateless.

2. PEOPLES' RIGHTS

What are the problems?
- ☒ Only civil and political rights are included in the present constitution; social and economic rights are left out.
- ☒ The rights we have are open to abuse and need a good constitution to protect them from abuses.

Are there enough civil and political rights covered in the current constitution?
We may want to include more civil and political rights. Some examples are:

Right to privacy: This could prevent government from interfering with our correspondence and our private lives.

Right to control of one's own body: This could allow women and men to make their own decisions about sexual activity and reproduction.

Freedom of the media: This could stop government from stopping newspapers and radio and TV stations from operating.

Right to Liberty: No-one may be deprived of his liberty unless for the following reasons: to undergo sentence or punishment, arrest, prevention of diseases or preventing unlawful entry into Zimbabwe or for deportation, extradition etc.

Protection from slavery and forced labour: No one may be held in slavery or required to perform forced labour. This protection does not prevent labour as part of a sentence of imprisonment, labour for members of armed services or during times of public emergency.

Protection from torture or inhuman or degrading punishment or treatment: This provision relates to acts that affect physical and mental integrity of the individual.

Protection from deprivation of property: No property may be compulsorily taken unless the taking is necessary and the person from whom it is acquired gets fair compensation in a reasonable time. The deprived person may go to court for a decision on the amount of compensation. There are limitations to the above provision in cases where land and other property may be acquired by the State for resettlement or other public purposes.

Protection from arbitrary search or entry: Except in terms of the law, no-one may be searched without his consent and no one has to allow anyone else into his premises.

Protection of the Law: This includes: the right to fair trial, the right to be presumed innocent until proven guilty by a competent court, the right to defend oneself in court, the right not to be tried for the same offence twice, the right not to have to give evidence at one's trial and the right to trial within reasonable time.

Protection of freedom of conscience: This includes freedom of thought, freedom of religion, and the right not to have to take an oath in conflict with his one's conscience.

Freedom of Expression: This includes the right to hold opinions, to express ideas and to pass on ideas and information.

Freedom of assembly and association: This includes the right to form and join political parties and trade unions or other associations. The right to join an association includes the right not to be compelled to join any association.

Freedom of Movement: Everyone has the right to enter and leave Zimbabwe, to move about freely, to reside where he wants, and to be free from expulsion. No law may provide for expulsion of a citizen or prevent a citizen from entering the country.

Protection from discrimination: No law may discriminate on grounds of race, tribe, place of origin, political opinions, colour, creed (religious beliefs) or gender. Some forms of discrimination are allowed in family and personal matters or on the application of customary law.

10. AMENDMENT OF THE CONSTITUTION

The Constitution must include a section which states how the constitution can be changed. Usually it should be more difficult to amend the constitution than to pass an ordinary law.

Currently it can only be amended by a vote of two thirds of the members of Parliament, but this has made it too easy to amend, especially when the executive has so dominated the legislature.

Possible suggestions:

- ☑ It could require two thirds of each house separately if there are two houses of Parliament;
- ☑ It could require a referendum (expensive and clumsy if it is a minor change)
- ☑ It could require two thirds of Parliament and the assemblies of two thirds of the provinces if there is a system of provincial government;
- ☑ It could be made impossible to change some sections of the constitution such as the Declaration of Rights, unless they are adding more rights.

ADVANTAGES: All of these would make it more difficult to change the constitution and would protect our rights.

11. CURRENT DECLARATION OF RIGHTS

This is the current Declaration of Rights found in the Constitution. Please decide well how to change it for the better of all Zimbabweans.

What is the Declaration of Rights? The Declaration of Rights sets out the rights that every person is entitled to. No laws may be made which take away any of those rights, unless the Declaration of Rights itself allows such laws to be made. Any laws that already exist that take away any of the rights maybe declared to be invalid.

What rights are included in the Declaration of Rights? The declaration begins with a preamble, which states that the rights included are to be enjoyed by every person. But the rights are limited in ways that make sure that people do not violate the rights of other people, and the public interest is served.

Below are the specific rights and their limitations:

***Right to Life*:** No-one may be killed unless for the following reasons: execution of sentence of death, when resisting a lawful arrest, during a riot or a lawful act of war, or in order to prevent him from committing a criminal offence.

We may want to change some of the rights already in the constitution, or strengthen them.

Some examples are:

Right to life: The constitution now allows courts to sentence people to death. We may want to remove this from the constitution.

