

LOCAL GOVERNANCE, DEMOCRATISATION AND CONSTITUTIONALISM IN ZIMBABWE

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ABSTRACT

Local government in Zimbabwe has a chequered history, having been a creature of statute for most of its existence. Although local governance exists ideally to bring governance to the door step of communities, challenges with the intolerant ruling elites has tended to compromise this position. Divergent traits of local governance are exhibited in federal and unitary states, with the former holding greater propensity for democratic governance. In unitary states, the overarching powers of central government have shaped the nature, status and perceptions of local authorities and residents. Previously, interference by central government on local authority operations has compromised efficient and effective democratic local governance. However, it remains to be seen whether the new constitution in Zimbabwe will overturn the previous local government dispensation. However, lack of political commitment to realign and harmonise the previous local government legislation and the new constitution has tended to create acrimony and confusion in the implementation of local government provisions from the new constitution.

Introduction

Local government is the nearest sphere of government to local communities and as such is very important as a conduit through which national/central government implements policies and provides services to communities. Given that central government cannot directly administer all communities, it utilizes local authorities as a conduit to reach out to individual communities. Such local authorities are manned by elected and appointed officials. These officials include technocrats whose expertise in the interpretation of statutes and bylaws is necessary in the administration of local authorities as they seek to enhance service delivery to

local communities. In addition to technocrats, there are those officials who are elected by the local people to represent local community interests in councils. The existence of elected officials (herein called ‘councillors’) enables local communities to keep informed of events in local councils and to participate in the business of local councils. The existence of such elected councillors is common in both federal and unitary local government systems. However, the relationship between central government and local government is different in federal and unitary systems of government. Federal and unitary governments have different forms of local authorities and the devolution of powers is more visible in federal governments than in unitary governments. In unitary forms of government, central government seeks to usurp and amass or even retain most decision making powers of local authorities while in federal forms of governments, central government spreads decision-making powers to regions or provinces and only retains important portfolios, such as those pertaining to national security, which cannot be handled at local or regional levels.

Although the relationship between central government and local government is different in federal and unitary systems of government, the major functions of local government in either of the two systems of government remain that of implementing central government policies. However, the difference is in the level of community participation. Although it might seem as though the administration of local councils is a straight forward practice, it is inundated by a myriad of challenges ranging from the politicization of local governance in favour of the ruling elites, lack or little consultation of local communities in decision-making processes, and the visible hand of central government in the affairs of local councils. The major challenges to local government in Africa have remained that of political interference by the ruling elites, as well as the scarcity of resources with which to deliver good quality services to local communities. This has resulted in the disintegration of local government structures in most urban areas, and the near destitution of residents in sprawling informal settlements as local authorities fail to meet the demand for housing as a result of increased urbanization. As in most African countries with unitary systems of central government, local government has had its own share of challenges. The most notable of Zimbabwe’s challenges in local governance has been the acutely partisan nature of local governance, manifesting itself in the plethora of legislation that determines local governance. With the Minister responsible for local government wielding enormous executive powers, there has been a notable disruption of operations in most local councils as the Minister has sought to settle political scores with

locally-elected councillors. With the advent of a new amendment to the Urban Councils Act (2008)- section 4 A, the Minister has been empowered to appoint special interest councillors, which, I argue, is a waste of resources and ratepayers' hard-earned money. Local governance benchmarks and best practice have proved that the appointment of special interest councillors is not only unnecessary, but is not consistent with democratic urban governance.

Local Governance and the Dynamics of Power

Local government has been described as a lower level of public administration that uses delegated powers and functions to manage local affairs and provide services through council¹. Consequently, urban councils can be taken as an attempt at decentralization and devolution of powers from central government to localities. Devolution is the most far-reaching form of decentralisation comprising of the transfer of administrative, political and fiscal powers, whereas delegation and de-concentration only include the transfer of administrative power (Steiner, 2005). Treisman (2002) adds to these distinctions that decentralisation can be analysed from a static or dynamic time perspective, as well as from a dichotomous or continuous point of view as either or not decentralised, or decentralised to different degrees (Treisman, 2002).

