An analysis of the doctrine of constitutionalism in the Zimbabwean Constitution of 2013

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Abstract

On 22 August 2013 the new Constitution of Zimbabwe wholly came into force. The Constitution contains some ideas which are a step towards ensuring that the country moves out of the political doldrums. It provides for the doctrine of separation of powers, limits on terms of office, independence of the judiciary and institutions that foster democracy. In so doing it inspires hope that Zimbabwe will break the mould of countries that have constitutions but no constitutionalism. However, these gains are threatened by the existence of an executive president whose powers have remained unchanged. The Constitution contradicts itself in that it undermines the independence of the judiciary, the very heartbeat of a constitutional democracy, by bestowing on the president wide powers to appoint and remove judges. Thus, the balance of power being weighted in favour of one arm of government to the detriment of constitutionalism is a significant risk.

1 Introduction

Zimbabwe achieved independence in 1980 alongside the Lancaster House Constitution. This Constitution has been amended a record nineteen times. With hindsight some of the amendments were inescapable and therefore necessary.[1] However, other amendments were repugnant to constitutionalism in Zimbabwe.[2] In a desire to ensure that Zimbabwe produces an autochthonous constitution which will end the political doldrums that the country has been facing, a Global

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[*]LLB, LLM (UKZN). This article is an excerpt of the author's LLM dissertation submitted to the University of KwaZulu Natal in 2013. My thanks to my co-supervisors Professor Karthy Govender and Ms Lee Stone for comments and discussion.

[1]Ncube and Nzombe 'The constitutional Reconstruction of Zimbabwe: Much ado about nothing?' (1987) 5 *The Zimbabwe LR* 1 at 8.

[2]For example, Constitution of Zimbabwe Amendment (no 17) Act, 2005, which introduced s 16B, a provision that ousts the jurisdiction of the courts insofar as the constitutionality of the expropriation of land by the Government of Zimbabwe is concerned.

Political Agreement (GPA) to form a government of national unity in Zimbabwe was signed.[3] This agreement was signed between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations. One of the commitments in the GPA was to produce an autochthonous constitution. Article VI of the GPA provides in part that the new Constitution should 'deepen our democratic values and principles and the protection of all citizens ... .'[4]

To that end a Select Committee of Parliament (COPAC) was established and tasked with co-ordinating the drafting of the new constitution. Three and a half years behind schedule, COPAC produced a draft constitution which was received with overwhelming support by those who voted in the 16 March 2013 referendum. Thereafter, the Constitution was gazetted as the Constitution of Zimbabwe Amendment (No 20) and having been adopted by both the National Assembly and the Senate, it was signed into law by the President on 22 May 2013. However, the Constitution was not wholly operational since it distinguishes between the 'publication date' and the 'effective date'. The publication date refers to the time the Constitution is published in the *Gazette* while the effective date means the day when the first president elected under the new Constitution is sworn in and assumes office.[5] Granted that the President-elect was sworn in on 22 August 2013 meaning that the Constitution of Zimbabwe Amendment (No 20) is now wholly operational, but the question which preoccupies Zimbabweans, as well as the regional and international community, is: does the new Constitution embody 'constitutionalism'? This is the question that this article seeks to answer.

2 The concept of constitutionalism

Constitutionalism is not only a 'fuzzy word'[6] but it is also a concept which is 'confusing'[7] and 'elusive'.[8] Certain scholars have distinguished between what they term the traditional form of constitutionalism and the modern conception of constitutionalism.[9] In making this distinction it has been argued that the former

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[3]Global Political Agreement 2008.
[4]Article VI of the Global Political Agreement 2008.
[5]Sixth Schedule of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[6]Li 'What is constitutionalism' available at http://www.oycf.org/Perspectives2/6 063000/what is constitutionalism.htm (accessed 2012-07-20).
[7]Shivji 'Contradictory class perspectives in the debate on democracy' in Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 253 at 255.
[8]Fombad 'Post-1990 constitutional reforms in Africa: A preliminary assessment of the prospects for constitutional governance and constitutionalism' in Nhema and Zeleza (eds) *The resolution of African conflicts* (2008) 179 at 181 (hereafter Fombad 'Post-1990 constitutional reforms').
[9] Mangu 'Challenges to constitutionalism and democratic consolidation in Africa' (2005) 24 *Politeia* 315 at 316.

