

# Emerging debates about, and prospects for, devolution in Zimbabwe by

Tinashe C Chigwata<sup>1</sup>

## Abstract

*The devolution of governmental powers and resources has always been a contested subject in Zimbabwe, as it has been in many other countries. The controversies that characterised the adoption of devolution have continued to shape or impede its implementation since 2013, when the new Constitution of Zimbabwe was adopted.*

*The new administration of President Emmerson Mnangagwa has signalled that it will implement devolution during the 2018-2022 government term. The nature of the devolution to be implemented however remains unclear.*

*This paper interrogates the constitutional provisions regarding, and the emerging debates about, devolution in Zimbabwe. It is acknowledged that while the 2013 Constitution is not a perfect document that entrenches all the necessary aspects of an effective devolution programme, it does provide the starting point towards the establishment of a non-centralised form of government in Zimbabwe.*

*What is required in particular is for national officials (both political and administrative) to commit to a devolution process that respects the rules of the game. Importantly, if devolution is to succeed it should be a shared objective supported by both those with and without power as well as by the general citizenry.*

## 1. Introduction

‘Devolution’, which could not be freely advocated publicly in former President Robert Mugabe’s era (1980-2017), is now a buzzword in Zimbabwe. President Emmerson Mnangagwa, who succeeded President Robert Mugabe as the leader of both the government and the governing Zimbabwe African National Union-Patriotic Front (ZANU-PF) in November 2017, and was re-elected in the July 2018 harmonised elections, has declared that his government will implement devolution and establish the provincial tier of government, as required by the 2013 Constitution<sup>2</sup>. The Movement for Democratic Change (MDC) political formations, civil society groups, academia and ordinary citizens, in general, are all in agreement that devolution should be implemented without delay. The implementation of devolution is thus one of the few topical subjects where there is general consensus across the political and

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<sup>1</sup> Tinashe C Chigwata holds a PhD in Public Law. He is currently a senior researcher at the Dullah Omar Institute for Constitutional Law, Governance and Human Rights; University of the Western Cape, South Africa. He can be contacted on [tchigwata@uwc.ac.za](mailto:tchigwata@uwc.ac.za) The author would like to thank Prof Geoff Feltoe and Prof Solly Leeman for their editorial assistance with regard to this article.

<sup>2</sup> Constitution of Zimbabwe, Amendment No. 20 of 2013 (“the Constitution”)

social divide. There is however a lack of convergence on the meaning of devolution, or the nature of the devolution to be implemented, and the form that such devolution should take.

This paper looks at the key areas of discussion on devolution across political, economic and regional divides. It defines 'devolution' and tries to clarify some of the misconceptions associated with the term. A brief overview of the constitutional framework of provincial and local government is provided to show the nature of the devolution programme enshrined in the 2013 Constitution. The emerging debates on devolution are then interrogated before proposals on how to implement devolution are proffered. It is argued that if devolution is to succeed there should be a shared objective supported not only by the key stakeholders but also the general citizenry. The starting point towards achieving that objective is to put in place a participatory, inclusive and consensus driven process to drive the development of a shared vision on devolution that then shapes the relevant reforms, whether constitutional, legislative, institutional, financial or/and administrative.

## **2. The adoption of devolution**

The old Constitution of Zimbabwe (the Lancaster House Constitution) provided for a unitary form of government in which provincial and local governments did not have constitutional recognition. These subnational governments exercised powers delegated to them under various Acts of Parliament.<sup>3</sup> In addition, local authorities, particularly urban, exercised some level of discretion in certain areas that resembled elements of devolution. Thus, Zimbabwe has always had a decentralised system of government even though devolution was not the main mode of diffusing governmental powers. The challenges which local governments,<sup>4</sup> communities and the nation at large, were facing brought the issue of devolution to the table during the constitution review process which began in 2009 and ended in 2013. It was believed, among other things, that if Zimbabwe had adopted a devolved form of government the challenges which the country has experienced over the past two decades, attributed to over-centralisation and personalisation of power, might not have arisen at all or at least to a lesser extent.

Devolution was therefore seen as a necessary vehicle for doing away with the over-centralised system of government, deepening democracy, promoting locally driven development, improving the delivery of public services, and promoting national integration and peace while recognising diversity.<sup>5</sup> Given that devolution is about

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<sup>3</sup> These include the Urban Councils Act [*Chapter 29:25*], Regional Town and Country Planning Act [*Chapter 29:12*] and the Rural District Councils Act [*Chapter 29:13*].

<sup>4</sup> Local authorities have been struggling to provide basic services efficiently and effectively for over a decade, see Chigwata TC et al Ministerial directives to local government in Zimbabwe: Top-down governance in a decentralised Constitution (2017) 47; Chigwata T and De Visser D, 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' Hague J Rule Law (2018) 172.

<sup>5</sup> See Chigwata TC, *Provincial and Local Government Reform in Zimbabwe: Analysis of the Law, Policy and Practice* (2018) 59.

access to State power and resources, it was not a surprise when the constitutional review process stalled on various occasions partially due to this controversial subject. At the centre of the debate was what form of government Zimbabwe should have, and whether devolution should be the primary mode of diffusing governmental powers from the centre to the periphery? In reality, it was about those with power and control over resources wanting to maintain the status quo, whereas those who lacked power and resources sought to have more power and influence and a greater share of resources. After months and months of tense negotiations among the major political parties<sup>6</sup> comprising the constitutional parliamentary committee, which led the constitution review process, devolution was adopted as a key component of the new Constitution of Zimbabwe of 2013.

The 2013 Constitution maintains a unitary form of government,<sup>7</sup> which signifies some form of aggregated power at the national centre.<sup>8</sup> Unlike its predecessor, the Lancaster House Constitution, the new Constitution organises government at multiple levels - national, provincial and local. It is the first to recognise provincial and local governments as tiers of government.<sup>9</sup> The word 'tier of government', which is usually used interchangeably with 'level of government, refers 'to the part of the hierarchy through which state power is employed at a certain place in the vertical order of a country'.<sup>10</sup> Thus, it is different from 'level of administration' which 'describes an institutional setting that supports administratively the implementation of governmental policies in the regions, at the local level'. Unlike a 'tier of government', a 'level of administration' 'does not make policies but only implements them'.<sup>11</sup> The constitutional recognition of provincial and local governments as tiers of government instead of levels of administration is therefore significant. It, among other things, serves to prevent the arbitrary abolition of these subnational governments by the governing party for mere political advantage. The effectiveness of these constitutional safeguards in securing the existence of subnational governments however depends on how stringent the procedures for amending constitutional provisions protecting subnational governments are. It also depends on whether there is the rule of the law, otherwise the Constitution and court judgements protecting subnational autonomy can simply be ignored.<sup>12</sup>

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<sup>6</sup> ZANU-PF and two MDC political formations, one led by Morgan Tsvangirai and the other by Arthur Mutambara.

<sup>7</sup> See section 1 Constitution of the Constitution of Zimbabwe.

<sup>8</sup> See Bockenforde M, 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 35.

<sup>9</sup> Section 5 of the Constitution.

<sup>10</sup> See Bockenforde M, 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 44.

<sup>11</sup> See Bockenforde M, 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 44.

<sup>12</sup> Chigwata T and De Visser D, 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' (2018) 167-168.

The recognition of a three-tier system of government in the 2013 Constitution of Zimbabwe is a significant ‘indicator of the depth of decentralization, and therefore of its ability to bring government close to the people it is supposed to serve’.<sup>13</sup> The provincial tier of government is to be constituted by eight provincial councils and two metropolitan councils whereas, the local tier of government - local government - consists of urban and rural local authorities. Another addition brought about by the 2013 Constitution is that devolution is recognised as one of the Founding Values and Principles to the Constitution.<sup>14</sup> This recognition of an extensive form of decentralisation signifies the value which the constitutional drafters attached to devolution relative to other form of decentralisation, such as, deconcentration and delegation.