The dynamics of power in local governance manifests itself in different practices that revolve around who holds power and what role the public plays in this power matrix. As a result the form of local governance is informed by whether the power to make decisions is *centralised*, *decentralised* to localities, *delegated* or *devolved*. This paper discusses 'decentralisation', 'centralisation' and 'devolution' and how each of these impacts on and compromises or enhances good democratic governance.

Centralisation in local governance most decision-making powers is vested in central government with local authorities having no or very little power to make decisions. In that case, local authorities are there to implement policies handed down from central government. Decentralisation is the antithesis of centralisation and entails empowering lower tiers of government with decision-making powers. Political reforms across the globe have come in support of decentralization as viable option than centralised systems of government.

¹ Councillors Induction Handbook (2009:5)

Decentralized political systems have been characterized by power-sharing structures between central and local government structures². In decentralization, central government

transfers or delegates legal and political responsibility for planning, management and resource use and allocation from the central government and its agencies to field organisations of these agencies, subordinate units of government, semi-autonomous public corporations, area-wise regional or functional authorities, or non-governmental private or voluntary organisations³.

In organisations decentralisation

means a choice between different types of public institutions, which vary in terms of the areas over which they have jurisdiction, the range of functions delegated to local institutions and the level of discretion allowed, as well as the manner in which decision-makers are recruited, so producing institutions that are primarily political or bureaucratic or a mixture of both⁴

In summary decentralizations denotes that transfer of authority or power from a higher to a lower level of government, quasi-government or non-governmental organisations to execute and manage public activities or functions⁵.

This is the premise on which the paper will regard power and functional dynamics in Zimbabwe's local government system and the extent to which the responsible Minister exercises these powers.

This is similar to devolution where enabling institutions and powers are devolved or delegated to lower levels of government. In devolution, local authorities have the mandate to make decisions without seeking central government approval.

²Mawhood (1993“Decentralisation: The Concept and the Practice” in Mawhood, P (Ed), **Local Government in the Third World**, John Wiley and Sons, Chichester.

³ Cameron (1995 : 396-397); Rondinelli, D.A. (1981 : 137) 1981, “Government Decentralisation in Comparative Perspective: Theory and Practice in Developing Countries” in **International Review of Administrative Sciences**, Vol. 47, No. 2.

⁴ Smith (1997: 400) 1997, “The Decentralisation of Health Care in Developing Countries: Organisational Options” in **Public Administration and Development**, Vol. 17, No. 4.

⁵ Smith (1997: 400)1997, “The Decentralisation of Health Care in Developing Countries: Organisational Options” in **Public Administration and Development**, Vol. 17, No. 4.

However it has been noted that the delegation of power can either be practical or in principle and if it is the latter, it leaves most powers with central government.

Advocates of democratic decentralisation or devolution for rural development often put forward claims of improved public accountability, environmental sustainability and the empowerment of the poor and vulnerable groups (Andersson & Ostrom, 2008). The concept of accountability refers in general to the relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences (Bovens, et al, 2008). In a horizontal accountability situation, (government) officials and agencies have to appeal 'sideways' to others within the state or agency itself (e.g. corruption control agencies, administrative courts, legislative investigative commissions). The diverse experiences with rural decentralisation yield however inconclusive development outcomes and highlight a vast complexity in the structure and dynamics of governance. Governance refers in general to the nature of rules that regulate the public realm where state, economic and societal actors interact to make decisions. Core principles of 'good governance' are participation, fairness, decency, accountability, transparency, and efficiency (Court 2006b). In general, both the relations between the local and central government and the extent to which enhanced participation establishes accountability of local governments seem to determine decentralised performance (Moore & Putzel, 1999; Blair, 2000; Hutchcroft, 2001; Johnson 2001; Bardhan 2002; OECD, 2004; Jutting, Corsi et al, 2005).

Local Governance: A General Overview

Local government is the sphere of government that deals with local affairs and involves elected officials, usually as councillors, in addition to other technocrats appointed on the basis of their expertise in different areas. This is applicable in both federal and unitary state systems. Local government operates under the auspices of national government with the ruling political party dictating the pace and policy framework that is supposed to be implemented. This means that each political party that comes to power ensures that it implements local government policies that benefit that very party. Local government can therefore be used as a political tool to endear political parties to local communities. There in an effort to effectively handle communities, national governments subdivide the country into smaller and manageable geographical areas that are easy to manage (Mhlahlo, 2007:109).