focuses on procedure and restraint, while the latter is preoccupied with values.[10] However, today it is accepted that this distinction has become blurred because constitutionalism is understood to be an admixture of both the traditional approach and the modern approach.[11] This is because constitutionalism in its modern day conception subsumes both the prescriptive (the traditional approach), and the normative component (the modern approach to constitutionalism).[12] In short, the anatomy of constitutionalism today consists of both procedure and values. As such it has been observed that constitutionalism can be said to 'encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations'.[13] Constitutionalism stems from an appreciation that, as Madison put it, 'men are not angels'.[14] Accordingly, it is a prerequisite to have mechanisms controlling them when they exercise power. Therefore, if the 'twin evils of anarchy and tyranny'[15] which are inimical to democracy and the rule of law are to be thwarted, there is a need to have 'auxiliary precautions'[16] designed to check power. Constitutionalism provides an antidote to the perennial problem of tyranny,[17] and can thus be construed as the 'auxiliary precautions' which Madison was referring to in the Federalist papers.

Essentially, constitutionalism can be construed as having fundamental tenets which are 'irreducible'[18] and which have become accepted as the core elements of constitutionalism.[19] Informed by what academics have argued and the African constitutions crafted subsequent to the 'third wave of democracy',[20] the inevitable conclusion is that the fundamental tenets or core elements of constitutionalism are:

(i) the provision for the recognition and protection of fundamental human rights;

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[10] *Id* at 317.
[11] *Id* at 318.
[12] Barrie 'Paradise lost: The history of constitutionalism in Africa post-independence' (2009) *TSAR* 290 at 292.
[13] Fombad 'Post-1990 constitutional reforms' (n 8) at 181 citing Louis Henkin in his seminal paper 'Elements of constitutionalism'.
[14] Federalist papers no 51 available at http://avalon.law.yale.edu/medieval/magframe.asp (accessed 2012-07-19).
[15] Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *SAJHR* 98 (hereafter Fombad 'The Swaziland Constitution of 2005').
[16] Federalist papers (n 14).
[17] Li (n 6).
[18] Fombad 'Post-1990 constitutional reforms' (n 8) 181.
[19] Li (n 6) citing Louis Henkin who propounds nine elements which have to be construed as forming the core elements of constitutionalism. See also Barrie (n 17) at 293 who argues that a state is only a constitutional state if it displays the seven fundamental characteristics of constitutionalism.
[20] Hatchard *et al Comparative constitutionalism and good governance* (2004) 22.

(ii) the separation of powers. In other words, the creation of a government structure which ensures institutional comity between the different organs of state;
(iii) the use of the presidential term limits as a means of restraining the powers of the president;
(iv) the independence of the judiciary;
(v) the review of the constitutionality of laws;
(vi) the existence of provisions controlling the amendment of the constitution; and
(vii) the establishment of 'autochthonous oversight bodies'[21] or institutions that promote or foster democracy.

Hatchard *et al* identifies good governance, constitutionalism and sustainable development as the golden triptych towards which Africa is striving.[22] It is submitted that if this triptych is to be a lived reality there is a need for the core elements of constitutionalism to be the norm rather than the exception in the institutions of government in Africa.

3 The fundamental tenets of constitutionalism

At the outset it must be noted that the list of what has become the core elements of constitutionalism is not exhaustive. Although seven core elements of constitutionalism were noted, only two of those elements will be discussed in this article. These are: the separation of powers; and the independence of the judiciary.

The *raison d'être* for this is that these two elements of constitutionalism were egregiously negated in the Lancaster Constitution. For instance there has been a 'damning assessment on the independence of the judiciary'[23] which has been labelled by some as a system which has become a 'cornucopia of irrelevance'.[24] Furthermore, the separation of powers has been blurred to such a degree that the legislature has been accused of playing merely a rubber-stamping function.[25] Thus, it becomes imperative to ascertain to what extent the new Constitution has ameliorated these deficiencies.

