ZIMBABWE • LAW • REVIEW

Volume 7–8

1989–90

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University of Zimbabwe
P O Box MP 167
Mount Pleasant
Harare
Zimbabwe

THE ZIMBABWE LAW REVIEW

VOLUME 7 1989-90

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WHITHER PARLIAMENTARY DEMOCRACY: A LOOK AT RECENT CONSTITUTIONAL CHANGES IN ZIMBABWE

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Introduction

Except for the dissenting vote of Edgar Tekere, leader of ZUM, and some feeble protests by Mutare East Member of Parliament Lazarus Nzarayebani[2], the Constitution of Zimbabwe Amendment (No. 9) Act, 1989, which establishes a unicameral legislature, was overwhelmingly adopted by Parliament with little debate. And yet, given the effect of this law on Zimbabwe's constitutional and political system, it could rightly have been expected to raise as much debate and controversy as - if not more than - the seventh amendment[3] which brought about the executive presidency.

The crucial questions that need be asked about the ninth amendment to the Zimbabwean constitution are: to what extent does it enhance democracy; and to what extent is the new legislature it creates going to be representative of the nation, that is the general mass of voters who are the legitimate holders of sovereign authority? Further, does it observe the principle of separation of powers which is best ensured, among other things, by the existence of an independent legislature which, if not the supreme organ of state, is at least not subordinate to the executive? To answer these questions, it is necessary first to outline the main provisions of the Act.

Contents of the Act.

The Constitution of Zimbabwe Amendment (No.9) Act, 31 of 1989 creates a unicameral legislature to replace the 100-member House of Assembly and the 40-member Senate provided for under the Lancaster House constitution. The new legislative chamber will simply be called Parliament and will have 150 members. The President appoints 12 of the Members of Parliament, the country's eight provincial governors are *ex officio* members while 10 other Members will be specially elected chiefs. This leaves 120 Members to be elected by popular vote on a constituency basis. To the extent that a significant proportion of the parliamentary seats are not to be filled by popular vote, the Act is a negation of democracy when compared with the previous arrangement under which all 100 Members of the House of Assembly - the effective legislature - were elected by the people. One may also question the justification for abolishing the two-chamber legislature which had a total of 140 members only to replace it with a larger albeit single-chamber one. One would rather think that the abolished legislature was large enough, if not too large, both for the country's purse and for effecient parliamentary debate.

The Provision for Specially Appointed MPs

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1 BL (UZ), Dip. Sp. Etudes Jur Francaises, DEA (Pau).

2 At its third reading the Bill received 71 "ayes" and only one "no". See Zimbabwe Parliamentary Debates, House of Assembly Vol. 16 No. 44, Thursday 23 November 1989. Even Mr Nzarayebani who had objected to the size of the new legislature, preferring a 110 instead of a 150-member chamber, voted on the government side. See Mr Nzarayebani's remarks in Zimbabwe Parliamentary Debates, House of Assembly Vol. 16, No. 36 (Tuesday November 1989) col 1900 and the response thereto by the Minister of Justice, Legal and Parliamentary Affairs (col 1908).

3 For criticisms of the Constitution of Zimbabwe Amendment (No. 7) Act, see remarks by Joseph Msika, MP, in Hansard House of Assembly, 28th October, 1987 col.1602, and Ncube W and Nzombe S, "The Constitutional Reconstruction of Zimbabwe: Much Ado About Nothing?" (1987) Vol. 5 Zimbabwe Law Review 2 at p.13-14.

The provision for the appointment by special procedure of 30 MPs seriously infringes the principle of one-person one-vote, which is the cornerstone of majority rule. It seriously waters down the principle of universal suffrage, which is an indispensable element of a democratic political system. Democracy, as expressed by such terms as "one-person one-vote" and "majority rule" requires not only that all those of full age must have the franchise, but also that all voters should be equal. Equality of suffrage means that no voter or category of voters should be allowed to elect more parliamentarians than another voter or class of voters as the case may be.

It is in the bid to ensure equality of suffrage that the demographic factor is used as the main criterion when delimiting electoral constituencies. In other words, the electoral law in a democratic system will prescribe that constituencies should have approximately equal numbers of voters. Where because of other considerations it is not possible to have equal numbers of voters in a constituency, the law will fix a maximum percentage by which the number of voters in any one constituency can fall short of or exceed the national average per constituency[4].