Hence, Mamadou (1996) has consented that local government is “an administrative body for a small geographic area, such as a city, town, county, or state”.

What should be noted is that local governance is a process and a derivative of local government and entails the involvement of local communities in the management of their own affairs (Watts, 1999:25). Local governance involves organisations such as municipalities and city councils that are charged with providing public services in specific localities (be they urban or rural) and are usually controlled by officials who are either chosen, appointed and/or elected in local elections or through other formal means, responding to job advertisements, for example. (Madhekeni A & Zhou, 2012) In some cases, legislation may allow the Minister responsible for local government to appoint officials. One such piece of legislation that empowers the Minister responsible for local government to make appointments to local councils is section 4 A of the Zimbabwe Urban Councils’ Act of 2008. This empowers the Minister to appoint special interest councillors to all urban and rural councils in order to sit alongside elected local councillors, with a view to ostensibly enriching debates and deliberations in local councils and thereby apparently adding value to the making of bylaws. However, the new Zimbabwean Constitution adopted in April 2013 does not provide for such appointments and only provides for the election of councilors as well as technocrats recruited on the basis of their expertise.

Relationship between Central Government and Local Government

A central government can be defined as the government of a nation-state. Central government is usually more typically a characteristic of a unitary state whose powers reside with the centre and where there is little or no power for local government. In a unitary state, the central government has the power to make laws for the whole country, in contrast with local governments where local councils and communities influence the making of national laws, in addition to making their own laws as in the federal system. The federal form of government may have distinct powers at various levels authorized or delegated to it by its member states, though the adjective 'central' is sometimes used to describe it (Watts, 1990).⁶ The structure of central governments varies, ranging from quasi-decentralised to totally centralized systems of governance. Many countries have created autonomous regions by delegating powers from the central government to governmental institutions at subnational level, such as a regional, local,

⁶Watts, R., "Comparing Federal Systems" (2nd ed.) SPC Queen's U (1999) pp 20-26.

or state level. Based on a broad definition of the existing political dispensation in a designated territorial area, there are two or more levels (tiers/spheres) of government that exist within an established territory and govern through common institutions with overlapping or shared powers, as prescribed by a constitution or other law (Madhekeni A & Zhou, 2012). It would be practically impossible for central government to reach out to various parts of the country other than through local government institutions such as rural councils and urban councils. Usually the constitution of the concerned country allows for the demarcation of the country into constituencies or towns/cities and rural sub-divisions which are in turn administered by local councils. A local government will typically only have control over their specific geographical region, and cannot pass or enforce laws that will affect a wider area. Local governments can elect officials, enact legislation to draw and charge taxes and other revenues, and do, on a more restricted scale, many of the things associated with the practices of national government.

Major Functions of Local authorities

Through local governance, local authorities implement policies for the provision of services to local communities and, in addition, formulate bylaws that effect the provision of such services. Local authorities are responsible for the provision of an extensive range of public services in a geographical location. In addition to making bylaws and providing services, local authorities promote the interests of local communities in various spheres ranging from and including the social, economic, environmental, recreational and cultural. In federal state systems, local authorities enjoy more autonomy than in unitary state systems where such local authorities operate under the watchful eye of central government and receive instructions from the centre.

Local Government in Federal States

As has been indicated above, the operations of local government in federal states is more liberal than in their unitary counterparts, hence they can be regarded as partially self-governing. This is acknowledged by Watts (1999:27) in his definition of a federation. A federation (also a *convent* in Latin), is a political entity characterized by a union of partially self-governing states or regions united by a central (federal) government (Watts, 1999: 26). In a federation, the self-governing status of the component states, as well as the division of

power between them and the central government, are, typically, constitutionally entrenched and may not be altered by a unilateral decision taken by a component state (Watt, 1999:26). The governmental or constitutional structure found in a federation is known as federalism and constitutes the very opposite of a unitary state which is characterized by the centralisation of power at the expense of local communities (Hyden, 1992). It was in Germany where the practice of federalism started, with the country itself being constituted of 16 federal states of districts (landers). Similarly, Germany's neighbour, Austria, is made up of administrative divisions which are characteristic of federal states in which power is devolved to local administrative units, in most cases called 'local councils', 'municipal councils' or 'city councils'. This is the system that was inherited by most African states when they attained their political independence status.