Right to equality: The constitution now allows discrimination against women in some situations in which customary law is applied. We may want to remove this. We may want to strengthen the right of women to access land, especially in communal areas.

Right to property: The constitution now includes a right not to be deprived of property without good reason and proper compensation. But there are many exceptions, especially relating to agricultural land.

We may want to strengthen peoples' right to compensation and remove many parts which allow the state to take away land. We may want to build in some clause which gives the user of land the right to some form of legal protection.

Do we want to include social and economic rights?

Zimbabwe as a country is a signatory to international charters and conventions. For example, Zimbabwe has signed (ratified) the various socio-economic and cultural rights included in the African Charter and the UN Conventions. These include: **the right to education, health, shelter, adequate standard of living, to work.**

We have to decide if these must be included in our new constitution and consider the following as rights to add:

- ☐ **Children's rights**
- ☐ **Right to education**
- ☐ **Rights of women**
- ☐ **Rights of the disabled**
- ☐ **Right to health, health care and reproductive health**
- ☐ **Workers' rights**
- ☐ **Right to environment**
- ☐ **Right to administrative justice**
- ☐ **Right to housing/shelter**
- ☐ **Freedom of trade, occupation**
- ☐ **Right to adequate standard of living**

ADVANTAGES:
These are the basic things we need to live a decent life, which has been taken away from us by our government of the past decades, so we need them to be in the constitution.

DISADVANTAGES:
- ☹ They might build expectations that government will immediately be able to provide everything for people, which is not possible.
- ☹ They are not easy to defend in court because the court cannot order government to do things which it is unable to do.

OBSERVATION: The South African constitution includes these rights and their Constitutional Court has found ways of making sure that government observe these rights to the best of their ability.

How can we better protect our rights?
At present it is only possible for a person whose right has been abused to take a claim to court, and then they may be prevented by the lower courts from taking a case to the Supreme Court. Usually the court administration delays cases so they are never heard.

What could we do?
- » We could make it possible for anyone to go to court to claim that a law or action of the government or government official violates their rights, and to put a time limit for the hearing of the claim.
- » We could set up a special court to hear claims of abuse of rights and make it open to anyone. This could be a ***Constitutional Court***.
- » We could set up a ***Human Rights Commission*** with strong powers to hear complaints, to investigate and call witnesses and order the courts to prosecute offenders.
- » All rights should be **justiciable** – this words means that it must be possible to go to court to defend all rights, including social and economic rights if they are in the constitution.

3. LEGISLATIVE POWER (PARLIAMENT)

What is the problem with our parliament?
Our present constitution provides for two houses of Parliament, the House of Assembly and the Senate. Both houses have to agree in order to make a law. But from 1988 to 2005 we had only one house. Even with two houses, Parliament has been too weak, and the executive has controlled it. Our new constitution needs to make sure that Parliament has enough power to act on its own, and to prevent the executive from abusing its powers.

c) Finance
Commissions can only be effective if they are guaranteed adequate levels of funding by the constitution, so that they cannot be made ineffective by starving them of funds, as happened with the ombudsman. There could be a constitutional provision which requires a certain percentage of the national budget to be allocated to the watchdog commissions.

9. INTERNATIONAL LAW

It is the role of the executive to sign treaties with other countries and legal instruments under international law. At present no international agreement which is signed by the Zimbabwe government is part of our law until it is passed by our Parliament. Thus most of the human rights instruments which we have signed are not part of our law.

DISADVANTAGES OF HAVING TREATIES MADE LAW BY PARLIAMENT:
- ☹ Our government can sign anything knowing that they will never apply it within Zimbabwe e.g. the right to health and the right to education are in human rights conventions we have signed, but have not been made part of our law;
- ☹ Citizens do not benefit from international law;
- ☹ Our government can deceive the international community, signing commitments and then saying they are not part of our law – e.g. The SADC Tribunal. The ZANU PF government appeared before it but when they lost the case they said it is not part of our law.

ADVANTAGES OF HAVING TREATIES MADE LAW BY PARLIAMENT:
If the government signs something which is not acceptable to Zimbabweans, it can be rejected by the Parliament.

Possible Solution: We could put a clause in the constitution which provides that any international agreement signed by the government automatically becomes law *unless* the Parliament specifically rejects it.

ADVANTAGES:
- ✓ Government will be more careful what it signs and gain a more reliable reputation internationally; it will be more committed to implementing the agreements that it signs.
- ✓ Zimbabweans can benefit from international law agreements without having to wait for Parliament to find time to enact them.

