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Arthur Manase
INTRODUCTION

Zimbabwe's constitution has been amended fifteen times in the past nineteen years. Considering that the American constitution has only been amended 26 times in over 200 years, the Zimbabwean scenario is rather extraordinary. It raises critical questions about constitutional development in Zimbabwe. For instance, what political factors have dictated changes to the constitution? What role does the constitution play in the consolidation of political power by the ruling elite? Did constitutional amendments lead to a more open and responsive democracy or were they primarily designed to entrench a dictatorship?

Answers to these and other pertinent questions can only be obtained after undertaking a brief journey through the various amendments. What may be said at the outset is that the overall goal of the constitution-amendment process in Zimbabwe appears to have been to create and entrench a dominant position for the nationalist elite who took power at independence. The creation of a more open and responsive democracy does not emerge from any of the key amendments made in the period under survey.

THE AMENDMENT PROCESS

Textbook writers refer to a distinction between rigid/inflexible and flexible constitutions. The distinction arises from the ease with which a constitution may be amended. Eric Barendt explains the distinction as follows:

In a flexible constitution there is no difference between ordinary and constitutional laws. In terms of legal principle and procedures, the latter may be amended or repealed as easily as the former... Rigid constitutions, on the other hand, may only be amended by a particular procedure set out in the constitution itself, such as a referendum or the vote of a special majority, perhaps two-thirds, of the members of each house of the legislature.1

This distinction is, however, misleading in that apart from there being an insignificant number of countries that have "flexible" constitutions2 rigidity is a matter of degree and is largely dependent on political practice rather than the formal procedures specified by law. Thus, on the one hand, rigidity in the United States has made it difficult to amend the constitution while in Germany, on the other hand, it has not stopped nearly 40 amendments in about 50 years.

Zimbabwe falls into the group of "rigid" constitutions in that the constitution cannot be amended in the same way as any other legislation. The whole constitution is "entrenched"

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2. There is a handful of countries who belong to the group of "flexible" constitutions such as the United Kingdom and New Zealand.
in the sense that the rigidity applies to all provisions of the constitution.\textsuperscript{3} There are four aspects, which make the process of amendment of the Zimbabwean constitution an entrenched one. First, no provision of the constitution may be amended by implication. Every amendment must be in express words.\textsuperscript{4} Other statutes can be amended by implication. This is less rigid than the position in other countries, such as South Africa, which insist on the bill amending the constitution not to contain any other provisions.\textsuperscript{5} This is designed to achieve maximum transparency in the amendment of the constitution in that a provision, although express, which purports to amend the constitution must not pass unnoticed by being hidden among unrelated issues. In theory, a bill amending the Zimbabwean constitution may contain other provisions as long as the amending clauses are in express words.\textsuperscript{6}

Secondly, a Constitutional Bill must be published in the Government Gazette at least 30 days before it is introduced in Parliament.\textsuperscript{7}

There is no such requirement for other bills. Although the objective of the 30 days requirement is not stated, it must be clear that it is to allow public debate on the proposed amendments. In South Africa, comments arising from public debate must be tabled and debated in the National Assembly and the latter cannot vote on the bill before the expiry of 30 days from its introduction.\textsuperscript{8} Thirdly, at least two-thirds of the total membership of Parliament must vote in favour of a bill for it to pass.\textsuperscript{9} Other bills only require a mere majority of those “present and voting”\textsuperscript{10} and given that the quorum of Parliament is twenty-five members,\textsuperscript{11} thirteen MPs may validly pass a bill. With a Constitutional Bill, a minimum of one hundred MPs is required.

Fourthly, a Constitutional Bill, requires to be accompanied by a certificate from the Speaker of Parliament confirming the two-thirds vote and the President cannot assent to the Bill unless it is so accompanied.\textsuperscript{12}

In other countries, there are even less flexible mechanisms. Some impose a complete prohibition on the amendment of certain provisions of the Constitution. Such is the case

\textsuperscript{3} See Rautenbach & Malherbe, \textit{Constitutional Law}, 2nd edition, Butterworths 1996, p.148 where the word used in place of “rigid” is “entrenchment” and the following is said: “Constitutional entrenchment means that limitations are placed on the repeal or amendment of certain or all provisions of a constitution.”

\textsuperscript{4} Section 52(1).

\textsuperscript{5} See Section 74(4) of the South African Constitution, 1996.

\textsuperscript{6} The Constitution, in Section 113 defines a “Constitutional Bill” as follows: “a Bill which, if enacted, would have the effect of amending, adding to or repealing any of the provisions of this constitution.” Clearly, this definition accommodates any Bill which contains other provisions in addition to those seeking to amend the constitution.

\textsuperscript{7} Section 52(2).

\textsuperscript{8} See Section 74(5), (6) and (7) of the South African Constitution, 1996.

\textsuperscript{9} Section 52(2a).

\textsuperscript{10} Section 56(1).

\textsuperscript{11} Section 54(2).

\textsuperscript{12} Section 52(5) as read with Section 51(3).
with Section 79(3) of the German Basic Law which prohibits the amendment of provisions relating to the democratic and federal nature of the state. Section 131 of the Namibian Constitution prohibits any amendment of the Bill of Rights "in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms". Another mechanism of entrenchment is to require that in addition to the affirmative vote of the legislature, an amendment must undergo another process such as approval by the electorate through a referendum. We now turn to the Zimbabwean Constitution.

**Amendment I (1981): Black Advancement or Affirmative Action**

This amendment was effected by Act No. 27 of 1981. It may appropriately be described as a "black advancement or affirmative action" amendment. The original Lancaster House provisions required appointees to the Senate Legal Committee and the Judicial Service Commission to be lawyers of not less than seven years experience. The new government immediately realised that few blacks had the requisite number of years of experience to qualify for appointment and yet it was imperative in the new political dispensation for blacks to be appointed to key institutions. The remedy brought by Amendment No. 1 was to amend the constitution and reduce the seven years to five. Further, regarding minimum legal qualifications, the Constitution was made more flexible to allow appointment, not only of persons with less than five years but also persons who may not be lawyers in the strict sense. This was achieved through a formulation which allowed the appointment of a person who:

\[
\text{possesses such legal qualifications and has had such legal experience as the President considers suitable and adequate for his appointment.}
\]

It also required the chairman and at least one other member of the Public Service Commission to be persons with at least five years experience at a high grade in the Public Service.

This first amendment reveals two features which were to characterise constitutional development in Zimbabwe. First, the constitution was not allowed to stand in the way of deeply held political positions whatever the justifications for the initial provisions. Thus, while the initial provisions were purportedly designed to ensure that persons appointed to certain positions in state institutions had to have sufficient experience, this goal was regarded as secondary to the political objective of achieving "black advancement". The protagonists of black advancement saw the initial provisions as a vehicle to maintain white control of the newly independent state and as long as this was regarded as unacceptable, the constitution had to be amended.

Secondly, a clause giving the government almost unlimited discretion in avoiding the constraints imposed by the constitution was introduced. The clause rendered inconsequential the minimum qualifications imposed by the other provisions of the constitution as these could be circumvented by the President's power to appoint a person


who “possesses such legal qualifications... as the President considers suitable and adequate...” This clause marked the beginning of the trend where the government, through the President, was empowered by the constitution itself to circumvent constitutional safeguards in pursuit of ill-defined political goals.