The multi-level system of government and devolution were not implemented by President Mugabe’s administration. There was a lack of understanding of the meaning of devolution, of whether the Constitution provided for devolution, and, if it did, what was required to implement devolution. Concerns around the availability of sufficient resources necessary to implement this system of devolution were raised.<sup>15</sup> There was also the argument that devolution was considered ideologically incorrect in certain political quarters, particularly in the governing party. Hence the reluctance to implement it. What kind of creature is devolution that it scares some and makes it attractive to others? The following section tries to demystify this concept.

### 3. Devolution demystified

Devolution is generally classified as the most extensive form of decentralisation<sup>16</sup> that diffuses substantial governmental powers, authority, responsibilities and resources to subnational or local units.<sup>17</sup> Such units exercise a measure of autonomy, which is ‘the extent to which [subnational] governments have discretion in carrying

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<sup>13</sup> See Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 189.

<sup>14</sup> See section 3(2)(l) of the Constitution.

<sup>15</sup> Moyo P and Ncube C ‘Devolution of power in Zimbabwe’s new constitutional order: Opportunities and potential constraints’ *Law, Democracy and Development* (2014) 299.

<sup>16</sup> Decentralisation is a ‘generic term for the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration’. This dispersal takes place through deconcentration, which ‘[o]ccurs when the central government disperses responsibility for implementing a policy to its field offices without transferring authority’. The dispersal may also take the form of delegation, which is a ‘mechanism under which the central government refers decision making and administrative responsibilities for various public functions to other levels of government on a revocable basis. The degree of supervision varies and might include substantial central control, or might fully allocate the administration and implementation of policy to subunits’. See Bockenforde M ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 1, 47. In some other instances, privatisation is classified as a form of (economic) decentralisation. This paper does not focus on this transfer of power to private actors as it is not a territorial concept. It involves the diffusion of authority to private entities outside the political system of government instead of levels of to government.

<sup>17</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ *Journal of African Law* (2018) 181.

out their duties and obligations'.<sup>18</sup> However, such autonomy cannot be equated to the independence enjoyed by a sovereign State, given that subnational and local units exercising devolved powers are not on a par with the central government. Unlike federal systems where the regions or provinces maintain their own independent power and cede or receive some authority to or from the federal government,<sup>19</sup> devolved units do not occupy the same sort of position in relation to the central government. They are always the recipients of such authority and they can never have more than what they are given. While not occupying the same position as the central or national government, devolved units do however enjoy a certain level of autonomy from the centre which takes many forms but is usually political, fiscal or administrative.

### **3.1. A devolved unit enjoys political autonomy**

Political autonomy is perhaps the most important element of subnational and local units exercise devolved powers. It means, among other things, that the Constitution or legislation guarantees the existence of subnational or local units as an independent tiers or levels of government, how they are established, the scope of their authority, and their jurisdiction over a defined geographical area.<sup>20</sup> Devolved units are characterised by a minimum level of democratic content to promote and sustain representative, accountable, participatory and inclusive government. Thus, measures, such as the direct election of local political representatives by local people are indispensable for a devolved form of government. The method of appointing or electing subnational political officials is significant for some form of self-government 'which enables the lower levels of government to participate actively in the country's political processes and institutions'.<sup>21</sup> Political autonomy also means that subnational or local governments have distinct powers and functions, including the power to adopt and implement laws and policies, which can be exercised independently of the centre.<sup>22</sup> It is through such laws and policies that subnational and local interests find expression.

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<sup>18</sup> Chigwata T and De Visser D, 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' (2018) 167.

<sup>19</sup> Bockenforde M 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 48. Zimbabwe, Zambia and Malawi once experimented with a federal form of government between 1953 and 1963 when they formed the Federation of Rhodesia-Nyasaland. For a detailed discussion on the nature of the federation and why it failed see Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 73-74.

<sup>20</sup> UN-Habitat 'International guidelines on decentralisation and the strengthening of local authorities' (2007) 6.

<sup>21</sup> Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 191.

<sup>22</sup> Fesha Y and Kirkby C 'A critical survey of subnational autonomy in African States', *Publius: Journal of Federalism* (2008) 255.

### **3.2. A devolved unit enjoys fiscal autonomy**

Political autonomy is meaningless if it is not accompanied by fiscal autonomy, which entails the ability to raise and spent revenue.<sup>23</sup> This is the reason why a devolved subnational or local unit usually enjoys some form of fiscal autonomy. A government, whether at national, provincial or local level, should be able to raise at least a portion of revenue required to fund its expenditure priorities. It is, however, unusual for subnational governments to rely on the national government for funding, as is the case in South Africa. The national government in South Africa funds no less than 95 per cent of the budgets of the nine provincial governments. These provincial governments however have the power to raise revenue even though it is minimal. The reliance on intergovernmental grants is a significant indicator of the extent of the fiscal autonomy a subnational government enjoys. The spending discretion of subnational or local units tends to be low when they significantly rely on intergovernmental grants, especially those that comes with conditions.

### **3.3. A devolved unit enjoys administrative autonomy**

A body exercising devolved powers usually enjoys some form of administrative autonomy. This form of autonomy entails that a subnational or local unit can appoint and dismiss its staff, as well determine remuneration levels. It also means that a subnational or local unit has some discretion to determine its internal administrative structures and procedures. Administrative autonomy is necessary to a devolved unit for several reasons. It enables a devolved unit to adapt its administrative establishments to the requirements of its locality to ensure effective governance.<sup>24</sup> A subnational governments can easily (re)adjust its remuneration scale to retain and attract key skills, among other objectives. It also fosters the accountability of local staff to local politicians, which enhances effective policy implementation. Thus, administrative autonomy is important for devolved units as it frees them from reliance on the national government and its bureaucracies to implement local policy decisions.<sup>25</sup> It is however unusual to have devolved forms of government that provide public services that cut across the organisation of government at a vertical level. The secondment of staff to lower tiers of government is also common but it can weaken accountability at subnational level.

### **3.4. A devolved unit is supervised not micro-managed**

Autonomy is not the only feature of a devolved form of government. Supervisory instruments are key to the effective functioning of a devolved form of government. These instruments at the disposal of higher tiers of government (national or/and provincial) denote that subnational and local units should be regulated, monitored and supported. In the event of serious challenges at the subnational or local levels,

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<sup>23</sup> UN-Habitat 'International guidelines on decentralisation and the strengthening of local authorities' (2007) 8.

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<sup>25</sup> Fesha Y and Kirkby C 'A critical survey of subnational autonomy in African States', Publius: Journal of Federalism (2008) 259.

higher tiers of government should be able to intervene to rectify the situation. These instruments are not only important to protect national objectives but also local ones given the dangers of corruption and resource wastage, among others, that tend to flourish at the subnational and local levels because of favourable conditions that exist at that level.<sup>26</sup> However, for devolution to succeed, such supervisory powers should be limited and exercised in accordance with the law, following determined procedures and subject to oversight mechanisms for checks and balances.<sup>27</sup> The bottom line is that the activities of devolved units are supervised instead of micro-managed.

### 3.5. Promoting effective multi-level governance

Under a devolved form of government, supervisory instruments, which are generally of a coercive nature, are unlikely to be used or be effective in all cases. Sometimes co-operative instruments will have to be employed to achieve the desired results.<sup>28</sup> These instruments emphasises that governments organised at various levels and within levels should cooperate with one another to ensure that government as a whole delivers.<sup>29</sup> Their activities should be co-ordinated and they may have to complement and consult each other from time to time. What matters to the citizens at the end of the day are accessibility and affordability of quality public services. These are the reasons why most countries that have multi-level forms of government, such as a devolved system, have put in place mechanisms for promoting intergovernmental and intragovernmental cooperation to achieve these objectives.<sup>30</sup>

This section tried to define the term ‘devolution’ and provide some of the key characteristics of a devolved form of government. Without being lost in the jargon, devolution is simply concerned with giving subnational and local governments some measure of autonomy so that the State as a whole can respond better and faster to the challenges of public service delivery, development, democracy, national integration and peace.<sup>31</sup> Countries that are organised solely on the basis of devolution are rare. In most cases, all the forms of decentralisation - devolution, delegation and deconcentration - operate at the same time. Thus, it is all about which form of decentralisation is the primary mode of organising the State. If the objective in a particular country is to establish a multi-tiered form of government, as the 2013 Constitution of Zimbabwe seems to suggest, then devolution should be

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<sup>26</sup> See Chigwata TC et al Ministerial directives to local government in Zimbabwe: Top-down governance in a decentralised Constitution (2017) 43, Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 184.