Ensuring accountability of local councils:
The current law which gives central government so much power over local councils is intended to ensure that local councils spend money wisely and raise money according to the ability of the people. However, this power has been misused for political gain and brought disaster to the people.

Other possibilities:
» Citizen boards could be established as watchdogs over local councils;
» The law and courts must be allowed to take care of criminal activity;
» Elections at more frequent intervals (e.g. two or three years) could make the councillors more accountable to the wishes of the voters;

Taxpayers have to learn that nothing is for free but there are priorities and decisions to be made on how best to raise and spend money.

8. CONSTITUTIONAL COMMISSIONS

Several commissions are provided for in our present constitution. They could be grouped into three categories:

- ☐ Commissions to oversee specific institutions, e.g. Judicial Service Commission, the Police Service Commission, the Prison Service Commission, and the Defence Forces Commission; the Media Commission.
- ☐ Commissions to provide for elections e.g. the Electoral Commission (which has now included the functions of the former Delimitation Commission.
- ☐ Commissions to act as watchdogs on the executive power e.g. the Human Rights Commission, the Anti-Corruption Commission.

***MAIN ISSUES*:**

a) Appointment of the members

These commissions are often described, even in the constitution, as independent commissions. However, in practice in Zimbabwe they have not been independent of the executive, because the President has the right to appoint the members of most of these commissions, and where he is required to consult with another person or body, it is usually one which he also has the power to appoint.
This means that these commissions have not been independent. It is necessary to introduce methods of appointment that do not give so much power to the executive.

b) Powers of the commissions

In order to be effective, the commissions must have adequate powers to do their job. The Human Rights Commission and the Anti-Corruption commissions, for example, should act as watchdogs on executive power. To do this properly they must be able to receive complaints, investigate them, summon witnesses and order prosecutions and interdict applications.

What decisions do we need to make about Parliament?

(a) One house or two?

Some countries have only one house of Parliament (e.g. Zimbabwe before the Senate was re-introduced), but most countries have two houses or chambers, both of which must pass a Bill before it becomes law.

ADVANTAGES OF TWO HOUSES:
- ✓ The second house is meant to act as a check on the power of the main or lower house, to prevent laws from being made very quickly without enough debate or consideration.
- ✓ A second house could provide a place for older more experienced and wise individuals who might not wish to expose themselves to the pressures of election campaigns or who do not have the charisma to be elected, or it can provide for regional representation.
- ✓ More representatives should allow for more interaction between the people and the law-makers.

DISADVANTAGES OF TWO HOUSES:
It is much more expensive, and we don't have excess money to be able to afford it.

OBSERVATIONS:
- Since 2005 we have had the Senate as a second house but it has not acted as a check on the House of Assembly and legislation has been rushed through both houses.
- When the legislature as a whole is weak against the power of the executive it does not help to have two houses.

(b) Constituency representatives or proportional representation?

There are two possible ways of electing representatives to Parliament.

1. Constituency system (also known as "first past the post")

The country is divided into constituencies or voting districts, and each one elects one Member of Parliament; the candidate with the most votes wins (Zimbabwe has this system, as does the United Kingdom, the United States, Canada and many others).

ADVANTAGES:
- ✓ A member of parliament represents a particular constituency and can be held accountable by them for what he/she does in parliament;
- ✓ Primary elections can be held in constituencies by the voters in each party to choose someone they like for their candidate.

DISADVANTAGES:

☹ A party which has many votes but does not get the majority in any constituency is not represented in Parliament.

☹ It is not easy to provide for fair representation of specific groups such as women or the disabled.

2. Proportional representation:

Each party contesting the election makes a list of candidates. Voters vote for the party, not an individual candidate. When all the votes are counted, the parties are allocated seats in parliament on the basis of the proportion (percentages) of the people who voted for them. I.e. if party A gets 42% of the votes they will get 42% of the seats (South Africa has this system, and Zimbabwe used it in the 1980 election when there was no voters roll and no constituencies for the black voters.)

ADVANTAGES:

✓ Smaller parties which do not win constituencies outright but have a lot of supporters can still be represented in parliament.

✓ Parties can arrange their lists so that all groups will be represented in Parliament.

DISADVANTAGES:

☹ Party bosses get more power because they make up the party lists and anyone who does not gain their favour can be left off the list; democracy within parties may be reduced.

☹ Members of parliament are not linked as closely to constituencies and it is more difficult to hold individual members accountable.