**Amendment 2 (1981): Establishment of Supreme Court and High Court**

This amendment was effected by the Act No. 25 of 1981. Before this amendment, the highest court in Zimbabwe was the High Court, which had two divisions: the Appellate Division of the High Court and the General Division of the High Court. The amendment merely created two courts from one, with the Appellate Division being transformed into a Supreme Court while the General Division became the High Court. There was no change of substance and the motivation for the amendment must have been to create a new look court consistent with the practice of other countries. The amendment introduced the title of “Judge President” for the head of the High Court who was previously described as “Senior Puisne Judge”. There was one substantive limitation to the jurisdiction of the new High Court which may not have been intentional. Section 81(2) of the original constitution provided as follows:

> The General Division shall have power, jurisdiction and authority to review all proceedings of all inferior courts of justice and tribunals established by law.

This clause was dropped in the new provisions leaving the jurisdiction of the High Court largely dependent on the provisions of an Act of Parliament. Under the original clause, the High Court’s review powers were constitutionally entrenched and could not be ousted in an Act of Parliament creating a particular tribunal or inferior court. With the amendment, it became competent, for an Act of Parliament to oust the High Court’s review jurisdiction in given circumstances.

Apart from the creation of the two courts, Amendment 2 also dealt with other issues. The first was the reduction of the minimum age of senators from 40 to 30. The original position of a minimum age of 40 was, without doubt, unreasonably high given that many young politicians who had participated in the liberation struggle could not be accommodated in the House of Assembly where the minimum age was 21. The second aspect followed the fusion of the legal profession by the Legal Practitioners Act of 1981. This latter Act had abolished the distinction between “attorney” and “advocate”, creating one category of “legal practitioner”. There were several sections of the constitution which had to be amended to reflect this new development and this was done by Amendment 2. For instance, in the

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15. See Section 79 of the Lancaster House Constitution.
16. Section 81(3) of Lancaster House Constitution.
17. See for example the debate surrounding the alleged ouster of the review powers of the High Court in labour matters in L. Madhuku, “The jurisdiction of the High Court in labour matters” 1995 Zim Law Review 152.
18. See Section 12 of Amendment 2 which amended paragraph 1(i)(b) of Schedule 3.
original constitution, only advocates qualified for appointment as judges of the High Court but this had to be changed, as the category of “advocate” had been abolished. Amendment 2 substituted the word “legal practitioner” in place of “advocate”.

Amendment 3 (1983): Abolishing Dual Citizenship

This amendment was effected by Act No. 1 of 1983. Although it dealt with other issues, its most far reaching provision was on dual citizenship. The Lancaster House Constitution took every care to protect dual citizenship in an obvious deference to the interests of the white minority. Section 8 of the Constitution provided as follows:

(1) A person who, on the appointment day, is a citizen of Zimbabwe or entitled to be registered as such and is also a citizen of some other country or entitled to be registered as such shall not, on and after that day, solely on the ground that he is or becomes a citizen of that other country, be deprived of his citizenship of Zimbabwe

(a) refused registration as a citizen of Zimbabwe or required to renounce his citizenship of that other country; by or under any law

Provided that a person referred to in this subsection may be required to take and subscribe the oath of loyalty in the form set out in schedule 1.

(2)...

This section was clear and unambiguous: the main beneficiaries were members of the white community, who could be citizens of both Zimbabwe and any other western country. This appears to be one of the provisions which the nationalist leaders were uncomfortable with at Lancaster. By 1983, the internal security situation had already deteriorated. The new government blamed some whites whom it believed to have been without sufficient attachment to the country and were engaging in undermining the sovereignty of the newly independent state. A number of sensitive cases were being heard in the courts. This appears to be one of the provisions which the nationalist leaders were uncomfortable with at Lancaster. By 1983, the internal security situation had already deteriorated. The new government blamed some whites whom it believed to have been without sufficient attachment to the country and were engaging in undermining the sovereignty of the newly independent state. A number of sensitive cases were being heard in the courts.

Amendment No. 3 abolished dual citizenship in its entirety by repealing Section 8. It went further to recast Section 9 by empowering Parliament to make laws in respect of citizenship and providing for a variety of matters such as the acquisition, deprivation, cession and renunciation of citizenship. The hostility to dual citizenship was further entrenched by the provision that empowered Parliament to make a law that could deprive a person of their citizenship by birth on the basis that “he is or has become a citizen of some other country”. Previously, a citizen by birth could not be deprived of his/her citizenship whatever the circumstances.

Amendment 3 also dealt with three other significant aspects. First, it widened the political class that could be appointed to Commissions set by, or established in terms of, the Constitution such as the Electoral Supervisory and Judicial Services Commissions.
original provisions sought to limit political influence in these Commissions by making ineligible for appointment any person who was "a member or has, within the period of three years of the date of the proposed appointment, been a member or been nominated for election as a member of the Senate or the House of Assembly or any local authority." Under the amendment, only serving members of Parliament were disqualified and all former members were made eligible. This allowed the government to appoint, as members of the Commissions, persons who shared the same political perspectives as itself by having been recently in Cabinet or Parliament, a scenario which the original provisions sought to avoid.

Secondly, it gave the Prime Minister some greater degree of manoeuvre in the appointment of Ministers. In the original provisions, a Minister could only be appointed from sitting members of Parliament. In other words, a person had to be a member of Parliament at the time of appointment for him/her to qualify to be a Minister. The amendment allowed the Prime Minister to appoint, as a Minister, a person who was not a member of Parliament for a maximum period of three months provided that the person could continue as a Minister if within that period he/she secured a seat in Parliament. This brought the system in line with the constitutional position in the United Kingdom. Although there is no law that a Minister must be a member of Parliament, it is an established convention of the British Constitution that all ministers be members of one or other House of Parliament. de Smith and Brazier state the position as follows:

All ministers must be or become members of one or other House of Parliament; if a Minister is not a member of either House at the time of his appointment, he must obtain a seat at the earliest opportunity or resign.

This position enables the Prime Minister to appoint a person with certain skills or attitudes which may not be available from existing members of Parliament and then assist such person to get a seat in Parliament. In the UK if there is no opportunity to obtain a seat through a by-election in a safe constituency, the Prime Minister may secure a seat in the Upper House by creating a life peerage for the Minister in question.

It is this flexibility that a new Zimbabwean Prime Minister sought through this amendment. Needless to say, an appointee from outside Parliament who has to depend on the Prime Minister to get a seat in Parliament is, almost invariably, more loyal than other Cabinet colleagues. Through this approach, the Prime Minister's dominance over cabinet is enhanced. In the absence of a by-election in a safe constituency, the Zimbabwean Prime Minister had an easy avenue through the old Section 33(1)(d) for purposes of getting a seat for the appointee. Section 33 (1)(d) gave the Prime Minister the power to appoint six of the forty members of the Senate. He/she could persuade one of the appointed Senators to

25. See Section 61(2) of Lancaster House Constitution for Electoral Supervisory Commission, Section 90(2) (for Judicial Service Commission and Section 109 (other Commissions).
26. See Section 69(1)(b) of the Lancaster House Constitution.
28. Ibid.
29. The provision was in the following words: "six shall be appointed by the President, acting on the advice of the Prime Minister".
resign so as to enable him to get a seat for an appointed Minister. It must be evident that this amendment increased the Prime Minister’s influence through patronage.