<sup>27</sup> UN-Habitat ‘International guidelines on decentralisation and the strengthening of local authorities’ (2007) 7.

<sup>28</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 182.

<sup>29</sup> See Chigwata TC *Provincial and local government Reform in Zimbabwe* (2018) 40.

<sup>30</sup> Examples include Kenya, South Africa and United Kingdom.

<sup>31</sup> See Bockenforde M ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 4.

the primary basis for organising the State, otherwise the outcome will be merely a multi-level form of administration.

Once the objective to organise the State on the basis of devolution is chosen, it should be recognised that devolution is not the same as federalism. Devolution can however take place in a federation as much as it can occur in a unitary state. It is not about creating an independent State but merely to ensure that power and resources are not concentrated at the centre, and that people at the local level have the necessary tools to champion their own development. It is also not automatic that when you devolve governmental powers, responsibilities and resources, a devolved unit, such as, province or local authority, will secede. Supervisory instruments can be effective in countering any secessionist tendencies. However, it should be acknowledged that those that campaign for devolution as a vehicle towards the establishment of an independent State make devolution politically contentious and difficult to entrench fully and/or implement. This is attested nowhere better than in Zimbabwe where the Constitution on devolution seems to give with one hand and take back with the other.

#### **4. The constitutional framework for ‘fudged’ devolution**

Chapter 14 of the 2013 Constitution, which provides for provincial and local governments, is the only Chapter of the Constitution that has got a preamble of its own. The preamble reads:

Whereas it is desirable to ensure: (a) the preservation of national unity in Zimbabwe and the prevention of all forms of disunity and secessionism; (b) the democratic participation in government by all citizens and communities of Zimbabwe; and (c) the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas; there must be devolution of power and responsibilities to lower tiers of government in Zimbabwe.

The preamble provides the basis for devolution. However, the foundation may not be very strong given the use of the words ‘whereas it is desirable’ which are prone to a wide range of interpretations. It is nevertheless striking that the Constitution identifies devolution as the most desirable form of diffusing governmental powers, responsibilities and resources in Zimbabwe to realise development, democracy and peace, including national integration.

The requirement for devolution in the preamble is further given effect by section 264(1). The provision provides that ‘[w]henver appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively’. At face value, this provision suggests that questions of when to devolve, what to devolve, whom to devolve, and devolution for what purposes, are completely left to be determined by the national government. But a closer look at the history of over-centralisation of power, poor service delivery, and perceived

marginalisation of certain areas, among other reasons which motivated the adoption of devolution, it would make it seem illogical to come to that conclusion.<sup>32</sup> Moreover, the fact that devolution, relative to other forms of decentralisation, is recognised as one of the Founding Values and Principles of the Constitution suggests that devolution is ‘now’ rather than ‘futuristic’. In other words, devolution is desirable now and should be basis for organising the three-tier form of government recognised in the Constitution, and whose establishment is not made conditional on ‘competence’, among other qualifications.<sup>33</sup> Thus, an argument can be made that under the new constitutional order provincial and local governments should exercise some devolved powers. This nevertheless does not preclude the national government from deconcentrating authority and delegating power.

#### **4.1. The objectives of devolution and principles of provincial and local government**

Section 264(2) of the Constitution provides the general objectives of devolution. Devolution is necessary to ‘give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decision affecting them’. It must be implemented to ‘promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole’. Given that Zimbabwe is an ethnically diverse country, devolution is important to ‘preserve and foster the peace, national unity and indivisibility of Zimbabwe’. While there is nothing wrong with nationally led development with respect to ‘national issues’, devolution is a means of ‘recognis[ing] the right of communities to manage their own affairs and to further their own development’. If properly designed, devolution can ‘ensure the equitable sharing of local and national resources’. Lastly, for locally driven development to have a higher chance of success, devolution is necessary to ‘transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority’.<sup>34</sup> It can be observed that the Constitution envisages the devolution of powers, responsibilities and resources not just to the provincial and local levels but to structures beyond the local government level.

The objectives of devolution are supported by the general principles of provincial and local government enshrined in section 265 of the Constitution. The provision provides that provincial and metropolitan councils and local authorities must, within their spheres, ‘ensure good governance by being effective, transparent, accountable and institutionally coherent’. They must ‘assume only those functions conferred on them by th[e] Constitution or an Act of Parliament’. In other words, their conduct should be legal at all times. The Constitution requires these subnational

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<sup>32</sup> See Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 59.

<sup>33</sup> See Nyathi M and Dube M ‘The Myth of Devolution in Zimbabwe: The Reality Post - May 2013’, *University of Botswana Law Journal* (2017), June, 44-45.

<sup>34</sup> Section 264(2) of the Constitution.

governments to ‘exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government’. They are encouraged to ‘cooperate with one another, in particular by (i) informing one another of, and consulting one another on, matters of common interest (ii) harmonising and coordinating their activities’. Even with devolved powers, provincial and local governments are required to ‘preserve the peace, national unity and indivisibility of Zimbabwe’. They must always work towards ‘secur[ing] the public welfare; and ensure the fair and equitable representation of people within their areas of jurisdiction’. While they are not hard rules, these principles demand positive action from provincial and local governments.

#### **4.2. Provincial tier of government**

The Constitution recognises a total of 10 provinces, namely Mashonaland Central, Mashonaland East, Mashonaland West, Manicaland, Masvingo, Midlands, Matabeleland North, Matabeleland South, Bulawayo and Harare. It requires the first eight provinces to be governed by provincial councils and the remaining two metropolitan provinces, which are wholly urban in nature, to be governed by metropolitan councils. As it stands, the number of provinces may not be changed other than by means of a constitutional amendment. The same applies to the names of provinces. However, the boundaries of provinces may be altered: they are not protected by the Constitution. Thus, provinces have been accorded original constitutional protection, another indicator of the depth of decentralisation.<sup>35</sup>

The Constitution provides that provincial and metropolitan councils are to be constituted by a combination of elected and appointed officials. A total of ten directly elected officials, all members of parliament, and the president of the council of chiefs and his deputy, make up the provincial council in the relevant province.<sup>36</sup> The metropolitan council, on the other hand, is constituted by all members of parliament, mayors, chairpersons, deputy mayors and deputy chairpersons in the relevant province.<sup>37</sup> Thus, both provincial and metropolitan councils are constituted by a majority of officials from the national and local tiers of government. Throughout the world it is rare to find a political official occupying two political positions in governments organised at different levels at the same time. What value would national and local political officials bring to the provincial setup which they are unable to give to their respective governments? With such double representation how will the different levels of government check on each other, a benefit which a devolved system of government is supposed to offer?<sup>38</sup> Is it feasible for members of parliament and ministers to attend to both the business of the national and provincial governments given the demanding nature of their primary

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<sup>35</sup> See Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 189.

<sup>36</sup> See section 268(1) of the Constitution.

<sup>37</sup> See section 269(1) of the Constitution.

<sup>38</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 184.

roles?<sup>39</sup> Hence, the composition of the provincial and metropolitan councils raises key democratic and feasibility questions that require further examination.

The Constitution requires provincial and metropolitan councils to undertake social economic development in their respective provinces, including:

- a) planning and implementing social and economic development activities in its province;
- b) coordinating and implementing governmental programmes in its province;
- c) planning and implementing measures for the conservation, improvement and management of natural resources in its province;
- d) promoting tourism in its province, and developing facilities for that purpose;
- e) monitoring and evaluating the use of resources in its province; and
- f) exercising any other functions, including legislative functions, that may be conferred or imposed on it by or under an Act of Parliament.<sup>40</sup>

The Constitution does not define what socio-economic development entails. It is not clear whether this includes the power to adopt policies and spend budgets on matters that relate to socio-economic development. In general, socio-economic development encompasses almost everything, from social related services, such as, the provision of health, education and sanitation, to economic orientated activities including tourism, natural resources extraction and job creation. Legislation and policies that clarify the parameters of the socio-economic development function of the councils, among other things, is therefore required.