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[21] *Id* at 208.
[22] *Id* at 2.
[23] International Bar Association's Human Rights Institute (IBAHRI) *Zimbabwe: Time for a new approach* (September 2011) available at *http://www.ibanet.org/Search/Default.aspx?q=zimbabwe&page_num=3* (accessed 2012-08-31).
[24] Civil Alliance for Democracy and Governance *The rule of law in Zimbabwe* (15 February 2006) available at http://www.kubatana.net/html/archive/demgg/060215cadego.asp?sector=OPIN, (accessed 2012-08-31).
[25] Hatchard *et al* (n 20) 48.

3.1 The meaning of separation of powers

The doctrine of separation of powers is informed by the same perspective which led Lord Acton to caution that 'all power tends to corrupt, and absolute power corrupts absolutely'.[26] This perspective is the one which was expressed by Madison when he said that in the exercise of power there is a need to create 'auxiliary precautions'.[27] The doctrine of separation of powers has since become 'an important touchstone of constitutional democracy'.[28] In other words, separation of powers has assumed the status of a fundamental tenet of constitutionalism.

Charles Louis de Secondat, Baron de Montesquieu, has been celebrated as an exponent of the doctrine of separation of powers.[29] In his ground-breaking work, *The spirit of laws*, Montesquieu propounded that government has to be separated into three different arms, namely executive, legislature and the judiciary.[30] He further advocated that 'power should check power'.[31] In other words, he was contending for what the Americans have called 'checks and balances', or as Madison would put it, 'auxiliary precautions'. In 1787 the doctrine of separation of power was given expression by the Americans.[32] The American Constitution provides for the separation of powers, albeit with nuances.[33] These nuanced variations to the pure theory of separation of powers manifest themselves in the notion of 'checks and balances' to allow for the intermixing between the different arms of government.[34]

The doctrine of separation of powers has had a tortuous path in its evolution since it was first expounded by Montesquieu. In spite of this, the underlying object of the doctrine has been to thwart tyranny.[35] In the African context the doctrine of separation of powers manifests itself in three types, namely, the American presidential system, the British parliamentary system and the French hybrid system.[36] Anglophone countries amalgamated the American presidential system with the British parliamentary system to come up with a hybrid, while

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[26]Lord Acton quotes available at http://www.acton.org/research/lord-acton-quote-archive (accessed 2012-08-31).
[27]Federalist papers (n 14).
[28]Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301 at 341 (hereafter Fombad 'The separation of powers').
[29]Currie and De Waal *The new constitutional and administrative law* (2001) 17.
[30]Montesquieu *The spirit of laws* Book XI, available at http://www.constitution.org/cm/sol.htm (accessed 2012-04-13).
[31]*Ibid.*
[32]Currie and De Waal (n 29) 17-18.
[33]*Id* at 18.
[34]*Ibid*.
[35]Fombad 'The separation of powers' (n 28) 309.
[36]*Id* at 310.

Francophone countries have embraced the French hybrid system.[37] It is imperative to preface with a note on the three types of systems which the crafters of constitutions in Africa had to choose from.

The British parliamentary system recognises the three arms of government, but envisages a close relationship between the legislature and the executive.[38] Notwithstanding this, Britain still has separation of powers because the three different arms of government exist in their exclusive domains, and incursions into the domain of one another should take place in terms of the law. The United States presidential system provides for a form of constrained parliamentarism.[39] It provides for the sovereignty of the constitution and its corollary is an independent judiciary with strong powers of review.[40] The US Constitution also provides for a system of checks and balances among the three organs of state. The French hybrid system does not embrace a strict form of the separation of powers, but allows for close co-operation between the executive and the legislature.[41] The French system has a number of peculiar features which include *inter alia,* vesting the power to review the constitutionality of the law in a quasi-administrative body; making the President the guardian of the courts; and giving residual legislative power to the President.[42] Making the President the guardian of the judiciary denotes a hierarchy among the three arms of government, which is not the case with the Westminster and the US presidential system.