Thirdly, it revisited the issue of the minimum age of Senators. As already noted, Amendment 2 reduced the minimum age from 40 to 30 years. It appears that this had been done without the support of the white members of Parliament who preferred the conservative age of 40. Amendment 3 made a distinction between Senators elected by white members and the rest. For the former, the minimum age was raised back to 40 while the latter remained at 30. It is difficult to understand why it became necessary to perpetuate the black-white divide in the franchise. The whites must have argued that the reasons advanced to support the reduction of the minimum age to 30 did not apply to them and given that the constitution had separate provisions for blacks and whites in some aspects, they saw nothing wrong with creating a distinction on this particular score.

Amendment 4 (1984): Strengthening the hand of the Prime Minister vis-à-vis the non-executive President

The Lancaster House Constitution provided for a parliamentary executive system of government headed by a Prime Minister and with a non-executive President as head of state. The framers devised a system whereby the non-executive President, while largely acting on the advice of the Prime Minister, retained some discretionary powers in relation to certain specific issues. Thus, while section 66 provided that “in the exercise of his functions, the President shall act on the advice of the Cabinet or a Minister acting under the authority of the Cabinet,”30 the same section made it clear that the President “shall not be required to act on the advice of any person or authority”31 in relation to matters such as dissolution of Parliament and the dismissal of a Prime Minister who had lost a confidence vote in Parliament.

A major area of substance was that the President was empowered to make certain key appointments on the advice of some other body other than the Prime Minister or his Cabinet. This created a potential area for reducing the power and influence of the Prime Minister. For instance, the chairperson and two other members of the Electoral Supervisory Commission and the Ombudsman were appointed by the President “on the advice of the Judicial Service Commission”.32 In relation to judicial appointments, only the Chief Justice was appointed on the advice of the Prime Minister. The other judges were appointed on the advice of the Judicial Service Commission.33 The Director of Prisons and the Comptroller and Auditor General were appointed on the advice of the Public Service Commission.34 The main rationale was to shield these appointments from direct political influence.

Amendment No. 4 brought the Prime Minister directly into play, by making all appointments to be based on his/her advice. The new formulation required the President

30. See Section 66(1) of the Lancaster House Constitution.
31. Ibid.
32. Section 61(1)(a) and Section 107.
33. Section 84(2).
34. Sections 73(2) and 105(2).
to act on the advice of the Prime Minister who in turn was obliged merely to "consult" the relevant body. Thus, in the appointment of judges, the President now had to appoint "acting on the advice, tendered after consultation with the Judicial Service Commission, of the Prime Minister or such other Minister or Ministers as may be designated for the purpose by the Prime Minister". The net effect of the Prime Minister's direct involvement in almost all key appointments to state institutions was to concentrate immense powers in one person. This already laid the basis for a future powerful executive president.

Amendment 4 had two other aspects. It introduced the notion of appointing judges for a fixed period. It also increased the membership of the Judicial Service Commission from four to six by adding the Attorney General and one other appointee.

Amendment 5 (1985): Provincial Governors

This amendment dealt with a new political institution in the form of provincial governors. Provincial governors were not provided for in the Lancaster House Constitution. The amendment inserted a new section 111 A in the Constitution which stated that "an Act of Parliament may provide for the appointment by the President of governors for any areas within Zimbabwe". It did not specifically refer to "provincial governors" and was worded in such a way as to permit the appointment of district and/or regional governors. The functions of a governor were not stated in the constitution but were to be prescribed by an Act of Parliament. However, the institution was being introduced for the "better administration of Zimbabwe". That the governor was to be a powerful politician was confirmed by provisions which made the new office incompatible with being the President of the Senate or being speaker of the House of Assembly or being a Minister or Deputy Minister or even being a Member of Parliament.

This amendment seems to have been designed to create a new political office for the furtherance of the dominance of the ruling elite. The governorship provided a new powerful portfolio that could absorb many high-ranking politicians who were not in cabinet. It also provided an avenue through which the ruling party could exert a direct control of opposition strongholds such as Matebeleland. Although not stated in the Constitution, a governor reported to the Prime Minister whose political tentacles were thereby widened. Amendment 5 must therefore be seen as part and parcel of the quest for political dominance by the Prime Minister.

There were two other aspects in Amendment 5. First, the amendment purported to guarantee the independence of the Electoral Supervisory Commission. Secondly, the Prime

35. See new section 84(2) brought by Amendment 4.
36. See Section 90 brought by Section 4 of Amendment 4.
37. See Amendment of Section 35 whereunder the President of the State was required to resign if he/she accepted appointment as a governor.
38. See amendments to Section 40 which required the Speaker to resign if he/she accepted appointment as a governor.
39. See amendments to Section 70 which required a Minister to resign if he/she accepted appointment as a governor.
40. See amendments to Schedule 3.
41. See new subsections added, particularly 61(5) and (9).
Minister was placed in the same position as the Chief Justice regarding the initiation of steps to investigate the question of removal of a judge from office. The original position was that the Prime Minister only had power to initiate an investigation in respect of the Chief Justice, while the latter alone had the prerogative to initiate proceedings with respect to any other judge. The amendment, in its quest to further entrench the dominant position of the Prime Minister, opened the judiciary to political manipulation.

**Amendment 6 (1987): Abolishing the Reserved Seats for Whites**

Among the most notorious provisions of the Lancaster House Constitution were those clauses that preserved the privileged status of the white population. The constitution provided for two voters rolls: a “white roll” on whom were registered white voters and a “common roll” on whom were registered all other voters. White voters participated in a separate election in which they elected their own members of the House of Assembly. Twenty seats out of one hundred seats in the House of Assembly were reserved for whites while in the Senate, out of forty members, ten had to be white. The latter were elected by an electoral college consisting, exclusively of the twenty white members of the House of Assembly.

To ensure that these provisions remained in force for a considerable period, the constitution entrenched them by providing that none of the provisions could be amended in the first seven years of independence without the approval of all members of the House of Assembly. This effectively gave the white members a veto over any proposed constitutional amendment seeking to abolish the reserved seats. After the first seven years, the constitution required an affirmative vote of seventy members.

Amendment 6 came immediately after the expiry of the first seven years of independence and abolished the reserved white seats. The timing of the amendment, which was immediately after the expiry of the entrenched seven years, strongly indicated the abhorrence with which this racial misfit was viewed. It had been imposed at Lancaster as a key component of some of the compromises that had to be made by the liberation movement to secure independence.

The amendment abolished the reserved white seats and the separate “white roll”. It declared the seats vacant and the persons concerned lost their seats on the coming into force of the amendment. However, the sizes of the House of Assembly and the Senate were not changed. The replacements were elected by an electoral college consisting of the members of the House of Assembly. Amendment 6 therefore ended the era of racial segregation in
Zimbabwe's electoral system, a feature which had been a pillar of the system since 1890 when the country was colonised. It was therefore a progressive amendment.