### **4.3. Local government**

The Constitution makes provision for two categories of local authority: urban local authorities, for urban areas, and rural local authorities, for rural areas.<sup>41</sup> The Constitution does not enumerate the various local authorities in accordance with the general international practice.<sup>42</sup> Thus, while the institution of local government is constitutionally guaranteed the same cannot be said for the existence of each local government unit. A certain measure of guaranteeing their existence could have been provided by constitutional provisions that guard against their arbitrary disestablishment or amalgamation, which the 2013 Constitution does not provide.<sup>43</sup>

The Constitution requires local authority areas, whether urban or rural, to be governed by councils constituted by democratically elected councillors.<sup>44</sup> This is commendable in the light of the need to promote the primary accountability of councillors to the local people. Unlike the South African Constitution (1996) and the

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<sup>39</sup> Nyathi M and Dube M 'The Myth of Devolution in Zimbabwe: The Reality Post - May 2013' (2017) 40.

<sup>40</sup> Section 270(1) of the Constitution.

<sup>41</sup> See section 5 of the Constitution.

<sup>42</sup> The Constitution of Kenya (2010) is unique in this regard as it enumerates the names of the 47 counties that make up the second and lowest tier of Kenya's devolved form of government.

<sup>43</sup> See Chigwata T and De Visser D, 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' (2018) 168.

<sup>44</sup> Section 265(2) of the Constitution.

Kenyan Constitution (2010), the 2013 Constitution does not list or enumerate the powers and functions of local government. The enumeration of local powers and functions would have provided the ‘assurance that decentralised powers will not be recentralised arbitrarily’.<sup>45</sup> To the contrary, section 276(1) of the 2013 Constitution merely provides what may be referred to as generic powers whose boundaries or depth are subject to interpretation. The provision states that

subject to th[e] Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.

The Constitution however envisages that local authorities will exercise law-making and resource raising powers. Section 276(2) provides that ‘[a]n Act of Parliament may confer functions on local authorities, including - (a) a power to make by-laws, regulations or rules for the effective administration of the areas for which they have been established; (b) a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities’. Thus, section 276 requires national action through laws to provide details of what local government powers and functions will entail. The direction of how to legislate, taking into account the need for local government to enjoy a certain measure of discretion in line with the ‘right to govern’, has however been given.

#### **4.4. Equitable revenue sharing**

The 2013 Constitution recognises the need for equitable revenue sharing among the tiers of government.<sup>46</sup> It provides for the transfer of fiscal resources from the national government to provincial and metropolitan councils and local authorities. Section 301(1) of the Constitution directs Parliament to enact legislation providing for conditional and unconditional grants to provincial and metropolitan councils and local authorities. The Constitution sets the criteria that should inform the allocation of conditional and unconditional grants to provincial and metropolitan councils and local authorities.<sup>47</sup> Among other factors, the criteria advance redistribution of wealth and economic resources between jurisdictions. If the criteria are fully implemented, the intergovernmental fiscal system may serve as device for equitable development throughout the country.

In addition, the Constitution requires the allocation of ‘not less than five per cent of the national revenues raised in any financial year’ to provincial and metropolitan councils and local authorities.<sup>48</sup> This constitutional requirement was adopted to ensure that subnational governments do not continue to rely on the goodwill of the national government for resources as was the case under the previous constitutional

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<sup>45</sup> Chigwata T and De Visser D, ‘Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy’ (2018) 168.

<sup>46</sup> Section 298(1)(b)(ii) of the Constitution.

<sup>47</sup> See section 301(2) of the Constitution.

<sup>48</sup> Section 301(3) of the Constitution.

order. Even though the Constitution does not prevent the national government from allocating more than five per cent, the adequacy of this percentage in guaranteeing a sound financial base for each provincial council, metropolitan council and local authority is in doubt. The financial position of subnational governments can however be improved by other forms of intergovernmental grants that the national government may allocate to provinces and local government from time to time.

There is no doubt that the 2013 Constitution is against centralisation of governmental powers. Devolution is one of the many mechanisms that have been adopted to achieve this objective. However, as mentioned above, the Constitution seems to give with one hand and take with the other when it comes to devolution. The majority of the provisions on devolution require action (through the enactment of laws, among other things) by the national government before they can be implemented. Thus, one may arrive at the conclusion that devolution has been ‘fudged’. Without self-enforcing hard provisions, devolution will depend on the will of national officials. The ambiguous nature of the provisions on devolution in the Constitution may make effective implementation difficult. This is against the background that a ‘constitutional entrenchment of a well-designed decentralization system, while not guaranteeing effective implementation, enhances its prospects, as well as creating considerable scope for deepening democracy, constitutionalism and respect for the rule of law’.<sup>49</sup> Thus it offers greater promise that the objectives of devolution will be met.

It should be recognised, however, that while constitutional entrenchment of all the key aspects of devolution may show the national government’s strong commitment to share power with subnational governments and aid implementation, it is possible to devolve real powers outside of a Constitution. The United Kingdom and other European countries, which have strong systems of subnational governments anchored in devolution effective outside of a Constitution, are good examples.<sup>50</sup> In fact the United Kingdom does not have a written Constitution and devolution is provided for in ordinary legislation. Thus, it remains possible to implement devolution in Zimbabwe within the current constitutional framework. What is needed is the will to devolve power, and for the national government to respect the rules of the game, once such devolution takes place. This should not be construed to mean that constitutional reforms to make devolution work better should not be explored.

## **5. Emerging debates on, and controversies about, devolution**

The controversies about devolution did not end with the adoption of devolution in the 2013 Constitution. They have continued to characterise the new constitutional dispensation period. One of the key questions that has dominated the debates is

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<sup>49</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies (2018) 195.

<sup>50</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 177.

whether there is devolution in the 2013 Constitution. This question has been answered in the above section which came to the conclusion that there is devolution in the 2013 Constitution although it has been ‘fudged’. There seems to be general consensus on this view, particularly in the post-Mugabe era. However, there are several contradictory views emerging from different political, economic and societal circles on the issue of devolution and how it should be implemented. This section briefly looks at these key points of discussion.

### **5.1. The meaning of devolution remains unclear**

The first bone of contention is the meaning of devolution. The 2013 Constitution mentions the word devolution about five times but nowhere does it define it. The meaning of devolution is therefore subject to interpretation. Various persons and formations in Zimbabwe have tried to define devolution. Some define devolution as the delegation of governmental powers and responsibilities to subnational governments. This is wrong, as devolution is not the same as delegation.<sup>51</sup> Devolution is also perceived as nothing more than giving decision makers stationed at provincial and local administrative levels the authority to make decisions while primary accountability remains with the centre. This is essentially deconcentration which is not synonymous with devolution. Others equate devolution with federalism, an arrangement of government where federating units are almost on a par with the federal government. This is incorrect, even though devolution can take place in a federation, as stated above. As long as there is no consensus on the meaning of devolution, there is little basis for its effective implementation.

### **5.2. The objectives of devolution are contested**

The objectives of devolution are important as they dictate its nature and scope.<sup>52</sup> Despite the fact that the 2013 Constitution explicitly recognises the objectives of devolution, as stated above, they remain contested. The governing party, opposition political parties, civic groups and other political and economic organisations ascribed different objectives to devolution.

President Mnangagwa and his administration have been unequivocal about the implementation of devolution of an economic nature to drive economic development. In terms of this model, it is reported that the provincial Ministers for the ten provinces are expected to drive economic devolution which will see the disaggregation of the Gross Domestic Product (GDP) to the provincial level for competitiveness purposes.<sup>53</sup> The 2019 national budget presented by the Minister

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<sup>51</sup> For the distinction between devolution and delegation, see Bockenforde M ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 47.

<sup>52</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 183.