3.2 The doctrine of separation of powers in the new Constitution of Zimbabwe

The new Constitution of Zimbabwe evinces a desire to offer constitutional protection to the doctrine of separation of powers. It identifies the doctrine of separation of powers as a founding value and principle.[43] The arms of government are clearly divided into three, namely the executive,[44] the legislature[45] and the judiciary.[46] Firstly, section 88(2) reposes executive authority in the president who must exercise this power subject to the Constitution and the cabinet. However, a shortcoming is that the Constitution affords the president

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[37]Fombad 'Post-1990 constitutional reforms' (n 8) 188.
[38]*Id* at 187.
[39]Currie and De Waal (n 29) 18.
[40]Tushnet 'New forms of judicial review and the persistence of rights- and democracy-based worries' (2003) 38 *Wake Forest Law Review* 813-834.
[41]Fombad 'The separation of powers' (n 28) 316.
[42]*Id* at 317.
[43]Section 3(2) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[44]*Id* ch 5.
[45]*Id* ch 6.
[46]*Id* ch 8.

unconstrained power to appoint and dismiss the cabinet ministers.[47] Legislative authority vests in the parliament, while judicial authority vests in the courts.[48] Unfortunately, section 116 is likely to operate as a claw-back as it states that the president is part of the legislature. This is incompatible with the doctrine of separation of powers, and undermines the doctrine. It is feared that this anomalous section is likely to render the provisions of the Presidential Powers (Temporary Measures) Act constitutional.[49] In terms of the Temporary Measures Act the president is empowered to make regulations which 'may provide for any matter or thing for which Parliament can make provision in an Act.'[50] Thus, the fact that the president still wields legislative authority threatens to undermine the doctrine of separation of powers as it affords the president the power to encroach upon the terrain of the legislative arm of government.

Plausibly, the Constitution empowers parliament with the crucial mandate of ensuring that all the provisions contained in the text are upheld and respected.[51] Further, by making it peremptory that all state institutions account to parliament, the Constitution ensures that the ethos of accountability and transparency will reign supreme in this new constitutional dispensation. Moreover, a mechanism through which the legislature can check on the executive is provided by the Constitution when it stipulates that cabinet members must attend parliament and parliamentary committees to respond to questions.[52] However, in the era of dominant political parties and party elitism it is doubtful whether this mechanism will be a useful means of ensuring that the legislature does not degenerate into a subcommittee of the executive branch of government.

The Constitution does not provide for the removal of the president through a motion or vote of no confidence. This could be based on the fact that the constitutional dispensation in Zimbabwe provides that the president is directly elected and, thus, the legislature has no power to remove the president on the basis of a vote of no confidence. The reason for this is because of the concept of 'temporal rigidity' which refers to the fact that the tenure of a president who is directly elected is fixed and difficult to change.[53] Rather, it provides for the legislature through a resolution of a two-thirds majority to pass a vote of no confidence in the government. The president has two options either to dismiss all ministers or to dissolve parliament and call a general election.[54] At first glance this appears to skew the balance of power in favour of a democratically elected

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[47] *Id* s108(1) (a).
[48] *Id* ss 117(1) and 162.
[49] Presidential Powers (Temporary Measures) Act 1 of 1986.
[50] *Id* s 2.
[51] Section 119(2) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[52] *Id* s 107(2).
[53] Hatchard *et al* (n 20).
[54] Section 109(4) (a)-(b) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.

president against a mostly democratically elected parliament (some members, ie, traditional chiefs are *ex officio* legislators), but recall that the president can be impeached by parliament if it garners a two-thirds majority. Notwithstanding, the threat of dissolution of parliament is like a Sword of Damocles hanging over the heads of parliamentarians that frustrates them from bringing the executive arm to account.