The composition of federal states may vary, with some having multi-ethnic, multi-lingual and multicultural communities while others may be homogenous societies. The complexion of a federal state does not need to meet any ethnic or cultural requirements or criteria. Those federal states that cover vast geographical areas include India, which is multi-ethnic. Multi-ethnic communities may be prone to ethnic violence, a common feature in some federations, which usually results in demands for cession by some ethnic groups. Although sometimes, arguably, despotic, unitary state systems often have some semblance of stability as a result of their mostly homogenous nature. However, on the political front, such states are characterised by an acute centralization of power, often leading to authoritarianism where human rights violations are commonplace. In such systems, local government is more inclined and dependent on central government which holds all the power to make decisions.

Given that local government is a sphere and an extension of central government, it acts as a conduit through which national policies can be implemented and communities consulted. At the same time, the political ideology of most local government institutions is a manifestation of the desires of the ruling elites whose political survival rests with the local communities which should in principle, therefore, be appeased by local government in order to further reinforce their own position as the ruling elite. Hence, devolution and decentralization are common practices in federal political state systems. On the other hand, in unitary state systems, the local communities are mere recipients of policies made from central government level. There is no community participation in the formulation of these policies and in most cases central government is not wholly aware of what local communities might require for

their survival. The World Bank (2007) has bemoaned local government policies in unitary state systems for being more consultative than participatory in nature. By this, the World Bank means that local government legislation in unitary states does not oblige central government to incorporate communities in decision-making processes but that the government *may* consult communities. Below is a more detailed discussion of local governance in a unitary system of government.

Local Government in Unitary States

The most prevalent feature of a unitary state is that it usually consists of one centralized political structure in which there is a single tier or sphere of government wielding all or most of the executive authority in order to make and/or reverse decisions. In most cases unitary states may include one or more regions. In the case of Zimbabwe these regions are called ‘provinces’. One major difference between a federal system of government and a unitary system is that, while both political systems have regions or provinces, in a federal state system provinces are autonomous, having no or little recourse to central government, and have all the necessary institutions, resources and infrastructure to implement their own policies. On the other hand, in a unitary system the provinces are merely quiescent structures that do not serve any meaningful purpose other than distributing resources and serving as warehouses for keeping goods and information for subsequent onward transmission to central government which is usually housed in the capital. It should be emphasized that regions in unitary states are not guaranteed institutions as they can be revoked at any time, unlike in federal states where regional structures are permanent institutions with guaranteed life spans. It is normal practice that the powerful status of regions in federal states is manifested in the fact that they are, with the consent of central government, constitutionally empowered to make bilateral agreements with other independent states.

Local Governance and Democracy: The federal/unitary dichotomy

While it can be acknowledged that the essence for local government structures is to promote democracy, this has varied between federal and unitary systems. In federal systems of government, devolution enables central government to transfer power and resources to local councils. This helps to enhance local democracy and citizen participation in governance processes. Through devolution, local communities are able to engage with their own elected

leadership and to directly influence decisions on matters that directly affect their lives. In such cases there is very little central government interference and visibility. It is in matters of paramount importance, such as those of national security, that central government presides over since such matters do not always require public participation. In federal state systems, although central government may still seek to promote the policies of the ruling party(ies), the impact of such attempts can be vetted and at times turned down by local communities in favour of, for example, 'pro-poor' policies that benefit such communities (Afonso, 2006). Such is the character of democracy in a genuine federal system of government.

In contrast, in most unitary state systems it is common practice that central government dictates what should be done by local councils for the communities. While there may be elements of consultation between central government and local government, this is limited and it is usually left to the whims of the Minister responsible for local government to make decisions on behalf of both central government and the local communities. Unitary systems are generally characterized by a disconnect between central government and local communities, since the emissary of central government, who is the Minister responsible for local government, may block communication between the two, leading to a loss of trust in central government by local communities. This may also impact negatively on democracy, especially given that democracy is all about the existence of healthy communication structures between central government and local communities. This is the case with Zimbabwe, in which the appointment of special interest councillors has compromised and in some cases frustrated communication between central government and local communities. The residents in different constituencies where such special interest councillors have been appointed have questioned the *raison d'être* for such appointees, especially given that some of the appointees may have lost in local government electoral contests. Such mistrust has led to a loss of trust in central government's political will to involve communities in the resolution of problems concerning poor service delivery. This has resulted in residents accusing central government of peddling political ambitions. It has also been shown to be true that central governments in unitary state systems have sought to impose their political will on residents without consultation. This paper goes into detail about the extent to which such a practice resonates with international benchmarks and best practice on democratic urban governance.