Example

There are four parties in an election. There are 120 seats in the Parliament. Each party makes a list of 120 candidates. Everyone votes for a party. No one votes for a specific candidate.

Party A gets 50% of the votes	*and gets*	*60 seats*
Party B gets 30% of the votes	*and gets*	*36 seats*
Party C gets 12% of the votes	*and gets*	*14 seats*
Party D gets 8% of the votes	*and gets*	*10 seats*

The first 60 people on Party A's list become members of Parliament
The first 36 people on Party B's list become members of Parliament
The first 14 people on Party C's list become members of Parliament
The first 10 people on Party D's list become members of Parliament

☹ It allows another level of government to become corrupt and sap the meagre resources;

☹ It can lead to conflict between provinces and the centre, in effect making it difficult to achieve anything;

☹ It can lead to widening differences rather than narrowing them, especially between ethnic groups.

Suggestions for consideration if we do want provincial governments:

☐ The legislatures must be elected;

☐ The executive (e.g. governor) must be elected, not appointed;

☐ The number of provinces should be reduced to make it less expensive (e.g., Matabeleland, Mashonaland, Midlands-Masvingo, Manicaland).

(b) Local government – district and municipal councils

MAIN ISSUE: The current problem is that legislation gives central government in the person of the Minister of Local Government, has wide powers to control councils, through the requirement that he approve budgets and senior appointments, and has the ability to dissolve councils elected by the people.

The constitution at present does not protect the right of the people to have elected local councils which answer to the electorate, not the central government. This has caused great misery and the collapse of councils, as they have become the victims of political manipulation.

Possible options:

» Local government can be left out of the constitution and provided for by laws made by Parliament – as is the case now;

» A section of the constitution can state how local councils are elected and how they are to function.

DISADVANTAGES OF LEAVING IT OUT:

The democratic election of local councils is not protected; we would have the same situation we have now, where a mere majority in parliament can change the law and take away the powers of the local councils.

***ADVANTAGES OF INCLUDING IT*:**

The people are able to run their own local affairs without interference; they will themselves remove councillors who are corrupt through the process of law or through elections; this helps to develop democracy.

7. DEVOLUTION OF POWER

MAIN ISSUE: At present, almost all power is held by the central government. Provinces do not have their own money to spend and depend on receiving money from the Ministry of Finance through other ministries. Provinces do not control their own natural resources and local councils are subject to constant interference by central government.

The task is to create local government that is democratic, representative of the people and accountable to the people. At present the constitution does not make any provision for the election of councils for local authorities or for provincial governments.

(a) Provincial Government

MAIN ISSUES: We need to decide whether we want to have provincial governments, which will hold power to carry out some functions in their own provinces. If we do, then we have to decide how they will be chosen and what powers they will have.

POSSIBLE OPTIONS: We could have a provincial government elected directly by the voters, with an executive committee which would be the cabinet for the province. The head of the executive could be one of its members (like a prime minister) or could be a governor elected directly by the people. There would have to be a section of the constitution outlining what powers it would have. E.g. control of natural resources, roads, health etc.

ADVANTAGES:

- ✓ Certain aspects of government become closer to the people than when they are located far away in Harare;
- ✓ It allows for variation where there are differences in the natural resources and populations of different provinces;
- ✓ It gives different ethnic groups a sense of ownership of government in their region;
- ✓ It allows for more representation of the people;
- ✓ If there are political problems at national level, provinces can still continue with the business of government.

DISADVANTAGES:

- ☹ It is extremely expensive, with more salaries, benefits, offices, etc for the provincial assemblies and cabinets;
- ☹ Zimbabwe is a small country to require such another level of bureaucracy; normally this is done in large countries;

3. A mixture of both:

It is also possible to have a mixture of the two systems. There can be a certain number of seats in parliament based on constituency voting. Then there can be another number of seats allocated on the basis of proportional representation.

Example

There are 150 seats in Parliament of these, 100 are voted for by 100 constituencies
The other 50 are allocated on the basis of proportional representation.

Party A wins 60 of the constituency seats
Party B wins 34 of the constituency seats
Party C wins 6 of the constituency seats
Party D wins none of the constituency seats

Party A wins 40% of the votes and gets	*20 of the 50 seats*
Party B wins 30% of the votes and gets	*15 of the 50 seats*
Party C wins 20% of the votes and gets	*10of the 50 seats*
Party D wins 10% of the votes and gets	*5 of the 50 seats*

This system allows the smaller parties to have seats in Parliament which reflect that they did gain some support from voters.