Previously, the Lancaster Constitution placed certain matters beyond the reach of the courts.[55] This risked impunity and flew in the face of the doctrine of separation of powers which envisaged that there should be checks and balances in the exercise of power. This position has been left largely unchanged by the new Constitution since the presidential power to pardon is not justiciable.[56] In light of the fact that hitherto the power to pardon has been flagrantly abused,[57] the proposed Constitution should have made this power subject to the glare of legal scrutiny. The approach in South Africa is instructive as the power to pardon is reviewable under the principle of legality.[58] This principle is a judge-made substantive power reviewing the exercise of public power to ascertain whether it complies with the Constitution. In a myriad of judicial pronouncements, South African courts have noted that although the presidential power to pardon is an executive action,[59] it involves the exercise of public power which must comply with the Constitution and the principle of legality.[60] The principle of legality has been said to encompass the idea that the president, in exercising the power to pardon, must act in good faith, must not misconstrue his or her powers, must consider the application and must act rationally.[61] The new Constitution provides that such power must be exercised after the president has consulted the cabinet.[62] However, this is not enough to ensure that the decision is taken after proper processes or lawful and rational considerations have been made. It is submitted that the following jurisdictional factors must exist before the power of pardon can be used: it must be exercised in consultation with others who are in a position to render advice; there should be a legitimate governmental objective; and reasons for the pardon should be disclosed.[63]

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[55]Section 31 K of the Constitution of Zimbabwe as amended on 13 February, 2009.
[56]Section 112 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[57]Gubbay 'The progressive erosion of the rule of law in independent Zimbabwe' Lecture at the Bar Council of England and Wales on 9 December 2009. Full speech available at http://www.newzimbabwe.com/opinion-1806-Gubbay+lecture+on+rule+of+law/opinion.aspx (accessed 2012-04-13).
[58]*President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC); and *Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC).
[59]Section 84(2) (j) of the Constitution of the Republic of South Africa, 1996.
[60]*Albutt v Centre for the Study of Violence and Reconciliation* 2010 5 BCLR 391 (CC) para 49.
[61]*Minister of Justice and Constitutional Development* v *Chonco* 2010 2 BCLR 140 (CC) para 30.
[62]Section 112(1) (a) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[63]Hatchard *et al* (n 20) 265-266.

The requirement that the vice presidents be directly elected[64] is an improvement from the previous position which allowed the president to appoint the vice presidents. However, owing to the transitional provisions in the Constitution this will not take effect immediately.[65] Further, the transitional provisions provide that the vice presidents are not presidents-in-waiting since, in the event of the death or resignation of the incumbent president, the vacancy is filled by a nominee of the political party which the president represented when he or she stood for election.[66] This compromise is murky as it risks the reins being assumed by someone without electorate credentials. Further, in light of the fact that a motion of no confidence cannot be passed on the president, and secondly, the bar for impeaching the president is too high, the balance of power is tipped in favour of the executive arm of government. The Constitution does not cap the number of ministers or deputy ministers who may be appointed by the president. This risks the president using the 'offer or prospect of ministerial appointment to co-opt influential legislators'.[67] Further, it creates the risk of a bloated and oversized cabinet that strains the coffers of the state. The president is empowered to appoint a maximum of five persons as ministers and deputy ministers from outside parliament.[68] On one hand this ensures that technocrats who are not necessarily politicians but wield expertise in key areas are brought into the government. On the other hand, however, it risks these positions being used to reward individuals loyal to the president.

In an improvement on the Lancaster Constitution which was described by Hwalima as 'far less constructive and more obstructionist',[69] the president no longer has the power to frustrate the law-making process. In terms of the Constitution the president must either assent to a bill or resubmit it to parliament if she or he has reservations.[70] If his or her reservations have not been fully accommodated the president can refer the bill to the Constitutional Court after which she or he must assent to the bill.[71] Therefore, making it peremptory for the President to assent to a bill ensures that the '... President [does not] block the passage of legislation and at the same time emphasises parliament's independence'.[72] However, it may be argued that this debate is merely academic. This is due to the fact that *de jure* law-making has become the preserve of the

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[64]Section 92(3) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[65]Sixth Schedule, Part 4 s 14(1).
[66]*Id* s 14(4).
[67]Prempeh 'Presidents untamed' (2008) 19 *Journal of Democracy* 109 at 116.
[68]Section 104(3) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[69]Hwalima 'The rule of law and separation of powers in South Africa and Zimbabwe: A comparative study' 34 available http://www.africalegalbrief.com/attachments/article/176/Constitutional_Law_Paper.pdf (accessed 2012-04-12).
[70]Section 131(6) (a)-(b) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[71]*Id* s 131(8) (b).
[72]Hatchard *et al* (n 20) 77.