Equality of suffrage is one principle, among others, on the basis of which the provision for 20 parliamentary seats reserved for whites under the Lancaster House Agreement fell foul of democratic standards. The provision accorded gross over-representation to the small white electorate *vis-a-vis* the majority black voters. This came out clearly in the 1985 general election, when 34 041 white voters returned 20 MPs while 2 893 285 black voters elected 80 MPs[5]. This meant that a single white vote was infinitely more powerful than a ballot cast by a black voter. The position was so untenable that only a pocketful of whites dared mourn loudly the abolition of the 20 special white seats[6].

It would not have been much of a travesty for the Constitution of Zimbabwe Amendment (No. 6) Act, 1987, which abolished the white seats, to empower Parliament itself to fill these vacant seats on a nonracial basis. At least not if this special procedure was used only once, pending the next general election. The amendment came only two years after the 1985 general elections, and it would have been an unwieldy exercise to organise twenty by-elections by popular vote to fill the vacant seats. However, it was undemocratic to vest the power to fill 20 seats permanently in an electoral college composed of MPs as the Act did[7]. The power to elect voters rightly belongs to the people - that is to say the general voters. Any arrangement whereunder the electorate is barred from voting for a section of parliament is a serious denial of the democratic right to elect Members of Parliament. Such an arrangement cannot be regarded as recognising the

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4 The Constitution [section 60 (3) and (4)] reproduces the terms of section 6, of the Electoral Act, 1979, which provided that the number of voters in a constituency must be roughly equal to those registered in each of the other constituencies. The present Electoral Act, Act No. 7 of 1990 which repealed and replaced the 1979 Act makes no provision for the delimitation of constituencies. Delimitation is therefore governed exclusively by the Constitution which repealed and replaced the 1979 Act. While the numbers may vary from one constituency to another due to factors such as physical features, means of communication, the geographical distribution of registered voters [s. 60 (3)], the number of voters in any one constituency shall not fall below, or exceed the average for all constituencies by more than 20 per cent. [s. 60 (4)]

5 This means that there was a parliamentary seat for every 1702 white voters while black voters had to number at least 36 166 for them to be entitled to a seat. In other words, if all the white registred were treated in the same way as black voters, they would barely have been entitled to return one parliamentary candidate.

6 The main criticism by some of the white parliamnetarians was a failure to hold a "whites only" referendum on the future of the reserved seats. They argued that the change, without consulting their voters, disenfranchised the white electorate.

7 Section 3 of the Constitution of Zimbabwe Amendment (No. 6) Act, 1987 simply provided that the twenty seats formerly reserved for whites would now be filled in elections by "an electoral college consisting of the Members of the House of Assembly". Thus once 80 MPs had been elected by popular vote, they then constituted themselves into an electoral college and voted to fill the remaining 20 so-called non-constituency seats.

principle of universal suffrage based on an unqualified franchise. At best it amounts to a partial recognition of the right to vote.

The Constitution of Zimbabwe Amendment (No. 9) Act restricts the exercise of the right to vote only to the election of 120 Members of Parliament while effectively giving the President a disproportionately large franchise. The President effectively appoints 30 MPs[8]. Although at first impression it might appear that the President appoints only the 12 MPs expressly provided for, sight must not be lost of the fact that the President appoints provincial governors, who will be *ex officio* Members of Parliament. Subject only to the limited restriction that he should have regard to the customary rules of succession, the President also appoints chiefs as already stated above, who will contribute 10 of their number to the membership of the new legislature. One would have expected that after abolishing the obnoxious provisions for seats reserved on a racial basis, Parliament would have done away with any system of electoral quotas and instead subjected every parliamentary seat to an election by popular ballot. Instead, the 20 percent special quota taken away from the 34 000-odd white voters has in essence been given to the President: 30 out of 150 seats gives exactly the same percentage as the white voters had in the old House of Assembly.

It seems unfortunate that the sixth amending Act did not envisage putting the formerly reserved white seats at the disposal of common roll voters.