Framework for local governance in Africa

A number of regional legislative instruments on local governance govern the conduct of local governance and local government institutions in different parts of the globe, including on the African continent. These instruments form a framework for local governance on the continent. The different legislative instruments governing local governance in Africa are presented in this section. Some of the international instruments are linked to Africa since they have chapters on the African continent. An example is the United Cities and Local Governments (UCLG) which has the United Cities and Local Government in Africa (UCLGA) as its African chapter. As such, the two institutions link their activities. Similarly most African local governments draw from international frameworks such as the UN-Habitat framework on local government. There is also a plethora of Africa-specific legislative instruments that seek to provide a framework for democratic practice in general and democratic local governance in particular. The instruments and forums can either be binding or ‘soft laws’ which are not binding. The legislative instruments and forums to be explored in this normative framework include the Charter for Popular Participation in Development and Transformation (CPPDT) (1990); the African Union Charter on Democracy, Elections and Governance (ACDEG) (2012); the All Africa Ministerial Conference on Decentralisation (AMCOD); the United Cities and Local Governments of Africa (UCLGA); the Victoria Falls Declaration adopted in 1999; the Kigali Declaration of 2006 and the Harare Declaration. From each of the instruments the author extrapolates critical features of representative democratic governance that will be used to establish the compliance of section 4 A of the Urban Councils Act to democratic practice.

Politicisation of Local Governance in Africa

One of the most prevalent features of local governance and local government institutions is the high level of politicization, which has tended to compromise democratic practice. Be it in federal states (which are very few on the African continent) and unitary states (which constitute the bulk of the continent’s member states), local governance is inundated with political interference, to the extent that citizens are either not consulted adequately or central government simply hands down laws and regulations without consulting the general populace. What has resulted from this scenario is a high level of dissatisfaction among people as the quality of service delivery has continued to plummet, increasing outbreaks of disease and the mushrooming of informal settlements in most urban areas. All these challenges are

the result of a lack of adequate consultation with the residents who are the best judges of their needs. The World Bank (2007) has concurred that national governments in most of African states do not seek to promote democracy within the sphere of local government by allowing the participation of its citizens. Instead, national governments only go as far as consulting citizens when already armed with legislations and regulations already crafted in government offices by ‘technocrats’. ‘Consultation’ in this case is a formality and does not reflect the commitment of most African central governments to democratise local governance. The prevalence of the practice of the politicization of local government and local governance has not only deprived communities of their democratic right to contribute to policies that affect their development, but has been manipulated by the ruling elites to gain political mileage by crafting and handing down policies and regulatory frameworks that seek to promote the political agendas of politicians. One case in this regard is the crafting of a local government legislative framework that empowers the Minister responsible for local government in Zimbabwe to appoint additional councillors in addition to those elected by the electorate. It does not require much familiarity with issues of governance to see that such a system of local government enables the Minister to appoint friends and relatives and promote other corrupt practices. The overall impact of such a piece of legislation is a loss of confidence in central government by communities, the creation of a rift between local communities and central government as well as the perpetuation of corrupt practices initiated at central government level. In the end, communities feel insecure and find solace in the formation of community-based organisations (CBOs) such as residents’ associations. Residents’ associations are formed by residents to engage with local authorities and central government regarding the undesirability of some of its policies and practices.