executive, thus it is unlikely that the president will withhold assent to a bill. Moreover, in most cases cabinet members introduce bills after having discussed them in cabinet meetings chaired by the president, and the political party whips ensure that the bill sails through parliament without much hindrance.[73]

Whereas the Lancaster Constitution empowered the president to fix sections of parliament,[74] the new Constitution provides that parliament determines the time and duration of its sittings.[75] The first sitting of parliament following a general election is determined by the president, subject to the proviso that the date must not be later than thirty days after the president elect assumed office.[76] Allowing parliament to determine and fix its sessions ensures that parliament exercises its duties without obstruction.

3.3 The meaning of independence of the judiciary

The presence of a judiciary which is independent ensures that controls on executive power, or the 'auxiliary precautions' as Madison would prefer, do not become redundant.[77] Judicial independence can be considered a fundamental tenet of constitutionalism.[78] This is because the creation of a constitutional system where the constitution is supreme inevitably necessitates the existence of a judiciary which is independent. Judicial independence has been recognised at an international and regional level.[79] There have also been various instruments which have been adopted bearing testimony to the fact that judicial independence is sacrosanct.[80]

It has been noted that the independence of the judiciary is 'foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law'.[81] Further, it has been noted that the

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[73]Fombad 'The separation of powers' (n 28) 322.
[74]Section 62(1) of the Constitution of Zimbabwe as amended on 13 February, 2009.
[75]Section 146 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[76]*Id* s 145 (1).
[77]Magaisa 'Constitutionality versus constitutionalism: Lessons for Zimbabwe's constitutional reform process' 51, 57, available at http://kar.kent.ac.uk/30495/1/Submission4.pdf (accessed 2012-04-30).
[78]Barrie (n 12) 293.
[79]Article 10 of the Universal Declaration of Human Rights, 1948; art 14.1 of the International Covenant on Civil and Political Rights; and art 7(1) of the African Charter on Human and Peoples' Rights.
[80]United Nations Basic Principles on the Independence of the Judiciary, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; and the Bangalore Principles (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague 25-26 November 2002).
[81]*Justice Alliance of South Africa v President of the Republic of South Africa* 20115 SA 388 (CC) para 36.

independence of the judiciary is an indispensable cornerstone of a constitutional democracy.[82] The argument for an independent judiciary tasked with controlling the executive is rendered more forceful in the context of Africa where there has been a culture of imperial presidents.[83] The presence and existence of an independent judiciary is a hallmark of constitutionalism which is crucial if a country is to be governed by the rule of law as opposed to the rule of men.[84]

Although judicial independence has no settled definition,[85] it is trite that judicial independence embodies three characteristics, namely security of tenure, personal independence and institutional independence.[86] In *The Queen in Right v Beauregard*,[87] it was held that the core principles central to the independence of the judiciary was the 'complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges'.[88] This means that judicial power is exercised by the judiciary, and may not be usurped by the legislature, the executive or any other institutions. Judicial officers exercise their powers subject only to the Constitution and the law, not the whims of public opinion or of the majority in parliament.

Gleaning from the myriad declarations and statements relating to the notion of judicial independence, Fombad has propounded six core elements of judicial independence.[89] These are: institutional arrangements for judicial autonomy; financial arrangements for judicial autonomy; presence of arrangements pertaining to security of tenure; adequate remuneration; transparency in the appointment process; and judicial accountability.[90]

3.4 The independence of the judiciary in the new Constitution of Zimbabwe

The Constitution exclusively vests the judicial authority in the courts.[91] This is a significant improvement on the Lancaster Constitution whereby the legislature could assign judicial powers to any person or authority.[92] Furthermore, the tenor