**Amendment 7 (1987): Executive Presidency**

This amendment introduced the most substantial change to the governmental system in Zimbabwe. In one swap, the parliamentary executive system of the Lancaster House Constitution was metamorphosed into some obscure system most of whose features exhibited a presidential character. The government Minister who piloted the Amendment Bill in Parliament, regarded it as "revolutionary". He had the following remarks to make:

> Mr Speaker, Sir, this is a proud moment for me. Just over two months ago, I came before this house to present the bill which led to the removal of racial representation in Parliament and rid our constitution of the taint of racialism. Now I come before a House with the privilege of introducing another Bill, one which will fundamentally change, indeed revolutionise, the political structure of this country... This bill, Mr Speaker, will introduce what is generally known as an Executive Presidency into our political system.\(^51\)

The Lancaster House Constitution provided for a parliamentary executive system of the Westminster model. In essence, it was largely a codification of the British constitutional system with a non-executive president taking the place of the British Queen as head of State. The government was headed by a Prime Minister who had to be a member of Parliament.\(^52\) Like under the British system, the leader of the majority party became the Prime Minister. On a vote of no confidence being passed by the House of Assembly, the Prime Minister was obliged to resign, failing which the President had to remove him/her from office.\(^53\) Although the constitution purported to vest executive authority in the President,\(^54\) it is the Prime Minister who had real executive authority and this was fortified by section 66(1) which required the President to "act on the advice of the Cabinet". However, the President's role was not entirely ceremonial. In a fundamental respect, the President had power to cause Cabinet to reconsider any advice tendered to him/her.\(^55\) Although Cabinet was entitled to maintain its position and override the President's objections, this power acted as a useful check on the executive powers of the Prime Minister.

The President also wielded substantive powers on the passing by the House of Assembly, of vote of no confidence in the government. If the Prime Minister did not resign within three days or failed to advise the President to dissolve Parliament, the latter had power either to dismiss the Prime Minister or dissolve Parliament.\(^56\)

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52. See Section 69(1) of the Lancaster House Constitution.
53. See Section 70(1) of the Lancaster House Constitution.
54. See Section 64 of the Lancaster House Constitution.
55. See Section 66(2) of the Lancaster House Constitution.
56. See Sections 63(2) and 70(1) of the Lancaster House Constitution.
Finally, the President was empowered to make certain key appointments on the advice of some other bodies other than the Prime Minister. For instance, the President appointed members of the Delimitation Commission “with the approval of the Chief Justice”\(^{57}\) and the Chairperson of the Electoral Supervisory commission on “the advice of the Judicial Service Commission”.\(^{58}\) Except for the Chief Justice who was appointed by the President on the advice of the Prime Minister, judges were appointed on “the advice of the Judicial Service Commission”.\(^{59}\)

Amendment No. 7 created an all powerful president who enjoyed the “best” of both the parliamentary executive system and the American style executive presidency. What is being described as “best” here are those features which give real and substantive power to a head of government. First, like the American style president, the President was not made a member of Parliament. He was to be separately elected\(^{60}\) with a term of office longer than that of Parliament.\(^{61}\) Being not a member of Parliament made the president a separate and independent state organ exercising power at almost an equal level with that of Parliament. The President was not responsible to Parliament. Under the parliamentary executive system, the Prime Minister is, by definition, a member of Parliament and is responsible to it. Secondly, and flowing from the fact of the President not being a member of Parliament, he/she was shielded from removal from office by Parliament on grounds of incompetence or dereliction of duty. Provision was made for Parliament to impeach the president but this was restricted to grounds of “gross misconduct”, “wilful violation of the constitution” and “physical or mental incapacity”.\(^{62}\) Given that a two-thirds majority was required to approve the President’s removal on these grounds, this was calculated to make it impossible for Parliament to remove the President. This is the position occupied by the American president. Under the parliamentary executive system, parliament may remove a Prime Minister from office on any ground stretching from incompetence to misconduct by the simple act of a vote of no confidence.

Thirdly, while in the American system the president’s separate existence from Congress is counter-balanced by the fact that he/she has no power to dissolve the latter whatever the circumstances, the executive president in Zimbabwe had no similar restrictions as he was also given powers to dissolve Parliament. On this aspect, the president was given the powers of a Prime Minister under the parliamentary executive system. It is well established under the latter system that the Prime Minister enjoys the prerogative to advise on a dissolution of Parliament at anytime and this has been described as a “powerful weapon in the hands of a Prime Minister”.\(^{63}\) Yet, on this aspect, the executive president in Zimbabwe was given powers beyond that of a Prime Minister in that the power to dissolve Parliament could be exercised as a reaction to a vote of no confidence in his/her government.\(^{64}\) In general, the

57. See section 59 of the Lancaster House Constitution.
58. See section 61(1)(a) of the Lancaster House Constitution.
59. See section 84 of the Lancaster House Constitution.
60. Section 28(2).
61. Section 29(1).
62. Section 29(3).
64. See section 31F(3).
Prime Minister under a parliamentary executive system is obliged to resign if he/she loses a vote of confidence. In the exceptional case where the Prime Minister, in response to a vote of no confidence, advises on, and obtains, a dissolution of Parliament, this leads to the same thing in that since the Prime Minister is a member of Parliament, dissolution necessarily leads to new elections in which he/she may not be re-elected. In other words, a vote of no confidence must be followed either by the resignation of the Prime Minister or his/her seeking a new mandate which may never come.

This latter aspect shows the enormity of the powers wielded by the Zimbabwean executive president; he is empowered to react to a vote of no confidence in his/her government by dissolving Parliament with himself remaining comfortably in office.

Fourthly, the executive president was given veto powers over proposed legislation. The power to veto legislation was borrowed from the American president. Under the parliamentary executive system, the head of state is ceremonial and is, almost, invariably, expected to assent to a Bill passed by Parliament. In the UK, for example, the absence of veto power has been expressed as follows:

Refusal of the royal assent on the ground that the monarch strongly disapproved of a bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course — a highly improbable contingency or possibly if it was notorious that a bill had been passed in disregard of mandatory procedural requirements, but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.65

The American President's power to veto legislation may be overridden by a two-thirds majority of congress. This means that where the president has vetoed proposed legislation, a two-thirds majority of congress may force him to assent to the legislation. This restriction on the powers of the American president was abandoned by the creators of the Zimbabwean executive president. Where, by a two-thirds majority, Parliament resolves to return a vetoed Bill to the President, the latter is, unlike the American president, still not obliged to assent to the Bill but has the option to dissolve Parliament.66

The extra-ordinary nature of this approach becomes more pronounced when it is noted that other presidential systems have a much diminished role for the president in either assenting or withholding assent to legislation. In South Africa, the President cannot veto legislation and is only empowered to "refer" back to the National Assembly for "reconsideration" if he has "reservations about the constitutionality of the Bill".67 If the National Assembly reconSIDERS the Bill and returns it to the President, the latter is obliged to assent except where he still has reservations about its constitutionality, in which case he must refer it to the Constitutional Court for a final and binding ruling.68 In Uganda, if Parliament reconSIDERS a Bill which has been vetoed by the President and passes it with a

66. See section 51 (3b).
68. Section 79(4) of the 1996 South African Constitution.
two thirds majority, the Bill “shall become law without the assent of the President.” Section 58(5) of the 1999 Nigerian Constitution is to the same effect and provides as follows:

Where the President withholds his assent and the Bill is again passed by each House by two-thirds majority, the Bill shall become law and the assent of the President shall not be required.

In addition to all the above aspects, the executive president was given a final say over appointments of key state functionaries. The only restriction on his appointment powers was the requirement to act “after consultations with” some named state organ. He was not bound by the views expressed by the persons or organs being consulted.

Given the wide-ranging powers of the executive president, some of which had no precedent in either the presidential or parliamentary executive systems, Amendment No. 7 introduced the most fundamental changes to the Lancaster House framework. It completed the process that had started with Amendment No. 4, namely the concentration of power in the hands of one person.