Local Government in Zimbabwe: A General Overview

Local governance in Zimbabwe dates back to the 1890s when the colonial administration of the day, the British South African Company (BSAC), established the first formal local authority, the Salisbury Sanitary Board, to administer local affairs.⁷ Local government was not provided for in the Constitution but became a creature of statute which meant that the local government system did not have constitutional protection. Subsequent local government instruments and institutions such as municipal ordinances, as well as advisory boards and councils, were established and all fell under the direct control of the District Commissioner

⁷Jordan JD *Local Government in Zimbabwe: An Overview* (The Mambo Press Gweru 1984) 12.

who sought to reinforce colonial policy in African townships. The centrally-defined local governance institutions and structures were instituted to deny Africans self-government. In response to this repressive dispensation, residents, mostly from urban areas, resisted the entrenched racial, legal and institutional frameworks. The centralised local government system imposed substandard and centrally-defined programmes on African and Native Councils and 'laid the foundation for a highly centralised post-colonial local governance system that was inherited at independence in 1980'.⁸

The post-colonial reforms to the local government system culminated in the amalgamation of African Councils into District and Urban Councils governed by a new set of legislation, namely the Rural District Councils Act⁹ and the Urban Councils Act¹⁰. In District Councils, a consolidated set of legislative frameworks has been used to govern the conduct of district council operations, ranging from appointments, the election of council officials as well as revenue collection and service delivery. In addition, this legislation governs how the infrastructure should be developed. The same goes for urban areas where the Urban Councils Act operates along the same lines, providing direction on the way that local councils should be managed as well as how revenue should be collected to enable local councils to function properly. However, it should be noted that the new post-colonial dispensation did not seek to loosen central government's stranglehold on local authorities but, rather, perpetuated its dominance over local councils by empowering the Minister of Local Government, Rural and Urban Development (MLGRUD) to provide strict monitoring mechanisms for local councils, both in rural and urban areas. Consequently, the post-colonial political establishment is often blamed for failing to redress the centralisation of powers by central government and to democratise local government.¹¹ What appears to have been misconstrued by many people in Zimbabwe is the fact that the governing legal and institutional framework of local governance in the country provides an opportunity for the responsible Minister to legally enable or disable local authority administration.¹² The intervention in the operation of local councils by the MLGRUD has been viewed as the 'Achilles Heel' of local authorities and

⁸Madhekeni A & Zhou G 'Legal and Institutional Framework: The 'Achilles Heel' of Local Authorities and Raison D'etre of Ministerial Intervention in Zimbabwe'" (2012) *Journal of Public Administration and Development* 2 (3)20

⁹Chapter 29.13, Rural District Councils Act (1996).

¹⁰Chapter 29.15, Urban councils Act, (1996).

¹¹ Blunt G 'Overcoming a decade of crisis: Zimbabwe's Local Authorities in transition' 2011 *Journal of Public Administration and Development* 31 (4) 340-350.

¹² Bland G 'Overcoming a Decade of Crisis: Zimbabwe's Local Authorities in Transition' (2011) *Journal of Public Administration and Development* 31 (4) 342.

presents a major weakness in the administration of local government affairs in the country.¹³ One of the pieces of legislation that has promoted legal intervention by the MLGRUD is section 60 of the District Councils and section 4A of the Urban Councils Act in which the Minister monitors or appoints special interest councillors in all urban councils in the country. However, it is the implementation of the law and practice of appointing special interest councillors in urban local councils that has attracted controversy and public outcry. Public outcry and negative media reports on the implementation of section 4A has resulted in a loss of faith with the way that the MLGRUD has been implementing this legislation.

Devolution and Zimbabwe's new Constitution

Zimbabwe recently opted for a devolved system of governance and this can be hailed as a way of democratizing local governance. This was a paradigm shift from the previous local governance system which was a creature of statute and lacking in constitutional powers. Chapter 14 of the new Constitution of Zimbabwe introduces a 'devolved system' of governance for the first time in the country's history. This system, at least conceptually is different from the 'centralized system' of governance that existed previously. Under a devolved system, it is expected that certain aspects of political, administrative and fiscal management powers will be transferred and shared between the central government and the newly constitutionally-established Provincial/Metropolitan and Local Authority tiers of government.

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

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

¹³Madhekeni & Zhou 25.

‘detail’ that determines whether they will transcend the realm of theoretical idealism to practical reality.