The principle of representative democracy - which is the only really workable democratic system known to the world[9] - is grossly undermined by the Ninth Amendment since 20 percent of the membership of the new Parliament represent neither the popular will nor the nation as it is understood in electoral terms. The special appointment system smacks of the paternalism over

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8 Section 5 of the Constitution of Zimbabwe Amendment (No. 9) Act, 1989 repeals s.38 of the Constitution. It substitutes a new s.38 which provides for the election of the 150 Members of Parliament as follows: 120 shall be elected by voters registered on a common roll for 120 constituencies; eight shall be chiefs of Parliament, ex officio; ten shall be chiefs elected in accordance with the Electoral Law, and twelve shall be appointed by the President. In terms of the electoral Act 1990, the 10 chiefs will be elected by an electoral college of chiefs, see section 31 of the Act. But every chief in Zimbabwe is appointed by the President in terms of section 111 of the Constitution and section of the Chiefs and Headman Act, No. 29 of 1982. The only restriction to the President's discretion when making appointments is that he should "give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside." This is an insignificant restriction which can hardly prevent the President from exercising his discretion in favour of one candidate should there be a dispute over the succession of a chief. Often, it happens that the customary principles are unclear, thus leaving the President with a free hand to effect an appointment. There is no known example of a Presidential appointee being successfully impugned. The case of Rushwaya v Minister of Local Government and Town Planning and Ano. SC. 6/87, is one example suggesting reluctance by the courts to interfere once the President has made an appointment of a chief.

9 Pierre Pactet, Institutions Politiques et Droit Constitutionnel, Masson (Paris) 1986, p.89 defines "direct democracy" as "the regime in which the people exercise power directly", and observes that this system which is applicable only in small communities is, for most states only a political and institutional curiosity. However, it is practised in the Swiss cantons of Obwald, Nidwald Appenzell Rhodes Exterieures, Appenzell Rhodes-Interieures and Glaris (NB French names of cantons have been retained). The main institution of direct democracy in these cantons is the Landsgemeinde, which is an annual assembly of all citizens gathered in the open air at the end of April or beginning of May. The citizens elect their leaders, discuss constitutional and administrative problems and adopt solutions thereto. They also deliberate on and adopt new laws.

Pactet, ibid p.90 defines "representative democracy" as the system (practised by most modern states) in which "power is entrusted to representatives elected by universal suffrage and charged with deciding (issues) in the name of the Nation or of the ensemble of the people". He notes that representative democracy implies that all citizens must have the right to vote, preferably by direct suffrage, and comments that a regime can be representative without being democratic as was the case with the fortune or status-based regimes (regimes censitaires) of Britain before 1918 and France between 1814 and 1848.

- if not contempt of - the ordinary citizen as was common in pre-Enlightenment Europe, where the franchise was restricted to people of great fortune or high social status. Rather than take the regressive step to the restricted franchise, it would be better to maintain a truly representative system of parliamentary democracy, if only because the even more progressive system of semi-direct democracy - as practised in Switzerland[10] - is cumbersome to manage and too idealistic for Zimbabwe at the present stage.

Implications for Separation of Powers

One of the most important pieces of legislation adopted by the Zimbabwean Parliament is the Seventh Constitutional Amendment (1987),[11] which changed the country's political system from a full-fledged parliamentary regime into a semi-presidential regime[12]. While semi-presidential regimes have been known to operate democratically, one condition for this is that there must be a system of separation of powers especially as between the executive and the legislature, with adequate checks and balances. However, the salient feature of the Zimbabwean system is that Seventh Amendment gave the executive President much greater power than Parliament, with only notional checks.

By allowing the President to appoint 30 MPs (albeit 18 of them indirectly), the Ninth Amendment has further weighted the political system in favour of the President while weakening Parliament. It is true that even in systems where the executive is not given overriding powers by the constitution, it still has practical superiority over the legislature because in most cases it enjoys a parliamentary majority and is given precedence in the legislative process. However, this is a genuine and understandable problem arising from the practical functioning of a democratic system. It is certainly less objectionable than a system where the head of the executive is given power to appoint people to Parliament, so that even if his party lost the elections, he could still give it undeserved power and influence in the legislative chamber through his appointments.