<sup>53</sup> See Government of Zimbabwe, ‘Address by the President of the Republic of Zimbabwe his Excellence, Cde E.D. Mnangagwa, on the occasion of the State of the Nation Address and the official opening of the first session of the Ninth Parliament of Zimbabwe, 18 September 2018; The Sunday mail, ‘Government finalises details for devolution’.

responsible for finance, Prof Mthuli Ncube, on 22 November 2019, echoed the economic dimension of devolution to be implemented at the provincial level. In his budget speech, Minister Ncube stated that provinces would be required to plan economic growth and development, factoring in their provincial resources, with the national government providing financial support for implementation.<sup>54</sup> This model of devolution ‘also embraces initiatives to facilitate establishment of companies in various districts, in line with the thrust to enhance production in respective provinces, with the long established Growth Points being epicentres of this developmental thrust’.<sup>55</sup> Thus, it seems that what the Mnangagwa government wants to implement is devolution but not of a political nature. The key question is whether any form of devolution that lacks political aspects will go far enough in addressing the economic and political challenges that the country is facing.

Others view devolution as not just an economic solution but also a political one. This is based on the belief that different political formations may have much to gain if devolution is implemented. Devolution can solidify the political bases of political parties, including the ZANU-PF and the MDC, at the provincial and local levels. With its two-thirds majority in Parliament obtained in both the 2013 and 2018 elections, Moyo and Ncube argue that ‘it is also possible that ZANU-PF may decide to capitalise on its electoral gains and implement devolution to its fullest so as to create a buffer zone against the MDC opposition who have previously combined advocacy for devolution with criticising ZANU-PF’s policies’.<sup>56</sup> It may be unsustainable for the ruling party to negate subnational politics. But for politics to be sustainable at the subnational level, even for ZANU-PF, real powers and resources ought to be devolved to that level. As for the MDC, like any other opposition political party, with political power and resources at the subnational level made possible by devolution, it will no longer be about just eyeing presidential and parliamentary seats. Equally attractive political positions can be found at the subnational level. In this regard, devolution can be a potential solution to the current winner takes all system in Zimbabwe where political parties are left with no choice but to try to win national elections at all costs. Putting all one’s eggs in the national basket heightens the competition for national political positions whether presidential or parliamentary. Political parties, especially smaller ones, and independent candidates, which/who often lack the muscle to challenge for national positions can often do so effectively at the subnational level. It is thus unsurprising that calls for the implementation of devolution are coming not only from the dominant political parties but also from smaller ones. Going beyond the benefits to political parties which are key drivers of democratic pluralism, a devolved form of government ‘creates vertical checks and

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<sup>54</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, ‘Austerity for Prosperity, 22 November 2018, pp 52.

<sup>55</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, ‘Austerity for Prosperity, 22 November 2018, pp 52.

<sup>56</sup> Moyo P and Ncube C ‘Devolution of power in Zimbabwe’s new constitutional order: Opportunities and potential constraints’ (2014) 296.

balances that can constrain the central and subnational governments' attempts to overstep or abuse their powers'.<sup>57</sup> Such oversight has been lacking in Zimbabwe since independence.

Civic groups and other community based organisations are also pushing for devolution on several grounds. The devolution of governmental powers, responsibilities and resources is expected to have a positive impact on the lives of ordinary people. The argument is that devolution promotes 'development by bringing government closer to the people to ensure that development projects reflect regional and local preferences and that resources are spread more equitably across the country'.<sup>58</sup> Thus, civic groups believe that devolution will be a game changer in addressing the existing unresponsive public service delivery system and wide-spread poverty, among other ills. A devolved form of government is likely to make it easier for civic groups to engage and collaborate with governments that are physically closest to the people. It is also hoped by 'establishing democratic governance at subnational level to provide a legitimate basis for local government, [devolution will enable the] democratic ethos to permeate the entire polity from the bottom up'.<sup>59</sup>

A devolved form of government offers multiple political, economic and social spaces that allow for the accommodation of diversity and continuous negotiation between the centre, subnational governments and local communities.<sup>60</sup> Such accommodation and negotiation can be effective in promoting intergroup harmony and thus reinforce peace.<sup>61</sup> In most countries where devolution has been put on the table, there are always extremists that often push for devolution as the foundation for the creation of an independent State - often referred to as separatist movements.<sup>62</sup> It is usually hoped by these movements that, with the measure of self-government which devolution may give, a platform for the establishment of an independent State can be found. Zimbabwe is no different with some groups calling for a separate State.

It is clear that the 2013 Constitution only permits devolution for the advancement of genuine national and local interests, while the peace, national unity and indivisibility of the Republic remain intact.<sup>63</sup> Unlike the Constitution of Ethiopia,<sup>64</sup>

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<sup>57</sup> Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 4.

<sup>58</sup> See Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 184.

<sup>59</sup> See Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 184.

<sup>60</sup> Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 5.

<sup>61</sup> See Bockenforde M 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 4, Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 184.

<sup>62</sup> These movements are common in countries, such as, Spain, Kenya, Somalia and Ethiopia.

<sup>63</sup> See section 265(1)(e) of the Constitution.

<sup>64</sup> See article 39(1) of the Constitution of Ethiopia. The provision provides that "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession". Thus, the right is not only given to regions or provinces but also to individual ethnic groups.

the Constitution of Zimbabwe does not allow secession of any province or region. Thus, any hopes for the creation of two independent states cannot be accommodated within the current constitutional prescriptions. The potential threat posed by these extremists should however not be a reason for not devolving power. Besides being over-exaggerated, the threat can be countered by a supervisory regime common under a multi-level system of government.<sup>65</sup> Thus, as it stands, devolution can present a win-win situation for political parties, civic groups and citizens in general.

### **5.3. Devolution to the provincial level is, unsurprisingly, contested**

The issue of devolution to the provincial level is perhaps the most controversial one. The place and role of provincial and metropolitan councils have not been settled. As stated above, the Constitution defines them as a tier of government that constitutes the provincial tier. The Constitution however does not go further in giving these councils real powers that are usually synonymous with a government - taxing, legislative, and executive powers. As stated above, it merely provides that provincial and metropolitan councils are responsible for socio-economic development without really defining what this entails. What is the extent of executive authority at the provincial level? Are provinces authorised to make resource allocation decisions and vary budgets, among other spending decisions? Will provincial and metropolitan councils supervise local government? If so, what form of supervision will that be? Is it going to be concurrent supervision with the national government? All these questions remain unresolved and are a bone of contention. It is reported in the State media that the ZANU-PF-led government is 'prepared to cede significant administrative, political, market and fiscal power to provinces'.<sup>66</sup> If that is the case, such devolution will, among other things, allow provincial and metropolitan councils to plan and implement policies with their own administrative machinery.

It is reported in the State media that each of the ten provinces will be 'assigned specific economic responsibilities in order to individually contribute to national economic development'.<sup>67</sup> It is further reported that 'Harare Metropolitan will be Zimbabwe's ICT nerve centre, while Bulawayo Metropolitan will be the country's industrial hub. Manicaland province will be the diamond beneficiation centre, with Midlands the iron and steel value-chain beneficiation centre'.<sup>68</sup> The question is: can such economic devolution succeed without, for example, political and administrative devolution? This question is critical given the evidence that devolution is likely to be effective where there is a minimum level of democratic

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<sup>65</sup> See Moyo P and Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 298.

<sup>66</sup> See The Sunday mail, 'Government finalises details for devolution'.

<sup>67</sup> See The Sunday mail, 'Government finalises details for devolution'.