Amendment 8 (1989): Attorney-General

This amendment was introduced by Act No. 4 of 1989. It closed a number of minor loopholes which had been noted after the introduction of the executive presidency by Amendment 7. For example, the original formulation of section 31 had not made provision for who would occupy the office of president in the event of it being “vacant”. Section 31 had only provided for the “absence” of the President and inability to perform the functions of his office owing to illness or “any other cause”. Amendment 8 reformulated section 31 and made it clear that in the event of a vacancy in the office of President, the Vice-President would take over as Acting President.69

The most substantive portion of Amendment 8 dealt with the office of the Attorney-General. In the Lancaster House Constitution, the Attorney-General’s office was purely professional. In terms of section 76(1), the Lancaster House Constitution stated:

There shall be an Attorney-General whose office shall be a public office and part of the Public Service.

Making the Attorney-General part of the Public Service was intended to create a non-partisan official. This was reinforced by provisions which required the Attorney-General to be a person qualified for appointment as a judge of the High Court. In making an appointment to the office, the President had to act on the advice of the Prime Minister who was required to consult the Public Service Commission, which in turn, had to consult the Judicial Service Commission. Parliament had to be informed before any appointment if the Prime Minister intended to propose a person not recommended by the Public Service Commission.71

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69. See section 91(6) of the 1995 Ugandan Constitution.
70. See the current formulation of section 31.
71. See section 76(2) of the Lancaster House Constitution.
Amendment 8 made substantial changes to this notion of the Attorney-General by turning the office, by and large, into a political institution. This was achieved by making the Attorney-General “the principal legal adviser to the Government and taking the office out of the Public Service”. Further, he/she was made, *ex officio* a member of cabinet and Parliament but without a right to vote in the two bodies. While the President was still required to appoint a person qualified for appointment as a judge and to consult the Judicial Service Commission, the requirement to inform Parliament before any appointment where the President’s choice was inconsistent with any recommendations made was dropped. The exclusive responsibility of the Attorney-General as a prosecuting authority was retained.

This amendment relating to the Attorney-General was, in essence, a continuation of the scheme of consolidating political power in the executive arm of the state. This scheme required the law to be tailored to the interests of the ruling elite, hence providing the Attorney-General a seat in the cabinet — the most politically sensitive organ. The Attorney-General was expected to have a full grasp of the political objectives of Government and/or the President and then, in turn, ensure that the law served those objectives. This is what the creators of this office understood by the role of being “the principal legal adviser to the government”.

Although the Attorney-General still retained the exclusive prosecuting authority in criminal matters, it is submitted that this role was greatly compromised by the political context of the other role. An Attorney-General sitting in Cabinet and Parliament can hardly be sufficiently independent to authorise criminal prosecutions in politically sensitive matters. For this reason, some countries create two different offices for the “legal adviser to the government” and the “prosecuting authority”. Thus, in Malawi, the Attorney-General as the principal legal adviser to the Government may be a Minister but is not involved in criminal prosecutions. Criminal prosecutions are undertaken by the Director of Public Prosecutions, a public office created by the constitution for that purpose.

**Amendment 9 (1989): Abolishing the Senate and introducing a unicameral legislature**

The Lancaster House Constitution provided for a bicameral legislature in which Parliament consisted of two chambers, a Senate and a House of Assembly. It was a replica of the British Parliament with the Senate corresponding to the House of Lords and the House of Assembly to the House of Commons. The House of Assembly had one hundred members, all of whom were directly elected by registered voters. The Senate, on the other hand, consisted of forty members none of whom was directly elected. They were in three groups as follows: twenty-four elected by the House of Assembly; ten chiefs elected by a council of chiefs and six appointed by the President on the advice of the Prime Minister.

A two-chamber Parliament may be criticised for being expensive to run for a developing economy and for providing a lengthy, and sometimes complex, legislative process. It appears
that in response to these criticisms, most parliaments are unicameral. However, there are good grounds to justify a second chamber. First, it provides an opportunity for a second view on legislative proposals, thus leading to effective legislation. In this instance, the second chamber is utilised as a "house of revision". Secondly, it can be used as an avenue of "checks and balances" in respect of executive powers, such as where the second chamber has the power to confirm or reject the executive's proposed appointments to some public offices, such as judges and cabinet ministers. This is the role of the Senate in the United States. Thirdly, it may accommodate both cultural and minority representatives in heterogeneous societies, thus leading to effective representation.

Amendment 9 abolished the Senate and established a unicameral legislature. The former "House of Assembly" became "Parliament" but with its composition increased from one hundred to one-hundred and fifty members. Thus, the size of the new one-chamber Parliament was made bigger than its two-chamber predecessor. This raises questions about the intentions of the authors of this aspect of constitutional reform. The main objective appears to have been to shorten the legislative process with a view to accommodating the political elite's undemocratic tendency of rushing legislation through Parliament whenever this suited its interests.

However, the government sought to mask this grand objective by claiming that this constitutional amendment was an essential part of its scheme to create "a truly indigenous constitution reflecting the legitimate aspirations and wishes of (our) people". During the second reading of the Constitutional Bill in the Senate, the government's claim was in the following words:

Mr President, as clearly explained in the memorandum to the Bill, the primary object of this Bill is to create a unicameral legislature. That is to say, instead of the present Senate and the House of Assembly, we shall now have only a single legislature which will truly be our own constitutional creation, based on the freely expressed political will of our people, as represented in Parliament by their duly elected and appointed representatives.

In other words, in place of the present two Houses of Parliament based on the Westminster model, we shall now have only one legislative Chamber which will be deeply rooted in our own native soil, and whose sovereignty will be derived from our own people as the custodians of our nation's political power.

These sentiments were demonstrably hollow. Just as there was nothing indigenous about a one chamber legislature, there was nothing particularly Westminster about the two-chamber legislature. The appeal to notions of being "deeply rooted in our own native soil" was meant to divert attention from the real issue, which was the consolidation of power in the hands of the political elite by shortening the legislative process.

76. See the Minister's second reading speech, Parliamentary Debates: The Senate 1989, para 922.
77. Ibid.
Amendment 10: Two Vice-Presidents

This amendment was introduced by Act No. 15 of 1990. Its sole purpose was to make provision for the appointment of a second vice-president. It did not make it mandatory for the country to have two vice-presidents but merely permitted the President to appoint "not more than two Vice-Presidents". Thus, it left it to the President to decide whether to have one or two vice-presidents. Having created room for two Vice-Presidents, the Amendment had to deal with the issue of who, between them, would assume the functions of the office of President in the event of that office being vacant or the President being absent from Zimbabwe or being unable to perform the functions of his/her office. This was addressed by providing for four scenarios as follows: (i) in every case, the President was empowered to designate the vice-president who would assume the functions of the office of president, (ii) in the absence of a designation by the president, the vice-president who last acted as president would take over, (iii) in the absence of both Vice-Presidents, the President was empowered to designate a Minister for such an eventuality and (iv) where the president had not designated a minister, Cabinet was empowered to designate a Minister to take over the functions of the office of president.

It is instructive to note that the additional office of a Vice-President did not affect the powers of the President. On the contrary, it enhanced the status and power of the president by giving him/her the sole discretion to decide whether or not to have a second vice-president and if so, what functions were to be allocated to that vice-president. The prerogative of the president to designate which of the two vice-presidents would act as president during his/her absence gave the president immense powers of control over his vice-presidents.

Amendment 10 was dictated exclusively by the interests of the ruling party, ZANU (PF), which in 1987 became a merger of the two liberation movements: PF ZAPU and ZANU (PF). The constitution of the "new" party provided for two vice-presidents to cement unity: one from each side. It was decided that the constitutional structure of the party be duplicated in government. The former leader of PF-ZAPU, Joshua Nkomo, who, upon merger of the two parties, became one of the two vice-presidents of the new party had to have a similar position in government. It was therefore the one-party state mentality that led to the creation of the second vice-presidency — the ruling party and government were viewed as two sides of the same coin.