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

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

The content and effect of these laws should ordinarily be gleaned from the essence of what was intended by the Constitution .This means that they ought to be designed in a manner that reflects not only the letter of the Constitution but also the spirit of Chapter 14 .This would mean for instance that they ought to extensively espouse the principle of subsidiarity which is the cornerstone of any devolved system of governance. The system of subsidiarity requires that certain government matters ought to be handled by the smallest, lowest, or least centralized authority capable of addressing those matters effectively.

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

According to the United Nations Development Programme (UNDP), this principle speaks of the need to restructure or reorganise government authority so that there is a system of co-responsibility between institutions of governance at the central provincial/metropolitan and local levels, with the objective of increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels. This is intended to result in: enhanced democracy by bringing government closer to the people; protecting democracy by establishing vertical checks and balances between the three

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

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

This paper deliberates on the ‘Devolve System of Governance` as outlined in Chapter 14 of the country`s new Constitution. It contains four articles that try to shed some light on some of the conceptual and legal niceties required to make the system functional. The articles touch on the definitional aspects of devolution; the structure of a devolved system of governance; the expected developmental benefits in terms of service delivery resource allocation efficiency. These articles are not exhaustive, by themselves, to provide a comprehensive depiction of what a devolved system of governance will look like in Zimbabwe. Rather they provide insights into some of the issues, with the purpose of promoting further debate and attention on the matter by government, the private sector, academics, civil society, and the general public.

Decentralization and Devolution: A Conceptual Understanding

Decentralization and Devolution are concepts and practices that underpin local governance and handing down of powers to lower levels. The concept of ‘decentralization` is usually given different meanings by different scholars. The definitional confusion usually arises from the interchanging use of its broad and narrow definitions. As a concept however, decentralization originates from the centre. This means that if there were no centre, there would be no decentralization but two or more separate entities. In broad terms decentralization incorporates three categories: de-concentration, delegation and devolution.

De-concentration is the distribution of powers and responsibilities among different units or levels within central government. Under de-concentration some discretion is allowed to the ‘field agents’. However these field agents are accountable to the central government. The

most significant aspect of de-concentration is that the allocation of responsibility occurs within the hierarchy of central government.

Delegation on the other hand refers to the transfer of responsibility for specifically defined functions to structures that exist outside of central government. In this arrangement central government has indirect control, with the sub national governments allowed wide discretion. For delegation to take place, the power must have originally resided in central government which then transfers it to the sub national government. While the central government can withdraw the delegated power it cannot exercise the same power while it has been delegated.

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

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

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

The Preamble to Chapter 14 of the Constitution gives a background to the provisions of devolution. It acknowledges the desirability of ensuring the preservation of national unity and the prevention of all forms of disunity secessionism; the need for democratic participation in government by all citizens and communities and the equitable allocation of national resources and the participation of local communities in the determination of development priorities

within their areas; and the need for devolution of power and responsibilities to lower tiers (levels) of government in Zimbabwe.

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

In essence a decision must first be made on the propriety of devolving governmental powers and responsibilities to the lower tiers of government as well as on the competency of the lower tiers of government to carry out the governmental powers and responsibilities efficiently and effectively. In practical terms therefore the devolution of governmental powers and responsibilities to lower tiers of government must take place when it is considered appropriate to do so i.e. when the lower tiers of government have been competent to carry out the governmental powers and responsibilities effectively and efficiently.

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

The recently adopted Constitution compels the State to promote fair representation of all the country's regions in all institutions and agencies of government at every level. This they will do by taking practical measures to ensure that all local communities have equitable access to resources to promote their development, with local communities benefiting from resources available in their areas. It will be seen that the above in essence, is a series of statements of intent that do not create any legal rules. However in interpreting these and other obligations

of the State as provided for in the Constitution, regard must be had to the objectives set out in Chapter 2, .i.e. the State`s obligations in terms of the Constitution will be interpreted bearing these statements if intent in mind.

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

These are

- i) To give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them;
- ii) To promote democratic, effective, transparent, accountable and coherent government as a whole;
- iii) To promote and foster the peace, national unity and indivisibility of Zimbabwe;
- iv) To recognise the right of communities to manage their own affairs and to further their development;
- v) To ensure the equitable sharing of local and national resources; and
- vi) To transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan councils and local authorities.