<sup>68</sup> See The Sunday mail, 'Government finalises details for devolution'.

content and administrative autonomy, among other issues.<sup>69</sup> Moyo and Ncube argue that there are fears that provincial ministers, who are political appointees, may suppress devolution.<sup>70</sup>

The practice of appointing provincial ministers started in President Mugabe's days, and his successor, President Emmerson Mnangagwa, has continued with the practice. The relationship between provincial ministers and chairpersons of provincial and metropolitan councils has not been clarified. It is feared that these ministers may override decisions made by provincial and metropolitan councils as well as by local authorities even though their role is not specifically provided for in the Constitution, particularly with regards to the organisation of the State at vertical level.<sup>71</sup> It should however be acknowledged that the President was within his powers to appoint ministers for specific portfolios and areas. Whether the role of centrally appointed provincial ministers can sit well in a devolved form of government remains debatable.<sup>72</sup> What is not in dispute is that such a role neutralises the checks and balances between the national and provincials governments that a devolved form of government is supposed to offer. An easier way of resolving this tension is to abolish the position of provincial ministers and reallocate their duties to chairpersons of provincial and metropolitan councils. Alternatively, the provincial ministers can be elected as chairpersons of provincial and metropolitan councils in their respective provinces.

Other sections of Zimbabwean society, including civil society, political parties and the general citizenry, are advocating for provincial and metropolitan councils to be empowered with real law and policy making and implementation powers accompanied by the necessary resources. This option, if chosen, should be feasible given that the Constitution provides the relevant framework which allows provincial and metropolitan councils to be 'real' governments.<sup>73</sup> What is required is the political will to implement it by, among other things, enacting the relevant laws and policies.

There are indications from the ruling party that it is considering amending the Constitution to reform the provincial structure. The objective of the proposed amendments is not yet clear. Is it about reducing the costs associated with implementing a fully-blown provincial structure as previously proposed by the former Minister of Finance, Patrick Chinamasa, when he presented the 2018 national

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<sup>69</sup> See Moyo P and Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 293.

<sup>70</sup> Moyo P and Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 300.

<sup>71</sup> Moyo P and Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 300.

<sup>72</sup> See Nyathi M and Dube M 'The Myth of Devolution in Zimbabwe: The Reality Post - May 2013' (2017) 39-40.

<sup>73</sup> For instance, section 270(1)(f) of the Constitution allows provincial and metropolitan councils to exercise any form of government power - legislative, executive and resource-raising - provided such powers is decentralised to them under an Act of Parliament.

budget? Or it is about making provincial and metropolitan councils more viable by giving them more powers and resources? It could also be about making these councils genuine institutions to represent provincial interests by, inter alia, abolishing the requirement that parliamentarians must also be members of provincial and metropolitan councils in their respective provinces.

The debate is not only about the place and role of provinces but also about the number of provinces. Some are arguing that the current ten provinces provided in the Constitution are too many, especially if they are going to be more than administrative units, as was the case under the previous constitutional order. The names of the provinces which reflect ethnic undertones have also received attention; there is an argument for the use of neutral names. The argument is that ethnic based naming of provinces and delineation of respective provincial boundaries can provide a base for political mobilisation on the basis of ethnicity which may exacerbate internal ethnic conflict.<sup>74</sup> Thus, devolution to the provincial level is, unsurprisingly, contested and controversial.

#### **5.4. Devolution to local government**

The Constitution also requires devolution to the local level.<sup>75</sup> However, the current debates on devolution in Zimbabwe are significantly and unfairly related to the provincial and metropolitan councils as opposed to local authorities. It is as if local authorities are already exercising exclusive devolved powers or that they do not require such powers, which is not the case. It may be because there is lack of clarity of what devolution to local authorities would entail. Is it about resources or about widening the discretionary powers of local authorities or both? Others believe that local authorities are no more than agencies of the national government charged with service delivery. This entails that the national government can willy-nilly take back powers and responsibilities assigned to local authorities. Yet the Constitution provides that every local authority, urban or rural, has the right to govern its area and affairs with 'all' the necessary powers to do.<sup>76</sup> The 'right' terminology, which is not used in reference to any other tiers of government, suggests that, under the new constitutional order, local authorities are more than extensions of the national government. They are a level of government that should make and implement policies and laws, as well as make expenditure decisions independently of the national government.<sup>77</sup>

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<sup>74</sup> See Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies (2018) 184, Bockenforde M, 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 4.

<sup>75</sup> See Preamble of Chapter 14 and section 264(1) of the Constitution which requires devolution to the local level.

<sup>76</sup> See section 276(1) of the Constitution.

<sup>77</sup> See Chigwata TC et al 'Ministerial Directives to Local Government in Zimbabwe: Top-Down Governance in a Decentralized Constitution' (2017) 42-46.

## 5.5. Calls for devolution to communities for locally driven development

There are calls for devolution to go beyond the provincial and local government levels to communities themselves. This is an interesting angle that resonates with the principle of subsidiarity which requires that governmental functions be exercised at the lowest level unless there is a convincing case for them to be exercised at a higher level.<sup>78</sup> It is based on the premise that governmental powers belong to the people and that only when the people are not in a position to exercise those powers for the public good should they be assumed by the appropriate level of government. If properly designed and implemented devolution may bring an “economic dividend” that accrues to regions or territories that are perceived to be disadvantaged by centralised models of development’.<sup>79</sup> Thus, devolution has the potential to address concerns regarding marginalisation common in provinces, such as, Bulawayo, Matabeleland North, Matabeleland South and Manicaland. If provinces, local authorities and communities are adequately empowered through devolution, then policy competition, policy experimentation and policy innovation that usually come with development benefits may take root.<sup>80</sup>

## 6. Implementing devolution: key issues for consideration

International practice suggests that the ‘effectiveness of any system of decentralisation depends as much on its design as it does on the political will of the government and the readiness of its political and administrative officials to implement it’.<sup>81</sup> Thus, besides the issue of the design of devolution ‘leaders at each level of government must commit themselves to the concept, particularly the national leaders, who must relinquish power and authority’.<sup>82</sup> The centrality of political and administrative will of national officials to the success of a decentralisation programme was nowhere better demonstrated than during President Mugabe’s reign in power when devolution remained on paper for close to five years. This is despite the fact that the Constitution requires that ‘all constitutional obligations [including the implementation of devolution] must be performed diligently and without delay’.<sup>83</sup> The post-Mugabe period has been characterised by a relatively different tone to the issue of devolution particularly in ruling party circles.

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<sup>78</sup> UN-Habitat ‘International guidelines on decentralisation and the strengthening of local authorities’ (2007) 4.

<sup>79</sup> Moyo P and Ncube C ‘Devolution of power in Zimbabwe’s new constitutional order: Opportunities and potential constraints’ (2014) 296.

<sup>80</sup> See Bockenforde M ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 10.

<sup>81</sup> Fombad C ‘Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies’ (2018) 195.

<sup>82</sup> Bockenforde M, ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 9.

<sup>83</sup> See section 324 of the Constitution.

In the run-up to the 2018 harmonised elections, almost all political parties, including President Emmerson Mnangagwa-led ZANU-PF campaigned partly on the basis of devolution.<sup>84</sup> When the re-election of President Emmerson Mnangagwa was certified by the Constitutional Court, the new administration did not waste time to proclaim the decision to implement devolution. The new administration declared the birth of the ‘Second Republic’ under which the State will be organised on the basis of devolution.<sup>85</sup> At the official opening of the First Session of the Ninth Parliament on 18 September 2018, President Mnangagwa declared that the ‘constitutionally enshrined provisions of devolution of [g]overnment powers and responsibilities will be implemented’.<sup>86</sup> The reform of key provincial and local government legislation, such as, the Regional Town and Country Planning Act, the Rural District Councils Act, and the Provincial Councils and Administration Act, has been placed on the legislative agenda of Parliament. With regards to the operationalisation of the provincial tier of government, the President stated:

The Provincial and Metropolitan Councils Bill will facilitate the devolution of governmental powers and responsibilities to Provincial and Local Authorities. Through this Bill, Provincial and Metropolitan Councils will be reconfigured in accordance with Chapter 14 of the Constitution. This will further seek to facilitate enhanced coordination between Central Government, Provincial Councils and Local Authorities, within the context of the decentralisation and devolution programme.<sup>87</sup>

The President also touched on the key issue of decentralising resources to the local level. He stated that ‘the Public Finance Management Act will be amended to facilitate the allocation of sufficient resources for basic social services and economic development at the local level’.<sup>88</sup> The need to implement devolution has subsequently been echoed in various government policy documents. On 5 October 2018, the government adopted its new blueprint, the Transitional Stabilisation Programme and Reforms Agenda, which covers the period October 2018 to December 2020. The blueprint provides various measures which the new administration is going to implement to change the socio- and economic environment in order for Zimbabwe to attain the status of a ‘prosperous and empowered upper middle income society by 2030’. A key feature of this plan is devolution of governmental powers,

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<sup>84</sup> See *The Sunday Mail*, ‘Government finalises details for devolution’, 2 September 2018. Available at <<http://www.sundaymail.co.zw/government-finalises-details-for-devolution/>> 1/> accessed 25 October 2018.