Or – if there are two houses, one house can be all constituency representatives while the other can be entirely proportional representation or have some seats on the basis of proportional representation.

ADVANTAGES:

Any mixed system may combine the advantages of both systems and reduces the disadvantages of each.

(c) All parliamentarians elected or some appointed?

Parliament, whether one house or two, can have all seats elected by the voters, or can have some elected and some appointed. If some are appointed, the question arises of who should appoint them?

In Zimbabwe, whenever there have been appointed members of parliament they have been appointed by the executive. This gives the executive too much power in relation to the legislature, and is thus not desirable.

***ADVANTAGES OF ALL ELECTED*:**

All members of parliament have the support of voters; this can strengthen the legislature.

ADVANTAGES OF SOME APPOINTED:

- ✓ Sometimes a very capable person with important skills does not have the personality which appeals to the voters; such people could be appointed and serve the nation.
- ✓ Groups which do not win elections can be included by appointment e.g. the disabled, minority races can be included or the gender balance can be improved by appointments.

DISADVANTAGES OF APPOINTED MEMBERS:

If they are appointed by the executive this gives the executive more influence in the legislature. We want to keep their powers separate and strengthen the legislature.

(d) What to do with the Chiefs?

Do we want to include chiefs in parliament or should they keep to governance in their own areas, dealing with customary law only? At present they elect all on their own Senators, thus having a very big influence in the Senate. And because of the way chiefs are being manipulated by the executive, they strengthen the executive's control over the legislature if they sit in parliament.

The possible options are:

- » Leave them out of any special representation in the legislature **or**
- » give them special seats as they have now **or**
- » give them a smaller number of seats **or**
- » Have a separate House of Chiefs which has its own powers to debate certain types of laws which relate to custom; they would not veto legislation but perhaps force a delay and force the legislature to think more carefully; they would act as a check on the legislature.

ADVANTAGES OF LEAVING THEM OUT:

- ✓ They concentrate on their own ethnic group where they have respect and know the customs;
- ✓ They are not elected so may not really belong in the Parliament;
- ✓ They cannot be manipulated by the executive as they are now;
- ✓ The legislature becomes more democratic.

ADVANTAGES OF SEPARATE HOUSE OF CHIEFS:

- ✓ The chiefs are very important in the eyes of many Zimbabweans and might be able to regain some independence of action;
- ✓ Their influence on the rest of the legislature is reduced and they do not change the balance of power;
- ✓ This will only work if the separate House of Chiefs cannot change legislation except by delay or persuasion.

(b) ***Delimitation and the Electoral Commissions:***

IMPORTANT ISSUE: Delimitation and the conducting of elections must be done by impartial bodies who will not favour any parties or candidates. The most important thing is who appoints the commissioners and by what process, and that they have some professional qualification and experience that makes them suitable.

Delimitation is the process by which constituencies are determined, when there is constituency-based voting. At present the Delimitation Commission consists of four people, one a judge of the Supreme Court or High Court and three others, all appointed by the President. He only consults the Chief Justice (who is also appointed by him).

The Electoral Commission is also appointed by the President after consulting with the Chief Justice.

Do we need a separate delimitation commission, or can this work be done by the electoral commission?

What process can be introduced to enable the electoral commission to be completely independent, not influenced by any part of the executive?

See above for the discussion about the executive's powers to make appointments.

6. JUDICIARY

IMPORTANT ISSUE: It is the judiciary which is meant to protect our rights, check abuse of power by the executive, and maintain the rule of law.

Therefore a constitution needs to ensure that:

- The judiciary is completely independent of the executive;
- The system of appointing judges does not allow the executive to appoint judges who will favour them.

At present the President appoints judges after consulting the Judicial Service Commission, but the Commission is itself appointed by the President.

POSSIBLE SOLUTIONS:

- » Require the executive's appointments to be approved by Parliament (e.g. the US);
- » Parliament could have a larger role, making the nominations themselves;
- » The general public could have a role in making nominations;
- » There could be public hearings;
- » If there is a Prime Minister, the ceremonial Head of State could make appointments on the recommendation of Parliament or another independent body.

See above for the discussion of the executive's powers of appointment.

What are the possibilities?

1. **The head of the executive can dissolve Parliament** (if it is a Prime Minister this is common, but it is done with the agreement of the cabinet).