Amendment 11: First Amendment of the Bill of Rights and Land Reform

The Lancaster House Constitution entrenched the Bill of Rights for the first ten years of independence. The entrenchment was in the following form: any proposal to amend the Bill of Rights less than ten years after 18 April 1980 required the approval of all members of the House of Assembly. This made it virtually impossible for Parliament to amend any provisions of the Bill of Rights in the first ten years of independence. As already noted, Amendment 9 repealed this special entrenchment and subjected all the provisions of the...
Constitution (including the Bill of Rights) to a less rigid amendment procedure requiring a two-thirds majority of the total membership of Parliament.

Amendment 11 was the first attack on the Lancaster House Bill of Rights. It is significant that this first attack was largely directed at section 16 which protects private property. Section 16 had, in the first ten years of independence, been the main obstacle to the new government's acquisition of land for resettlement for agricultural purposes. It imposed a number of restrictions. First, it imposed a "rule of law" regime by requiring every compulsory acquisition to be under the "authority of a law". The law in question had to provide for certain specified issues, the net effect of which was that any land reform contemplated by government had to be deliberate and conducted with due regard to the concerns of landowners. This meant that there had to be an Act of Parliament dealing with land acquisition. Secondly, it provided that only "under-utilised land" could be compulsorily acquired for settlement for agricultural purposes.80 Thus productive farms which were not under-utilised could not be acquired at all for settlement for agricultural purposes, however desirable the acquisition may have been in a particular case. It was a complete defence, and therefore a permanent bar to compulsory acquisition, for a landowner to prove that his/her land was not under-utilised.

Thirdly, notwithstanding that the land being acquired was under-utilised, compensation had to be paid "promptly" and in an "adequate" measure.81 This "prompt and adequate" measure of compensation was understood by the framers of the constitution and the new government as requiring compensation on the market value of "willing seller, willing buyer".

Fourthly, a recipient of compensation who was a citizen of, or ordinarily resident in Zimbabwe was entitled to remit the whole amount to any country of his/her choice outside Zimbabwe "free from any deduction, tax or charge other than ordinary bank charges".82

Further, access to the courts was guaranteed. Where the acquisition was contested, the government was compelled to apply to court for confirmation of the acquisition.83 The courts were empowered to (i) grant an application for the "prompt return" of property where confirmation of acquisition had been refused84 and (ii) determine any question relating to compensation.85 The right of land owners to appeal to the highest court of the land was constitutionally entrenched.86

Amendments No. 11 came in to demolish the above framework. Its first line of attack was the restriction relating to under-utilised land. It made all land liable to compulsory acquisition if the state so wished. Thus, even productive farms could be compulsorily acquired as long as the acquisition was "reasonably necessary for the utilisation of that or

80. See section 16(1)(b) of the Lancaster House Constitution.
81. See section 16(1)(c) of the Lancaster House Constitution.
82. See section 16(5) of the Lancaster House Constitution.
83. Section 16(1)(d).
84. Section 16(1)(e).
85. Ibid.
86. Ibid.
any of the land for settlement for agricultural purposes or for purposes of land reorganisation, forestry...” 87 The second aspect related to compensation. The amendment changed the “prompt and adequate” measure of compensation and replaced it with “fair compensation ... within a reasonable time”. The intention of this amendment was to create more flexibility in the assessment and payment of compensation. This was achieved by departing from the “adequate” criterion which was considered to be the market value of “willing seller, willing buyer”, and giving government more time to find the money via the device of “reasonable time” which replaced “prompt payment”.

The third aspect was the question of the role of the courts in the determination of issues of compensation. Amendment 11 repealed subsection 2 of section 16 and replaced it with a new provision which ousted the jurisdiction of the courts in determining the fairness or lack of it, of compensation paid for the acquisition of land. The amendment also removed the right of landowners to remit proceeds of compensation to any country of their choice outside Zimbabwe.

These aspects were fundamental. The removal of the restrictions relating to underutilised land gave government a large measure of access to land for acquisition. Any piece of land could be targeted for acquisition. This provided a basis for developing a land reform programme. The change from “adequate” to “fair” compensation was meant to side-step the unaffordable levels entailed by the market value of “willing seller, willing buyer”. It must be noted that although the Supreme Court had been alive to the need to water down the market value concept emanating from the “adequate” measure of conception in May and Ors v Reserve Bank of Zimbabwe, 88 the judges essentially endorsed the market value as the starting point to an assessment of “adequate” compensation. Dumbutshena CJ opened his examination of the concept of adequate compensation by embracing the definitions in the American case of United States v Miller 89 and Black’s Law Dictionary, 5th Edition, both of which emphasised the market value. He went on to state as follows:

The Compensation, to be “adequate”, must be “sufficient” to compensate the owner for the loss of his property, without imposing an unwarranted penalty on the public because the acquisition is effected in the interest of the public community. The interest of the owner of the property acquired must of necessity be balanced with the interest of the public from whom the money paid in compensation comes. 90

While this passage may be read as connoting a compensation less than the market value, in the context of the judgment, Dumbutshena CJ was merely attacking the proposition that the “market value” in that case included some speculative premium. He remained firmly of the view that adequate compensation depended on market value as long as the latter is properly ascertained. Gubbay JA & Beck JA who co-authored the dissenting

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87. See the new section 16 (1) (a) inserted by section 6 of Amendment.
88. 1985(2) ZLR 358 (SC).
89. (1943) 317 US 369 at 371-4.
90. At p.374F.
judgment were very clear about the essence of “adequate” compensation. They wrote as follows:

... (i) the compensation is to be determined by reference to the value of the expropriated property to the person from whom it is taken and not by reference to the value of that property to the expropriating authority. The question is what the owner has lost and not what the state has gained, (ii) the compensation should not be less than the money value into which the expropriated property could have been converted if there had been no expropriation.91

This is an outright “willing seller, willing buyer” framework. It was only McNally JA who was forthright that adequate compensation could be assessed at less than the market value. He said:

The market price, however, may not be the appropriate basis for determining the adequacy of the compensation. The particular circumstances of the case may dictate some other measure. Compensation is a matter of equity, and of being fair both to the person expropriated and to the general public for whose sake the expropriation is undertaken, and from whose pockets, by way of taxation, the price ultimately comes.92

In the light of this approach by the Supreme Court, there was justification for departing from the “adequate” measure of compensation, given the lack of adequate resources. However, the formulation of “fair” did not necessarily guarantee a different approach by the courts. A judiciary committed to the free market system can easily define “fair” as connoting a market value. In fact, in American jurisprudence on expropriation matters, “just compensation” has been interpreted as the “market value”.93 The fear that the courts could undermine the intention of the framers led to the ouster clause. The courts were prohibited from questioning any criteria of fairness to be set out in an Act of Parliament. This had no justification and undoubtedly undermined rights entrenched in other sections of the constitution. In the light of McNally JA’s statement in the May case, it would have made better sense for the framers, to have left the matter in the hands of the courts.

It is submitted that the ouster clause had no rational connection with a genuine land reform agenda. It went beyond what was reasonably necessary to achieve an equitable land redistribution exercise. It betrayed the government’s inner undemocratic instincts and an arrogant display of political power. This particular amendment was clearly contrary to the rule of law, however defined.