<sup>85</sup> See *The Sunday Mail*, ‘Government finalises details for devolution’.

<sup>86</sup> Government of Zimbabwe, ‘Address by the President of the Republic of Zimbabwe his Excellence, Cde E.D. Mnangagwa, on the occasion of the State of the Nation Address and the official opening of the first session of the Ninth Parliament of Zimbabwe, 18 September 2018.’

<sup>87</sup> Government of Zimbabwe, ‘Address by the President of the Republic of Zimbabwe his Excellence, Cde E.D. Mnangagwa, on the occasion of the State of the Nation Address and the official opening of the first session of the Ninth Parliament of Zimbabwe, 18 September 2018.’

<sup>88</sup> Government of Zimbabwe, ‘Address by the President of the Republic of Zimbabwe his Excellence, Cde E.D. Mnangagwa, on the occasion of the State of the Nation Address and the official opening of the first session of the Ninth Parliament of Zimbabwe, 18 September 2018.’

responsibilities and resources with a key focus on provinces. A section of the plan titled 'Empowerment of Provinces' reads:

84. While Zimbabwe remains a unitary State, the implementation of the country's development programmes will allow for devolution to achieve fair and balanced development, spearheaded by Provincial Councils which will initiate development programmes for their respective Provinces, consistent with Section 264 of the Constitution.

85. The Transitional Stabilisation Programme outlines targeted programmes to champion economic development across the Provinces, including the big cities such as Harare and Bulawayo.

86. This represents a new Governance Dispensation where decentralisation becomes a key feature and strategy for fair and just governance across its four dimensions, namely administrative, political, fiscal and market.

87. To this end, the Civil Service Commission will facilitate the transfer of the requisite functions and establish the structures and systems that will enable all Provinces to plan and implement their economic growth and development using their factor endowments.<sup>89</sup>

The proposed reforms focusing on the provincial level and devolution at large, are also recognised in the 2019 Pre-Budget Strategy Paper published by the National Treasury in October 2018.<sup>90</sup> The Paper emphasises the need for local authorities to begin to be more visible in 'service delivery and investment promotion'.<sup>91</sup> The fact that the blueprint and the Pre-Budget Strategy Paper are relatively 'talking to each other', may also be indicative of the fact that there is now the political and administrative will to implement the provincial tier of government and devolution in general. The 2019 national budget presented by the Minister responsible for finance on 22 November also speaks to devolution and the operationalisation of provincial councils. The national government has committed to allocate an estimated US\$310 million to provincial councils in the 2019 financial year as part of the five per cent subnational and local governments are entitled to in each financial year.<sup>92</sup> It is not clear whether the omission of metropolitan councils was deliberate, or, whether they were indeed factored into this allocation. The Minister indicated that the actual allocations to provinces will require Cabinet approval to ensure that these allocations 'target addressing pockets of marginalisation in Provinces and Districts'.<sup>93</sup> What is the rationale for requiring such approval? This requirement is

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<sup>89</sup> Government of Zimbabwe, Transitional Stabilisation Programme and Reforms Agenda, October 2018-December 2020, *Towards a Prosperous and Empowered Upper Middle Income Society by 2030*, 05 October 2018, Harare, pp21.

<sup>90</sup> National Treasury, 2019 Pre-budget Strategy Paper, *Towards a Prosperous and Empowered Upper Middle Income Society By 2030* October 2018, Harare, (2018) 66-67.

<sup>91</sup> National Treasury, 2019 Pre-budget Strategy Paper, (2018)66.

<sup>92</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, 'Austerity for Prosperity, 22 November 2018, pp 52.

<sup>93</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, 'Austerity for Prosperity, 22 November 2018, pp 53.

without a doubt an indication that while provinces can determine their own development priorities, it is the national government that have the final say since Cabinet can veto expenditure prioritisation proposed by a province. This does not augur well for the principle of devolution, which entails diffusing policy making and implementation powers, including over expenditure decisions, to the subnational level. Thus, it is not clear whether President Mnangagwa's government is at this point certain of the nature of devolution it seeks to implement and how to implement it, and importantly, whether the preferred form of devolution is capable of achieving the desired outcomes. This could be clarified in the anticipated law and policy reforms.

There is no doubt that the 2013 Constitution positions devolution as one of the potential solutions to the challenges of development, democracy and peace in Zimbabwe. This recognition is based on the fact that devolution has great promise on several fronts. The potential of devolution to promote development, democracy, national integration and peace is widely documented.<sup>94</sup> Given this potential, and against the background of the challenges being experienced, it becomes paramount for Zimbabwe to implement devolution without delay. The question of how to implement devolution is perhaps one of the most critical, given that a significant number of provisions on devolution are ambiguous. Given this lack of clarity, the solution to effective implementation lies in utilising the constitutional intent to devolve and avoid over centralisation of power. This will involve, among other things, going beyond the literal meaning of constitutional provisions and looking at the spirit of the Constitution and the intention of its drafters. Such a purposive approach to interpretation is increasingly used in countries that have constitutions which are the outcome of laboured constitutional negotiations, such as, Kenya and South Africa.<sup>95</sup>

The second key implementation issue is that the practice throughout the modern world is that policy reforms are increasingly being informed by data, facts or

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<sup>94</sup> See Fombad C 'Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies' (2018) 176, 184; Moyo P and Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 297, Bockenforde M 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 4 .

<sup>95</sup> In *Speaker of the Senate and another v Hon. Attorney-General and others* [2013] eKLR, at para 156, the Chief Justice Of Kenya, Mutunga W, remarked that 'constitution-making requires compromises which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilises vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the Courts to illuminate legal penumbras that constitutions borne out of long drawn compromises ... tend to create. The constitutional text and letter may not properly express the minds of the framers, and the mind and hands of the framers may also fail to properly mine the aspirations of the people. The limitation of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searching for the illumination and elimination of these legal penumbras'.

evidence. Devolution (provincial and local government) is no different. A vision of provincial and local government should be developed first, before the design issues are dealt with. In South Africa, even though the 1996 Constitution had provided a framework for local government, in 1998, the Government of South Africa, through the Department of Provincial Affairs and Constitutional Development, developed the White Paper on Local Government, which was an outcome of a research based and consultative process.<sup>96</sup> After its adoption by the South African Cabinet, legislation was then prepared to enact the policy directions provided in the White Paper. Kenya has also developed and adopted several policy papers on devolution that were used as the basis for implementing devolution, including the enactment of different enabling pieces of legislation.<sup>97</sup>

The design of a multi-level form of government, such as devolved form of government, in a constitution or otherwise, is always a response to both contextual and programmatic drivers. The choice of a particular form of multi-level government is determined by historical and political contexts. It is often also informed by the desire to achieve certain objectives, such as, realising development, deepening democracy, or building peace.<sup>98</sup> Decades of research on various decentralisation programmes and initiatives around the world has produced a body of knowledge on design features and their implementation that are likely to impact the success of the multi-level government construction in achieving such outcomes. Some of these design features or principles have been recognised by international bodies, such as, the United Nations, the Commonwealth, the African Union and the European Union.<sup>99</sup> This body of knowledge, together with the constitutional framework on devolution, can be useful in shaping the development of a framework on provincial

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<sup>96</sup> The drafting of the White Paper on Local government was a multi-stage process. Initial consultations, issue-focused research processes, and provincial and local workshops resulted in the Green Paper on Local Government which was published for public comments in October 1997. The Portfolio Committee on Local Government then arranged for hearings, a local government summit, public submissions and sectoral consultative conferences leading to the adoption of the White Paper. The White Paper covers several key areas, such as, developmental local government, cooperative government, political systems and municipal finance. See the Government of South Africa, Department of Provincial and Constitutional Development, White Paper on Local Government, March 1998, Pretoria.