DISADVANTAGES:

- ☹ If Parliament votes against the executive he or she can dissolve it and call for new elections; elections can then become too frequent;
- ☹ The executive gains power over the legislature.

***ADVANTAGES*:**

If there is a deadlock because of evenly balanced parties in the Parliament, it can become impossible to have Parliamentary legislation passed, and it may be necessary to call an election in order to make progress - but there is no guarantee that a new election will produce a better outcome.

2. **Parliament always completes its term** and no one can dissolve it before then (e.g. the US).

DISADVANTAGES: if there is a deadlock, there is no way to resolve it.

ADVANTAGES:

- ✓ Parliamentarians must get on with the business of law-making instead of plotting to vote against the executive to get them out of power, or supporting them in order not to have an election and possibly lose a seat;
- ✓ Compromise between parties and positions is encouraged;
- ✓ There is certainty about when elections will be held and everyone can plan accordingly.

President Appoints Ministers, Deputy Ministers and Cabinet according to the Kariba Draft

As under the present Constitution, there will be Ministers and Deputy Ministers appointed by the President in his absolute discretion from members of Parliament. It may be noted that under the rejected Government Constitutional Commission draft Ministers were to be appointed on the advice of the Prime Minister and there were to be no Deputy Ministers. Again as at present, there will be no limit to the number of Ministers and Deputy Ministers that the President may appoint. The office of Prime Minister has no place in the Kariba Draft. The Cabinet, as under the present Constitution, will be presided over by the President or a Vice-President. If the Kariba Draft Constitution is adopted there is no position of Prime Minister.

DISADVANTAGES OF KEEPING THEM IN THE MAIN HOUSES OF PARLIAMENT:

- ☐ They are not elected by the voters, but can shift the balance of power away from those who are most popular with the voters;
- ☐ This weakens the legislature, and if chiefs are manipulated by the executive, strengthens the executive.

(e) Size

How many parliamentarians do we want? Currently the two houses add up to more than 300 seats.

THINGS WE HAVE TO THINK CAREFULLY ABOUT - CONSIDERATIONS:

We need enough representatives:

- Who include a wide range of talents and interests;
- So that they can be able to meet the people frequently.

But… the more we have, the more it costs in salaries, travel expenses etc. The present 300 makes parliament far too expensive for a country with few resources.

(f) Party Loyalty

Should members of Parliament be allowed to change parties after they have been elected, or lose their seats and face a bi-election if they change parties after being elected?

ADVANTAGES OF BEING REQUIRED TO REMAIN LOYAL TO THEIR PARTY:

- ✓ It prevents parliamentarians accepting bribes and other inducements to change their party in their own personal interests rather than in the interest of the people who voted for them;
- ✓ The people know that the representative they voted for will not change parties unless the voters approve of the change;
- ✓ If they are elected on the basis of proportional representation the people voted for the party and not the candidate, so it would seem unreasonable to allow a member to change parties after election.

ADVANTAGES OF BEING ALLOWED TO CHANGE:

The parliamentarian should be in a position to follow his conscience if he disagrees with his own party on a major issue.

(g) Recall

In some countries the voters can recall their elected representative if they dislike what he is doing. They would have to organize a certain percentage (usually around

half of those who voted in the previous election) of the voters to sign a petition saying he or she no longer represents their interests, and then there would have to be a by-election to choose a new candidate.

ADVANTAGES:

- ✓ The parliamentarians have to pay attention to what their constituents want and don't want – an increase in accountability;
- ✓ The people don't have to wait until the next election to get rid of an incompetent or corrupt politician.

DISADVANTAGES:

- ☒ It can be clumsy and expensive;
- ☒ If the member has done something illegal he or she can be dealt with by the courts;
- ☒ If the time between elections is not too long, it is sometimes better to wait for the next election.

(h) Term of Office of Parliament

In most countries elections are held every four or five years. This gives parliamentarians enough time to get used to the system and become effective before having to go back to the voters, but in some it is only two years (US House of Representatives).

***ADVANTAGES OF A SHORT TERM*:**

Parliamentarians have to be more accountable, because they are always thinking about being re-elected and remember to listen to the voters and report to them.

DISADVANTAGES:

- ☒ Elections are expensive, so if they are held too often they become a financial burden on the state.
- ☒ Frequent elections do not give new parliamentarians enough time to understand how parliament works before they have to go to an election.