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[82] *Id* para 40.
[83] Fombad 'The separation of powers' (n 28) 332.
[84] Fombad 'Preliminary assessment of the prospects for judicial independence in post-1990 African constitutions' (2007) 2 *Public Law* 233 at 239 (hereafter Fombad 'Prospects for judicial independence').
[85] *Id* at 238.
[86] *Valente v The Queen* [1985] 2 SCR 673.
[87] *The Queen in Right* v *Beauregard* (1986) 30 DLR (4th) 481 (SCC).
[88] *Id* at 491.
[89] Fombad 'Prospects for judicial independence' (n 84) 242.
[90] *Ibid*.
[91] Section 162 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[92] Section 79(2) of the Constitution of Zimbabwe as amended on 13 February 2009.

and spirit of chapter 8 of the Constitution confirms the intent to promote and support the independence of the judiciary. In a robust guarantee of judicial independence the Constitution provides that 'the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance'.[93] Further, no state, institution or government agency may impede the courts in carrying out its function.[94] In terms of the Constitution it is peremptory that the state gives protection to the courts through the device of legislative measures.[95]

It should be highlighted that vesting judicial authority exclusively in the courts, means that as a corollary the courts have the power of judicial review. The powers of judicial review allow the judiciary to check whether the executive and parliament are exercising their powers within the four corners of the constitution. This is important as it not only ensures that the provisions encapsulated in the Constitution are respected, but it also strengthens the position of the judiciary in relation to the other two arms of government. The Constitution provides for the power of judicial review when it states that the Constitutional Court is empowered to test the legality of legislation and the conduct of the President and Parliament.[96]

A list of principles which must guide the members of the judicial authority is adumbrated in the Constitution.[97] Cumulatively, these principles are a clarion-call to judicial professionalism without which judicial independence would be greatly undermined. A novel invention by the Constitution is that a Constitutional Court is established as an apex court in the land.[98] Importantly, the Constitutional Court has exclusive authority with regard to the constitutionality of legislation; disputes relating to the election of the president; and whether the president or parliament has failed to fulfil a constitutional obligation.[99]

It has been highlighted above that the appointment of judges should be permeated by transparency and openness. Further, for the judiciary to be really independent and perceived to be independent it must be allowed to exercise its judicial authority free from any interference by the executive. Moreover, the following principles have to be given regard to if judicial independence is to succeed, namely: security of tenure; administrative autonomy; institutional autonomy; and adequate remuneration. The Constitution provides for a Judicial Service Commission (JSC) as the body responsible for the appointment of members of the judiciary. The JSC constitutes a great improvement upon the

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[93]Section 164(2) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[94]*Id* s 164(2)(a).
[95]*Id* s 164(2)(b).
[96]*Id* s 167(2).
[97]*Id* s 165(1)-(7).
[98]*Id* s 166(1).
[99]*Id* s 167(2).

commision provided for in the Lancaster Constitution which was an example of a body dominated by presidential appointees.[100] Section 189 of the Constitution establishes a JSC which comprises the following: the Chief Justice; the Deputy Chief Justice; the Judge President of the High Court; one judge nominated by judges of the Constitutional Court, Supreme Court, High Court, Labour Court and the Administrative Court; the Attorney-General; the Chief Magistrate; the Chairperson of the Civil Service Commission; three practising legal practitioners; one professor or senior lecturer of law; a chartered public accountant or auditor; and a person skilled in human resources management appointed by the president. This is a total of seventeen members, and the president only appoints one person.

The role of the JSC is strengthened in the Constitution which provides that the JSC must function in a just, fair and transparent manner.[101] Interviews for the judicial appointments must be held publicly.[102] Importantly, those members of the JSC who do not hold state appointments are appointed for a non-renewable term of six years.[103] This ensures diversified decision-making since there would be a regular change of membership.

A notable flaw which will undermine the independence of the judiciary is in the appointment of judges. In the appointment of a judge the JSC sends a list of three nominees to the president from which she or he chooses.[104] However, the president has the power to order that the JSC submit a fresh list. This affords a very wide discretion to the president and so allows the process to be tainted by political considerations. Thus, the powers of the president in this regard should be circumscribed by providing that the list is final and the president must choose from it.