Amendment 11 also amended another section of the Bill of Rights. It amended section 15 by adding new subsections (3) and (4) as follows:

(3) No corporal punishment inflicted —
(a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone in loco parentis or in whom are vested any powers of his parent or guardian; or
(b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law;

shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading.

91. At 397 E.
92. At 381 G-H.
93. See generally United States v Miller (1943) 317 US 369 at 373-4.
(4) The execution of a person who has been sentenced to death by a competent court in respect of a criminal offence of which he has been convicted shall not be held to be in contravention of subsection (1) solely on the ground that the execution is carried out in a manner prescribed in section 315(2) of the Criminal Procedure and Evidence Act.

These amendments were meant to reverse Supreme Court judgments. In *S v Ncube*[^94] the Supreme Court outlawed corporal punishment of adult offenders as inhuman or degrading punishment contrary to section 15(1) of the Constitution. In *S v A Juvenile*[^95] the issue before the Supreme Court was whether or not corporal punishment of juveniles was also contrary to section 15(1). In a three to two decision, the court also outlawed corporal punishment of juveniles as being contrary to section 15(1). In his dissenting judgment, McNally JA drew a distinction between an adult and a juvenile and said:

> It seems to me that there is a very clear distinction between the corporal punishment of adults and the corporal punishment of juveniles. A young person is a person whose character is being formed. He or she is by nature open to advice, correction, example and encouragement by parents, teachers, elders and those in authority. An adult's character is already formed, for better or worse.[^96]

He characterised the view of the majority as that of a “sensitive and articulate minority” but which “tends inevitably to be heard more frequently and more persuasively than that of the silent majority”.[^97]

These conservative sentiments struck a chord in government circles where it was felt that section 15(1) could be used to overturn some deeply held views on corporal punishment and similar matters. Given that the method of hanging as a way of executing the death penalty was being challenged as an infringement of section 15(1), the amendments were therefore made to reverse the Supreme Court’s liberal views and to impose what were considered to be the shared perspectives of the “silent majority”.

Amendment 11 introduced new formulations for the judiciary. It repealed section 79 and brought in a new section which stated the independence of the judiciary in more explicit terms.[^98]

Another aspect of Amendment 11 was that it extended the right to vote to permanent residents. In the Lancaster House Constitution, only citizens were entitled to vote.[^99] With the abolition of dual citizenship, there were many persons who opted to retain their foreign citizenship while remaining permanently resident in Zimbabwe. It was decided that such persons retain their voting rights for the duration of their natural lives and hence the amendment.

[^94]: 1987 (2) ZLR 246 (SC).
[^95]: 1989 (2) ZLR 61 (SC).
[^96]: At 93 F.
[^97]: At page 92.
[^98]: See Section 79B of the Constitution.
[^99]: See paragraph 3 of schedule 3 of the Lancaster House Constitution.
Amendment 12: Service Commissions and Land Reform 2

This amendment was effected by Act number 4 of 1993. Its main focus was on rearranging the Service Commissions. The Lancaster House constitution had purported to settle most questions relating to the organisation and administration of the Public Service, the Police Force, the Prison Service and the Defence Forces. Providing for such issues in the constitution meant that every proposed change to the operational framework of any of these security arms of the state had to lead to a constitutional amendment. The government wanted flexibility in dealing with the security arms and this was achieved by amending the constitution and transferring matters of detail to an Act of Parliament. For example, section 93(3) brought by Amendment 12 provided as follows:

An Act of parliament shall make provision for the organisation, administration and discipline of the Police Force, including the appointment of persons to offices or ranks in the Police Force, their removal from office or reduction in rank, their punishment for breach of discipline and the fixing of their conditions of service.

There were similar clauses for the Public Service,100 the Defence Forces101 and the Prison Service.102 The question is; why was this flexibility necessary? The answer is that this was part and parcel of the scheme of consolidating power in the hands of the executive which had almost unlimited control of Parliament. The idea was to use an Act of Parliament to fashion the security arms in a manner consistent with cabinet control of their day-to-day functioning.

Amendment 12 also dealt with two aspects of the bill of Rights as a continuation of the land reform changes. First, it amended section 16(1) (e) by repealing a clause which had been missed by Amendment 11. Section 16(1)(e) still had a provision entitling a landowner to approach the courts “for the determination of any question relating to compensation”. It is this latter clause which was removed by Amendment 12 as it was clearly inconsistent with the new section 16(2) which had been brought about by Amendment 11. Secondly, it amended Section 18 in a substantive way. In the Lancaster House Constitution, section 18(1) provided as follows:

Every person is entitled to the protection of the law.

Section 18(9) provided as follows:

Every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the existence or extent of his civil rights or obligations.

These two substantive provisions were inconsistent with the new section 16(2) introduced by Amendment 11 whereby the courts were prohibited from adjudicating on the fairness or otherwise of compensation for acquired land. This meant that notwithstanding Amendment 11, landowners could still have relied on section 18(1) and 18(9) to challenge the law on fair compensation, leaving it to the supreme Court to resolve the apparent contradiction. This is what Amendment 12 came to remedy. The two subsections were

100. Section 73(2).
101. Section 96(3).
102. Section 99(3).
reformulated by the addition, at the beginning of each sentence, of the phrase, ‘subject to the provisions of this constitution . . .’. This removed the contradiction and gave constitutional sanctity to land reform changes started by Amendment 11.

These two loopholes show the clumsy nature of the process of changing the law to accommodate the political aspects of the land reform process. This was not to be the last.

**Amendment 13: Reversing Supreme Court ruling on death row phenomenon and Land Reform 3**

This amendment was effected by Act No. 9 of 1993. The main focus of this amendment was reversing the Supreme Court decision in *Catholic Commission for Justice and Peace in Zimbabwe v A-G and Others*. In that case, the CCJP made an application to the Supreme Court in terms of Section 24 of the Constitution to prevent the execution of four convicted murderers and to have the sentences of death set aside. The basis of the application was that the delay in carrying out the sentences taken together with the conditions under which the four prisoners were being held in custody, was itself a breach of section 15(1) on inhuman and degrading punishment and treatment. The Supreme Court agreed with this argument and held accordingly. It set aside the death sentences. The executive was outraged by this ruling, claiming that the Supreme Court had usurped the role of the executive. Amendment 13 was effected to impose the views of the executive on the meaning of the constitution. New subsections were added to section 15 as follows:

(5) Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of subsection (1).

(6) A person upon whom any sentence has been imposed by a competent court, whether before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act, 1993, in respect of a criminal offence of which he has been convicted, shall not be entitled to a stay, alteration or remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1).

In *Nkomo & Anor v Attorney-General & Ors* the Supreme Court confirmed that the effect of the new subsection (5) was to destroy, completely, the right created by the CCJP case. The court also addressed the meaning of “any sentence” in subsection (6). It held that “any sentence” in subsection (6) does not include the “death sentence” as this is dealt with in subsection (5). Including the death sentence under subsection (6) would make subsection (5) superfluous.

Amendment 13 also carried further the cleaning exercise started by Amendment 12 to the imperfections that came with Amendment 11. It reformulated 16(1)(e) to make it clear that a right still existed to approach the High Court or other court specified by law for the return of any property acquired if the acquisition is not confirmed. It added a new paragraph (f) which clarified that the ouster of the courts in issues of compensation only applied to land. In all other matters, any claimant for compensation was entitled to “apply to the

103. 1993(1) ZLR 242 (5).
104. 1993 (2) ZLR 432 (5).
High Court or some other court for the determination of any question relating to the compensation and to appeal to the supreme Court.\(^{105}\)

These clarifications to the land reform provisions had largely been a response to the huge international outcry against Amendment 11. They were meant to pacify the critics.