The other danger is that the President could distort an election result and give his party a false parliamentary majority through his appointments in the event of his party losing the popularly contested seats by a narrow margin or getting an equal number of seats to those of a rival party. The twelve special appointees and eight Governors are bound to consider themselves responsible not to the general electorate like the 120 popularly elected MPs, but to the head of State himself. The same argument can be made in respect of the 10 chiefs, subject to the

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10 According to Bernard Chantebout, Droit Constitutionnel et Science Politique Armand Colin, Paris 8 ed. 1988, p.225 "semi-direct democracy" is the system in which the people can participate in the legislative process either by initiating Bills (popular initiative), by blocking the promulgation of a law or preventing its maintenance in the statute books (popular veto)

Pactet, op cit. p.93 lists 35 instances of referenda in the Helvetic Federation, consisting of compulsory referenda, optional referenda, popular initiatives and popular counter-bills (contre-projets) presented by the Federal Assemblies.

11 The Act, styled Constitution of Zimbabwe Amendment (No. 7) Act, 1987, came into full force on 31 December 1987, with Robert Mugabe being installed Zimbabwe's first executive president.

12 The semi-presidential regime combines elements of parliamentarism and presidentialism, hence the reference to it as a system of "mixed government". Typical examples of such a regime are to be found in France, Austria, Finland, Iceland and Portugal. The characteristic feature of such a regime is the co-existence of a government with collective responsibility (a parliament that is elected by universal direct suffrage and hence enjoying powers emanating from the manner of his appointment, including non-answerability to Parliament (the presidentialist element). The difference between the French and Zimbabwean systems is that in the former, there is a prime minister who is head of government while in the latter, the president himself is head of government. Thus in France parliament can pass a vote of no confidence in the government without appearing to disavow the president; in Zimbabwe a no-confidence vote in the government must of necessity be seen to reflect on dissatisfaction with the President himself as head of government.

qualification that their appointment by the President is much more indirect and they may be under less pressure to always vote with his party. All in all therefore, the 30 specially appointed MPs will come in handy in passing controversial Bills and in securing special majorities where they are required, in the absence of a genuine governmental (pro-President) majority. This would ensure that the executive has its way whatever the wishes of the popularly elected proportion of the legislature.

When one considers the fact that already, ZANU(PF) has enjoyed at most times an overwhelming majority in Parliament since independence, and that this may continue to be so, one cannot resist the conclusion that the Ninth Amendment could only strengthen the perception of Parliament as no more than wet putty in the hands of an all-powerful executive. This is not to suggest that there is anything wrong with any party winning overwhelming majorities in free and fair elections over a long period. It is simply to say that these majorities, whenever they occur, must emanate from a general election and not from special procedures of appointment by an individual, whatever his rank in society.

Adieu the Senate

Advocates of unicameralism can at last take pleasure in the disappearance of the Senate, which was viewed with all sorts of distaste and suspicion: a wasteful anachronism, a haven of conservatism standing as a bastion against progressive and revolutionary legislation, or a chamber with no cultural or historical relevance to Zimbabwe[13]. Another ground for criticising the Senate has been that it is not a representative chamber since its members are not elected on an open franchine.[14]

While the idea of an upper chamber is often correctly identified with conservatism and can be seen as a negation of democracy, one must still judge dispassionately and objectively the performance of Zimbabwe's Senate. Certainly some of its members, namely the chiefs, symbolised pre-modern political institutions, and they, together with others, may have looked at such legislation as the Legal Age of Majority Act as excesses of revolutionary thinking. But the Senate never stood in the way of progressive legislation proposed by the lower House. It simply did not have power, legally or politically, to effectively block any legislation. Legislation could only be effectively obstructed at the behest of the Senate Legal Committee if it violated the constitution. Few would quarrel with the then Senate Legal Committee for seeking to uphold the provisions of the constitution against an overzealous House of Assembly.

One of the grounds on which the constitution of Zimbabwe Amendment (No 9) Act may be attached is that it does not advance the democratic cause any further than the provision for a Senate did. Nor is there any real saving in public spending by virtue of there being no upper House.

Certainly the Senate was not a representative chamber in the strict democratic sense

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13 Welshman Ncube and Shephard Nzombe, "The Constitutional Reconstruction of Zimbabwe: Much Ado About Nothing" in (1987) Vol. 5 Zimbabwe Law Review p.15, comment that not much political weight needed be attached to the government's intention to abolish the Senate, arguing that after all "the Senate does not have the same historical origin, significance and role as (...) the House of Lords in Britain."