(i) Parliament's Control of Executive

Parliament may be given the power to force the resignation of the President/Prime Minister. If it is a Prime Minister, he must have the support of Parliament to retain his position, so it does not become an issue. If it is a President who is separately elected, then Parliament will have to have some kind of system by which they can force the President to resign. E.g. by vote of a certain percent % of Parliament (e.g. 2/3). This provision is in our present constitution, but it cannot work when the executive is so strong that it dominates parliament.

- ☹ Officials owe their jobs to the President and are always afraid of losing them if they displease him or her; this is particularly serious when it comes to judges, who must check the executive power.
- ☹ No one knows how these appointments are made or who else was considered – there is no transparency in the appointments.

ADVANTAGES: The officials will follow the policies of the executive so that implementation could be smoother.

Who should be responsible for such appointments? In most countries it is the executive, who makes the appointments, but in some there are others who will also have a role, and the head of the executive does not decide on his own.

The following are possible ways of making key appointments:

- ✓ President or Prime Minister makes them but has to get his appointments approved by Parliament (e.g. in the U.S., Congress has to approve major appointments even for cabinet positions);
- ✓ Public hearings are held either before Parliament or some other body where the individuals nominated must demonstrate that they are suitable;
- ✓ Parliament itself could make some of the appointments;
- ✓ The general public could be involved by submitting nominations and participating in the panels for public hearings.

Or there could be a combination of some of these methods.

(f) Size of cabinet

A large cabinet is very expensive. If it is drawn from the members of parliament, then a large cabinet makes the executive dominate the legislature. Many have proposed that we limit the size of the cabinet to perhaps 15 or 20 members.

5. ELECTIONS

The constitution should include the following:

- ☑ How often elections must be held (mentioned under legislature and executive powers);
- ☑ How Parliament can be dissolved before the term is up;
- ☑ Delimitation of constituencies.
- ☑ The supervision of the electoral process – usually an Electoral Commission.

(a) ***Dissolving Parliament:***

In our present constitution (before the Global Political Agreement) the President had the power to dissolve Parliament without any limitation. Usually where there is a prime minister, he or she can also decide to dissolve parliament if his or her party has lost a majority, or for any other reason.

DISADVANTAGES OF IMPUNITY:

- ☒ The President is seen to be above the law, which goes against all principles of equality before the law and protection of the law, thus undermining the rule of law;
- ☒ A President who has broken the law will use all means. Again breaking the law, to remain in power so that he escapes being punished for his crimes;
- ☒ A culture of impunity and lawlessness is built up, as the President also protects his colleagues from being punished.

ADVANTAGES OF IMPUNITY: None that are evident; it simply shows unnecessary "respect" for a leader whom we need to be able to hold accountable.

(d) Decision-making powers

Do we want the head of the executive to act on his own, or does he have to act with the consent of his cabinet?

Possible options are:

- » He has to consult his cabinet but can make decisions alone **or**
- » The cabinet must consent to any decision **or**
- » For some decisions he has to have consent and for others he only has to consult.

***ADVANTAGES OF CONSENT*:**

- ✓ It checks the power of the head of the executive;
- ✓ Such a system is less likely to allow a leader to become a dictator, making decisions on his own.

NOTE: this problem does not occur where there is a prime minister because he/she has to have the agreement of his party for his policies or they will remove him. It is difficult to know whether or not a head of executive has managed to get agreement from his cabinet, as minutes of cabinet meetings are normally secret.

(e) Powers of Making Appointments

Currently the president has the power to make many appointments to public office e.g. judges, ambassadors, permanent secretaries, heads of parastatals, some members of parliament, governors, members of commissions etc.

DISADVANTAGES:

- ☹ The President can use these positions as patronage to gain loyalty rather than to appoint the best people for the jobs.

ADVANTAGES:

- ✓ A head of the executive who misuses his powers can be removed from office before he damages the country;
- ✓ A President will be more careful of keeping to the constitution.

But… this can only work if other controls on the executive are built into the constitution.

4. EXECUTIVE POWER (PRESIDENT OR PRIME MINISTER AND CABINET)

Zimbabwe has tried a Prime Minister and a President. Since 1988, under a President holding executive power, the executive has assumed too much power, weakening the legislature, and democracy. Our task in writing a new constitution is to provide for an executive which has enough power to do its job effectively but still answers to people and cannot control the legislature and the judiciary.

(a) Which system – executive president or prime minister?

Before deciding, it is important to understand the difference in the two posts.

1. Prime Minister: Under this system, the leader of the party which wins the largest number of seats in Parliament becomes the head of the executive and chooses his cabinet ministers from fellow parliamentarians. He has only been directly elected by his own constituency.