**Amendment 14: Reversing the Supreme Court ruling in Rattigan and Land Reform 4**

This amendment was effected by Act No. 14 of 1996. It had several aspects. The first was a reversal of the Supreme Court ruling in *Rattigan and Others v Chief Immigration Officer and Others*.\(^{106}\) In that case, the three applicants were all Zimbabwean citizens. The department of Immigration had refused their alien husbands permanent residence in Zimbabwe. They sought a declaration that their rights under sections 11 and 22 of the Bill of Rights had been infringed by the refusal of the respondents to permit their alien husbands to reside with them in Zimbabwe. It also held, obiter and in line with its earlier observations in *In Re Munhuweso*\(^{107}\) that section 11 of the Constitution was not a mere preamble but embodied substantive rights which included the right to life, liberty, security of the person and the protection of the law.

These two rulings were disapproved by the government and Amendment 14 was categorical in reversing them. Section 11 was repealed as government feared that the Supreme Court could rely on it to outlaw some of its legislative instruments, particularly those of an oppressive disposition. The old section 11 read as follows:

> Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

> (a) life, liberty, security of the person and the protection of the law;

> (b) freedom of conscience, of expression and of assembly and association; and

> (c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation;

> and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of the protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

It was replaced by a new provision which was labelled "preamble" and in the following words:

> Whereas persons in Zimbabwe were entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the

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\(^{105}\) See the new Section 16(1)(f) inserted by Amendment 13.

\(^{106}\) 1994(2) ZLR 54(5).

\(^{107}\) 1994(1) ZLR 49(5).
Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons.

Section 22 was amended by the repeal of paragraph (d) of Subsection 3. The old paragraph read as follows:

for the imposition of restrictions on the movement or residence within Zimbabwe of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe or for excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe.

The new paragraph was in the following words:

(i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; or
(ii) excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe;

whether or not he is married or related to another person who is a citizen of, or a permanent resident in, Zimbabwe.

A reading of the above shows an amendment formula, which was a word for word reversal of the reasoning of the Supreme Court. This is significant. By 1996, the executive arm of government had an incredible distrust of, and intense hostility towards, the Supreme Court. It accused the Supreme Court of pursuing a hidden political agenda of promoting white interests. There was very little basis for this. The executive was merely displaying its undemocratic instincts which could not accommodate an independent judiciary.

At the time of the Rattigan decision, the constitution treated alien wives differently. Any woman married to a Zimbabwean citizen was entitled to be registered as a citizen of Zimbabwe. The Rattigan decision did not create an entitlement to citizenship by alien husbands, so the position remained different. Many supporters of the Rattigan reasoning argued for an elevation of alien husbands to the same status as alien wives. The government was so opposed to the Rattigan decision that its response to this equality principle was to remove the special entitlement of alien wives. Amendment 14 amended section 7 (2) of the constitution to remove the special entitlement of alien wives.

An important feature of Amendment 14 was the promotion of gender equality. One of the anachronisms of Zimbabwe's Bill of Rights was that up to 1996, it did not prohibit discrimination on the basis of gender. Before Amendment 14, section 23, which covered discrimination, only prohibited discrimination on the grounds of “race, tribe, place of origin, political opinions, colour or creed”. It was therefore constitutionally permissible for a law to discriminate on the grounds of gender. Amendment 14 finally incorporated gender equality by adding "gender" on the list of prohibited grounds of discrimination. This approach was half-hearted as the amendment allowed vague exceptions. One of the exceptions allowed was the application of customary law and the consequences became evident in Magaya v Magaya where the Supreme Court held that the customary

108. See the new subsection 5 of Section 23, inserted by Amendment 14.
109. 1999(1) ZLR 100 (S).
law rule of preferring males to females in intestate succession was constitutionally permissible.

A more substantive promotion of gender equality was on the aspect of citizenship. Before Amendment 14, the Constitution drew a distinction between "legitimate" and "illegitimate" children. A "legitimate" child's citizenship was determined by that of its father, while an "illegitimate child" followed the mother. Thus, in the case of a legitimate child, he/she could not be a citizen of Zimbabwe by birth even if born in Zimbabwe to a mother who was a citizen. A mother could only pass on her Zimbabwean citizenship to an "illegitimate" child. Amendment 14 changed all this and placed parents in the same position: either parent could pass on Zimbabwean citizenship to his/her child regardless of marital status. For example, a new subsection added to section 5 provided as follows:

(3) A person born in Zimbabwe on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 14) Act, 1996, shall be a citizen of Zimbabwe by birth if at the time of his birth his father or his mother is a citizen of Zimbabwe.

Amendment 14 also had some provisions on the land issue. The purpose of the provisions appear to have been to placate some of the continuing criticisms against earlier amendments. Amendment 13 had restored, to any claimant for compensation, the right to apply to the High Court for the determination of any question relating to compensation "except where the property concerned is land or any interest or right therein". Amendment 14 went further to expand the scope of this right by extending it to cover some land cases. In other words, unlike in the previous situation where every land acquisition was shielded from interventions by the courts over the levels of compensation, Amendment 14 only shielded that land which was "substantially unused or is used wholly or mainly for agricultural purposes and the land... is acquired" for resettlement. Where land was being acquired for purposes other than resettlement, the courts were now empowered to entertain disputes relating to compensation. The same situation obtained where government sought to acquire non-agricultural land for resettlement: Amendment 14 also exempted, from the constitutional scheme, land that was the subject matter of a treaty or convention executed by the President with one or more foreign states or governments.

Amendment 14 had two other aspects. First, it empowered the Electoral Supervisory Commission to supervise the conduct of elections to the office of President and to governing bodies of local authorities. Hitherto, it was only empowered to supervise the conduct of elections to Parliament. Secondly, the Ombudsman was given the additional responsibility of investigating allegations of infringements of human rights.

**Amendment 15: Change of Financial Year**

This amendment was effected by Act, No. 10 of 1998. It was exclusively a technical amendment which changed the government's financial year from (1 July to 30 June), to 1 January to 31 December, of each year.

110. See the old section 5(1) of the Constitution.
111. See new section 16(9b) inserted by Amendment 14.
112. See Section 61 (3).
113. Section 108 (1).
CONCLUDING COMMENTS

This survey has demonstrated some very clear features about the constitution-amendment process in Zimbabwe. It has largely been an affair of consolidating power in the hands of the ruling elite. This was achieved by a constitutional scheme that strengthened the powers of the executive against the other two arms of the state and by giving constitutional status to strong views held by the executive. The latter point is evidenced by a series of amendments meant to reverse decisions of the Supreme Court merely to impose the strong views of the executive. In the executive presidency, the framers found an effective devise to undermine traditional checks and balances utilised by most democratic governmental systems.

It is striking that these amendments were not subjected to public debate. The mere say so of the executive was sufficient to justify fundamental political changes. As a consequence, political intolerance became a driving force in constitutional reform. This is a recipe for disaster: a constitution must be able to outlive the political emotions of the day. The surest way of achieving this is to subject constitution-making to an open and broad people-centred process transcending partisan political interests. This is the lesson to be learnt from the haphazard and partisan constitution-making process of the period examined in this article.