14 Under the Lancaster House Accords, 14 Senators were elected by the 80 black members of the House of Assembly while 10 were elected by the 20 white MPs occupying the reserved seats. Ten were chiefs elected by the chiefs councils of Mashonaland and Matabeleland (five by each council) and six were appointed by the President. Constitution Amendment No. 6 abolished the reserved white seats and so the 10 Senators formerly elected by the white members of the lower House were now to be elected by the entire Membership of the House of Assembly.

However, it is significant to note that it was not wholly appointed by a single person but by electoral colleges of the House Assembly and the chiefs' councils, with the President being allowed to designate only six of its members. This meant that only six out of a total of 140 Members of the two houses of Parliament were appointed by an individual. Further, the unrepresentative character of the upper House was atoned for by the fact that the Senate did not have effective power to block legislation from the popularly elected House of Assembly. This is to be contrasted with the system under the new law where 30 MPs are not only Presidential appointees but have the same powers, rights and privileges as popularly elected members. It is surely better to have an unrepresentative Senate which has no effective powers than to have an unrepresentative *bloc* in Parliament which has the same powers as democratically elected representatives.

Instead of having to pay 140 MPs as under the Lancaster House system (100 Members of the House of Assembly and 40 Senators), the country will now have to bear an even larger salary bill for 150 MPs. It ought to be noted that in terms of government policy MPs will be required to do their job on a full-time basis and will, as a result, presumably become entitled to full salaries resulting in an even heavier financial burden for the Treasury.

Genuine arguments against having a Senate are probably not hard to find. But the argument that Zimbabwe has no tradition of having an upper House is not one of the convincing ones. It is neither factually correct, strictly speaking, nor does its logic stand closer scrutiny. The Ndebele State, the last African-run system of government in Zimbabwe before colonialism, had *uMphakathi* and *Izikhulu* as equivalents of an upper house and a lower chamber respectively.[15] Even assuming these parallels are disputed, it seems ludicrous to suggest that the present Zimbabwean State should have only those political institutions which its precedent political systems have had. That would mean Zimbabwe should not have, for example, a Supreme Court or a written constitution. If the Senate be abolished, let this be on the grounds of its undemocratic character and, to the extent that this argument is proved, the financial strain it imposes on Zimbabwe as a developing country. But then, real benefits must be seen to flow from its abolition. Whatever system replaces it must give effect to the principle of full representative democracy on an unrestricted franchise. It must also effectively abolish the institutional structures of the Senate, together with the expenses that go with these structures. The Ninth Amendment has failed to achieve these two ends.

The Federal Presidency: Constitution of Zimbabwe Amendment (No. 10) Act

Until the 1987 unity pact between ZANU(PF) and PF-ZAPU, there seemed little reason to have two vice-presidents. But given the nature of the conflict between the two organisations, it is obvious that the unity would be a reality only if it brought Matabeleland out of the political cold and into the mainstream of national political life. It is by means of the Constitution of Zimbabwe Amendment (No 10) Act, Act No 15 of 1990, that a second vice-presidency was created.[16]

The personal influence and prestige enjoyed by Joshua Nkomo, leader of PF-ZAPU, only partly explains the fact that he was elevated to the position of Vice-President as a result of the unity agreement. More convincing, however, is the fact the Matabeleland always stood as a distinct polity demanding recognition as such, having resisted assimilation into the ruling ZANU(PF) which, it must be admitted against all the usual protestations, drew its support almost exclusively from the Shona-speaking areas of the country. In other words, the creation of a

15 For a further discussion on uMphakathi and Izikhuku see Julian Raymond Dennis Cobbing, The Ndebele under the Khumalos, 1820-1896 Ph.D. thesis, University of Lancaster, 1976. Chap.2.

16 It is to be noted that there is equality of rank between the two vice-presidents, which is to be inferred from the absence of any ranking of the two positions in the Constitution.

second vice-presidency, and the appointment of Nkomo to tht position, is explicable more in terms of the co-existence of the two distinct polities within Zimbabwe. one Shona-speaking led by ZANU(PF) and the other Ndebele-speaking led by PF-ZAPU. NKomo's appointment was therefore significant in that it gave Matabeland a stake in government, and a sense of belonging, although of course the sheer existence of such distinct polities, real as it may be, is something which most Zimbabwean politicians and sometimes academics will deny in the hope that refusing to acknowledge it helps curb so-called "tribalism".