There will then be a separate head of state known as a ceremonial President who does not have much power (e.g. this is what we had in Zimbabwe up to the end of 1987, when Robert Mugabe was Prime Minister and Canaan Banana was President. Mugabe was not directly elected by all the people; he was elected to represent Highfield constituency, but because ZANU PF got the most seats in parliament and he was the leader of ZANU PF, he became Prime Minister).

ADVANTAGES:

- ✓ The head of the executive depends on the support of other parliamentarians in his party and can be voted out by his own party.
- ✓ Because the head of the executive is not directly elected by the whole country he does not have independent power, and is thus easier to control.

DISADVANTAGES: The head of the executive is part of the legislature and can more easily control parliament.

2. President: – The President has full executive powers:

- He/she is elected directly by people (most common) or by Parliament (e.g. South Africa)

- He/she appoints cabinet members - **either**
  (a) From members of parliament – (what we have now in Zimbabwe) **or**
  (b) From outside Parliament (e.g. in the U.S). The President can appoint whoever he wants to be cabinet ministers.

ADVANTAGES OF CABINET MEMBERS BEING APPOINTED FROM MEMBERS OF PARLIAMENT:

✓ The cabinet are elected people and therefore should be more accountable to the people;
✓ Since they are elected they do not depend completely on the head of the executive and may be able to check that power somewhat.

DISADVANTAGES: Cabinet sits in parliament and tends to dominate, weakening the parliament and reducing its ability to check the power of the executive.

ADVANTAGES OF CABINET MEMBERS BEING FROM OUTSIDE PARLIAMENT:

✓ The legislature and the executive are completely separate;
✓ The executive must persuade the legislature to pass laws it wants and is less able to abuse its power by making laws which are not popular with people;
✓ So the legislature can be a good check on abuse of power by the executive.

DISADVANTAGES:

☒ The cabinet ministers are not elected by the people and may not feel accountable to the people;
☒ They are entirely dependent on the pleasure of the President, so cannot in any way check his abuse of power.

(b) Term of Office

1. **Length of term:** A President may have a term of four, five or six years.
2. **Number of terms:** If there is a prime minister, the number of terms does not arise, as it is controlled by the party winning in parliament. Many constitutions which provide for an elected executive president, limit a person to two terms (e.g. US and South Africa).

ADVANTAGES:

✓ An individual who stays in power too long usually becomes arrogant and begins to abuse power. This is what has happened in many countries.
✓ If the opposition does not have a good chance of gaining power they tend to use unconstitutional means to get power (e.g. the army takes power by force.)

NOTE: the "third term" has become a big issue in Africa. Where presidents try to extend their rule beyond two terms it is often seen as an attempt to hold on to power to avoid facing the courts for crimes committed during their term of office.

The Presidency according to the Kariba Draft

There is to be an executive President, as at present, elected in a country-wide election. A President will be limited to two five-year terms, but tenure as President before the draft constitution comes into effect will not be counted, so Mr. Mugabe will be eligible to continue in office for another 10 years.

There will be up to two Vice-Presidents appointed by the President, as under the present Constitution and they will hold office at the pleasure of the President. They will act for the President in his absence and in the event of his death or incapacity one of them will act as President for up to 90 days, whereupon both Houses of Parliament acting together will elect someone to be President until the end of the former President's unexpired term of office.

The President will have extensive executive powers. Acting in his own discretion [i.e. without having to seek advice from anyone] he will be able to:

- *Prorogue [adjourn] and dissolve Parliament;*
- *Appoint and dismiss Vice-Presidents, Ministers and Deputy Ministers and assign functions to them;*
- *Appoint "other public officers";*
- *Appoint and receive diplomats, and conclude and execute treaties;*
- *Call referendums; and*
- *Deploy the armed forces outside Zimbabwe.*

Everything else he will have to do on the advice of the Cabinet.
The President's power to declare a state of emergency is much the same as under the present Constitution, but it will last for only three months, as opposed to six months at present, before having to be renewed; and the President will have to get Parliament's approval within 14 days.

(c) Legal liability or impunity:

In the present constitution, the President is not legally liable for his actions while he is in office. That means he cannot be charged with a criminal offence or be sued by anyone who wants to bring a claim against him for wrong he has done.

This clause could be removed, so that the head of executive, whether prime minister of president, is legally liable and can be taken to court and punished if he is believed to have broken the law.