In light of the fact that institutional independence and security of tenure constitute basic pillars of judicial independence, the removal of a judicial officer has to be made after an independent and impartial tribunal has ruled to that effect. Regrettably, the Constitution does little to ensure that judicial officers are not removed from office for political considerations. The President is almost given *carte blanche* powers in the removal process since she or he is the one who appoints a tribunal to enquire into whether an officer has to be removed from office.[105] The role of the JSC is relegated to being merely advisory in nature.[106] This is problematic in that it allows for the president to purge the bench by removing officers who are perceived not to be compliant with his or her wishes.

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[100]Madhuku 'Constitutional protection of the independence of the judiciary: A survey of the position in southern Africa' (2002) 46 *Journal of African Law* 232 at 239, available at http://www.jstor.org/stable/4141335, (accessed 2012-07-16).
[101]Section 191 of the Constitution of Zimbabwe Amendment (No 20) Act, 2013.
[102]*Id* s 180(2) (c).
[103]*Id* s 189(3).
[104]*Ibid*.
[105]*Id* s 187(2).
[106]*Id* s 187(3).

It is submitted that the Constitution should vest the JSC with the power to establish the tribunal as well as to appoint the members of that tribunal. An example is the South African Constitution which makes the role of the president in the removal of a judicial officer a merely formal endorsement.[107]

Though the Constitution provides that the salaries and benefits of officers are fixed, critically, there is no provision that the judicial organ is vested with administrative and budgetary autonomy. It is submitted that a clause allowing the judiciary to determine its own budget and appoint its own staff ensures that the judiciary is able to assume its position as a co-equal among the other organs of government.

4 Conclusion

The 2013 Constitution evinces a shift towards constitutionalism and amounts to a legal rupture with a past which was based on the arbitrary and capricious exercise of power, albeit that it does not do enough to cross the 'constitutionalism Rubicon'.[108] The relics of the old ghost, *viz* the Lancaster Constitution, have transmuted into the new Constitution. The new Constitution retains a president vested with unbridled powers in the appointment of cabinet ministers and who may encroach on the terrain of the legislature. The prospects of an independent judiciary are undermined since the executive has unconstrained powers in the removal of judges.

These shortcomings could have been ameliorated had the crafters of the new Constitution not viewed the notion of judicial independence not as a by-product of democracy, but as a cornerstone of democracy.[109] This is because of the fact that the judiciary is the least dangerous branch since it has no influence over either the sword or the purse.[110] Thus, if judicial independence is to thrive it needs a constitution which does not merely pay lip service to the independence of the judiciary, but rather entrenches such independence. Ultimately, although the Constitution may provide the judiciary with the constitutional power it needs, the extent to which constitutionalism will thrive rests with the judges. It has been noted that the 'philosophic attitudes, background and assumptions, and outlook that judges bring to the task of interpreting the constitutional text' is determinant on whether constitutionalism will thrive.[111]

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[107]Section 177(3) of the Constitution the Republic of South Africa, 1996.
[108]Fombad 'Post-1990 constitutional reforms' (n 8) 196.
[109]Mzikamanda 'The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa' Paper presented on 14 November 2007 at the South Africa Institute for Advanced Constitutional, Public, Human Rights International Law (SAIFAC), Johannesburg, South Africa, available at http://www.saifac.org.za/docs/2007/mzikamanda_paper.pdf (accessed 2012-08-31).
[110]Federalist papers (n 14).
[111]Prempeh 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018752&download=yes (accessed 2012-08-31).

Therefore, although the new Constitution shows that the tide of constitutionalism is coming in, the new Constitution is merely a bridge that Zimbabwe could use to cross over to a democratic and constitutional order. The 'bridge', *viz* the new Constitution, should be viewed as a building block which needs to be fortified if Zimbabwe is to get out of the political and economic doldrums.

Ultimately, for constitutionalism to take root, what is required is a new mind-set on the part of those in government.[112] This new mind-set should hold dear the fundamental tenets of constitutionalism. Failure to do so will mean that the country will continue to wobble under the weight of political distortions in perpetuity. This is because it is only '[o]nce a country has crossed the constitutionalism Rubicon [that] the chances of backsliding into anarchy or dictatorship are considerably reduced'.[113]

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[112]Hwalima (n 69) 34.
[113]Fombad 'Post-1990 Constitutional reforms' (n 8) 196.