The creation of the second post of vice-president, designed as it was specifically to bring Matabeleland into the fray of national politics, is a tacit acknowledgement of the essentially federal character of the Zimbabwean nation. Having said that, however, it must be noted that the tenth Act amending the constitution does not render obligatory the appointment of a two vice-presidents.[17] It simply empowers the president the power to appoint them. It is obvious, however that political wisdom dictated Nkomo's appointment as a way of integrating Matabeleland within the scheme of Zimbabwe's system of government. It may not be what Chief Kayisa Ndiweni argued for in his United National Federal party - in fact it is an attempt to negate his federalist ideas - but by designing this two-vice-presidents idea to win Matabeleland's support, the ZANU(PF) dominated Parliament unavoidably acknowledged the logic of federalism in the distribution of political power, even if such federalism may be more symbolic than real.

Legislative and Constituent Authority: Who wields sovereign Power?

On a more general note, one may ask whether the present procedures for amending the constitution are appropriate. So far, ten Acts amending the Lancaster House constitution have been passed by Parliament. While most of the amendments have not fundamentally affected the structure and character of the country's political system, the Seventh and Ninth Amendments have introduced monumental changes. There is no mechanism for the electorate to participate in the process of constitutional change.

The vexing question in the context of the constitutional changes that have so far taken place in Zimbabwe is whether sovereignty really does reside in the people. Or have we been so intoxicated with the English doctrine of parliamentary sovereignty that we fail to distinguish between the legislative function of parliament, which may be exercised in a representative capacity with no other control than the possible censure at future elections, and, on the other hand, the exercise of constituent power - that is to say the constitution-making and amending role, which can only be exceptionally delegated to parliamentarians? It is worth noting that Britain is the only country which, because of its peculiar historical evolution, has appeared comfortable in clinging to an almost puritan doctrine of parliamentary sovereignty, and perhaps only because the role played by its judiciary and the ingrained conservatism of even the most radical of its parliaments, have rendered it highly unlikely that the legislature in that country could ever change things significantly beyond the common good as generally perceived by the ordinary citizen.

There seems to be a strong case for suggesting that all constitutional changes likely to affect the structure Zimbabwe's *regime politique* must be adopted only if they have been approved by a special majority of voters in a national referendum. This would leave Parliament competent to institute constitutional changes by a two-thirds majority in matters of a procedural or non-fundamental nature, while the people themselves decided the fundamental issues. This would

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17 Section 31c (1) of the Constitution as amended by section 4 of Act 15 of 1990 simply provides that:
"(1) There shall be not more than two vice-presidents of zimbabwe, who shall be appointed by the President."
Subsection (2) of this section of the Constitution reads: "(2) the Vice-President or Vice-Presidents ...." thereby clearly indicating the permissive nature of the President's power to appoint vice presidents. He must appoint at least one, but he may choose to appoint two

entail requiring a referendum for all important changes to the constitution.

There is no provision for a referendum in Zimbabwe law, but Botswana[18] has such provisions. Zimbabwe would do well to emulate this country, which is its partner in the Southern African Development Coordination Conference (SADCC) and which has the longest experience with democracy in Southern Africa. It also goes without saying that Botswana has enjoyed the greatest stability in the region. It is morally unacceptable that the executive should use its Parliamentary majority to give itself excessive powers and to weaken the other branches of government. It is similarly unacceptable for parliament to arrogate to itself wide-ranging powers and, through laws passed by its monolithic majorities, to subordinate the other Sate organs and undermine their capacity to perform their constitutional functions. Such would be an abuse of its position. The main powers enjoyed by the State organs must be conferred by a referendum in which the *corps electoral* - that is to say the entire mass of voters - act as a constituent assembly.

18 Section 89(4) of the constitution of Botswana requires a referendum for certain constitutional changes, specified in subsection (3)(b) of the same section. The changes concerned are those relating to the composition, powers and life of Parliament, the franchise for parliamentary elections, legislative procedure, the judicature, the interpretation of the constituion, and the procedure for amending the constituion