From the above principles one can draw the conclusion that the people will have more say in the making of decisions that affect them; that they will manage their own affairs and can expect an equitable distribution of national resources .In addition State powers and responsibilities will be shared between provincial and metropolitan councils and local authorities. While the constitutional provisions, to some extent, approximate to conceptual idealism of a `devolved system ` of governance, there are some aspects that are not as clear yet. A critical issue is the degree of `autonomy` and `original power ` that will be accorded to Provincial Metropolitan Councils in particular. In other words , how ` autonomous ` will these tiers of government be in practice, bearing in mind that such autonomy should be conceptually different from that exercised through ` delegation ` and ` de-concentration `.

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

Structure of the devolved System

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

Membership of Provincial Councils

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

- Ten persons elected by a system of proportional representation

Members of the Metropolitan Councils

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

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

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

Unlike Provincial/Metropolitan Councils, this provision establishes the autonomy of local authorities, bestowing upon them a Constitutionally-guaranteed independent existence, powers and functions. The constitutionally-entrenched autonomy is expected to be supported by a high level of financial independence. Section 276 (1)(b) bestows local authorities with the power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities. This fiscal autonomy and function is also not given to Provincial/Metropolitan Councils (including local authorities as well) are financed by annual capital grants from the national government. The Constitution also establishes a set of principles that are intended to guide Provincial/Metropolitan Councils and essentially seek to differentiate between those functions meant for the national government, provincial /metropolitan councils and local authorities.

Principles to Govern Provincial and Local Government Councils

Provincial and local government councils are presented as a way of devolving power to provincial and local authorities. As such these institutions put into practice the notions of decentralisation and devolution. The principal purposes of the institutions of provincial and local councils are to democratise and enhance community participation. Consequently the purpose of the two institutions above is to:

- Ensure good governances by being effective, transparent ,accountable and institutionally coherent;
- Assume only those functions conferred by the Constitution or an act of Parliament;
- Exercise functions in a manner that does not encroach on a geographical, functional or institutional integrity of another tier of government ;

- Cooperate with one another, in particular by – Informing one another of , and consulting one another on, matters of common interest ; and Harmonising and coordinating activities ;
- Preserve the peace , national unity and indivisibility of Zimbabwe ;
- Secure the public welfare ; and
- Ensure the fair and equitable representation of people within their areas of jurisdiction.

Each tier of government is expected to exercise only those powers that are provided for in the Constitution so that they do not encroach into the functional area of another tier. In explaining the meaning of section 41 (1) (g) of the South African Constitution which contains similar principles ,the court in the Premier of the province of the Western cape v President of the republic of South Africa 1999 (4) BCLR 382 (CC) as para.58.),noted that:

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

In the spirit of cooperative governance all tiers of government are therefore expected to cooperate with one another by informing one another on matters of common interest as well as harmonising their activities. However, the Constitution of Zimbabwe does not say what steps must be taken to resolve a situation where a tier of government has encroached into the geographical, institutional or functional integrity of another tier of government. This was left to parliament to develop appropriate mechanism and procedure to facilitate coordination across the different tiers i.e. central government ,provincial and metropolitan councils and local authorities (Section 265 (3)).The equivalent of this provision in the South African Constitution is Section 41 (3) and (4) that requires organ of state involved in an intergovernmental dispute to make every reasonable effort to resolve the dispute by other means and to exhaust all possible avenues of dispute settlement before approaching the courts

for redress .To this end the South African law established a mediation committee (consisting of representatives from the national assemblies and provincial governments) mandated to mediate in cases of inter-tier disputes.

Conclusion

Although Zimbabwe, through the new Constitution, has established the constitutional basis for the functionality of a devolved system of governance; the specifics are yet to be tested on the ground. Given Zimbabwe’s dynamic political landscape, it remains to be seen whether the new constitution will be implemented in letter and spirit. Additionally, economic challenges that have bedevilled the country may further present challenges in the implementation of the new constitution, especially the local governance aspect whether local authorities are already riling under economic challenges. Lastly lack of political will to align and harmonise the new constitutional provisions to existing local governance legislation has also presented challenges such as over-lapping and duplication of tasks, as well as confusion in the implementation of the provisions of the new constitution. It however remains to be seen whether subsequent re-alignment of the old legislation to the new constitution will bear fruit.

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