<sup>97</sup> See Taskforce on Devolution in Kenya (2011). 'Interim Report of the Task Force on Devolution in Kenya', Task Force on Devolution in Kenya, Nairobi; Office of the Deputy Prime Minister and Ministry of Local Government, 'Final report on devolved government in Kenya, A report on the implementation of devolved government in Kenya' Volume 1, Nairobi; Ministry of Devolution and Planning (2016) 'Policy on devolved system of government' October 2016, Nairobi.

<sup>98</sup> See Bockenforde M 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 4.

<sup>99</sup> See African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development', adopted in 2014 by the Twenty-Third Ordinary Session of the African Union held in Malabo, Equatorial Guinea; the Commonwealth Local Government Forum 'Time for local democracy, the Aberdeen

Agenda: Commonwealth principles on good practice for local democracy and good governance', adopted

in 2005 by Commonwealth member countries in Aberdeen, Scotland; the Council of Europe, European Charter of Local Self-Government, Strasbourg, 15.X.1985; and UN-Habitat 'International guidelines on decentralisation and the strengthening of local authorities' (2007)

and local government (devolution) in Zimbabwe. Such a framework should, among other things, identify and clarify the place and role of provincial and metropolitan councils, define what devolution to local authorities will entail, clarify the parameters of fiscal devolution and revenue sharing, and define how the principles of supervision, local autonomy and co-operation can be balanced.

### **6.1. Identify and clarify the place and role of provinces**

The above discussion has shown that there is no coherent approach to assigning powers and responsibilities to provincial and metropolitan councils whose composition is also the subject of debate. Thus, the starting point of implementing the provincial structure should be to clarify or identify the place and role of provincial and metropolitan councils in Zimbabwe's multi-level system of government. If the objective is to make these councils real governments, then real governmental powers and responsibilities must be devolved to them. In addition, Nyathi and Dube argue that provincial structures should be directly elected by the people of the respective provinces so that they can be genuinely autonomous from the centre.<sup>100</sup> The abolition of the representation of national government officials (such as parliamentarians) in provincial and metropolitan councils may be the starting point towards that end. If the decision to make these councils real governments is taken, then the number of provinces and the basis for delineating provincial boundaries<sup>101</sup> are some of the many issues which may be reconsidered. Whether the chosen number of provinces should exercise uniform powers and undertake similar responsibilities is another important matter for consideration.<sup>102</sup>

Another option is for provincial and metropolitan councils to be positioned merely as intergovernmental relations structures that are charged with promoting cooperative governance and co-ordinating government programmes including integrated planning and implementation. If the provincial and metropolitan councils are no more than intergovernmental relations structures then there is no need to constitutionally recognise them as tiers of government. It follows from this reasoning that such structures should not be given real government duties of making expenditure decisions and implementing them as they may be unequipped in democracy terms to do so. The current composition of the councils is compatible with such intergovernmental relations duties;<sup>103</sup> but the function of socio-economic development suggests that the councils are more than intergovernmental relations structures. If the benefits associated with devolution are to be realised, the temptation to have provincial and metropolitan councils that look like a government yet are not, should be ignored. In the 2019 Budget Speech, Minister Ncube indicated that the principles of the Provincial Councils and Administration Amendment Bill, which provides for mechanisms of decentralisation and devolution had been

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<sup>100</sup> Nyathi M and Dube M 'The Myth of Devolution in Zimbabwe: The Reality Post - May 2013' (2017) 39-40.

<sup>101</sup> Identity versus economic viability or both.

<sup>102</sup> Symmetric versus asymmetric decentralisation issue.

<sup>103</sup> See Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 406-407.

approved by Cabinet.<sup>104</sup> It was unclear at the time of writing (December 2018) what the principles entail, particularly whether provincial and metropolitan councils are being positioned as a level of government or merely as an administrative level.

## **6.2. Devolution of powers to local authorities**

Worldwide, the issue of devolution to the provincial or regional level ‘typically involves a struggle over controlling and balancing power’.<sup>105</sup> On the other hand, devolution to the local level is more often concerned with service delivery. Thus, the contentious issue of devolution to the provincial level in Zimbabwe should not obscure the fact that to local authorities there are genuine service delivery problems to address. Devolution to the local authorities is about putting local government at the forefront of State delivery and giving it the necessary powers and resources to do so. With the advent of the 2013 Constitution, it should be relatively less difficult to implement devolution to local authorities. What is required is the abolition or reform of all the legislative provisions, practices and institutional make-up that unjustifiably limit the right of local authorities to govern their respective areas. For instance, legislative and policy prescriptions that empower the national minister responsible for local government to reverse council resolutions, and require his or her approval before a council can implement certain decisions, will be an obvious target for reform. Others relate to by-law making, the budget process, and employment of staff.<sup>106</sup> The objective is to ensure that local authorities enjoy a certain measure of discretion when undertaking their functions and that the national government is not in a position to macro-manage local affairs unless there are big problems that warrant such intrusive forms of supervision.

## **6.3. Devolution of fiscal powers and revenue sharing**

There is no doubt that the quest for devolution is more than giving provincial and local governments responsibilities. It is also about ensuring that resources needed for development are devolved not only to the provincial and local levels of government but also to the people so that they can lead their own development. With regards to provincial and local governments, it is about ensuring that these governments have a sound financial base, through taxing powers, tax bases and intergovernmental grants, to deliver on their obligations, as required by the Constitution.<sup>107</sup> A review of the current resource raising powers of local government will be required to enhance their revenue raising potential. The re-centralisation of the collection of certain taxes, licences or charges over the years requires reconsideration.<sup>108</sup> If no additional resource raising powers are devolved, then the question of the nature and adequacy of intergovernmental grants becomes

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<sup>104</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, ‘Austerity for Prosperity, 22 November 2018, pp 53.

<sup>105</sup> Bockenforde M, ‘Decentralised forms of government’ in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 9.

<sup>106</sup> See Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 450.

<sup>107</sup> See section 264(2)(f) of the Constitution.

<sup>108</sup> These include the collection of vehicle license fees and land levies in rural areas.

important. The consultation and participation of provincial and local governments in the process that leads to the determination of these grants is crucial as they affect their financial sustainability.<sup>109</sup> Equally critical are the criteria for vertical and horizontal sharing of revenue to ensure equitability. In the 2019 national budget, Minister Ncube introduced an ‘interim formula’ of sharing revenue among provinces in the 2019 financial year.<sup>110</sup> The formula, which is considered by the government to be ‘simplistic and objective’ will involve the consideration of three main components: population profile, poverty profile and infrastructure quality and deficit. The ‘interim formula’ may not be a bad starting point. What is left is its proper implementation.

#### **6.4. Balancing supervision and local autonomy**

Devolution cannot succeed without the national government (and in some instances, provincial governments) supervising the activities of lower governments. As observed above, supervision takes many forms, namely, regulation, monitoring, support and intervention.<sup>111</sup> Executive or administrative interventions into subnational or local government are the most intrusive forms of supervision. Whether or not this instrument can co-exist with local discretion in a system of multi-level government can only be assessed with reference to the checks and balances that surround these instruments, and how much legal strength they are accorded. The arbitrary removal of subnational or local elected officials or the takeover of subnational or local functions will undermine the multi-level government system. Important questions therefore are: What are the criteria for intervention? Does the system provide for review of an intervention by an independent institution? If its limits and extent are adequately defined and acknowledged in policy and law, particularly the higher law, supervision not only protects the autonomy of subnational or local governments but also clarifies the role of the national government. Thus, if a devolved form of government is to work well in Zimbabwe, there is a need to balance the requirement for supervision and the need for local autonomy.<sup>112</sup>

#### **6.5. Co-operative governance**

The devolution debate is not complete without addressing the question of how the devolved units, whether at provincial or local levels, will engage with each other as well as with the national government. Once governmental powers, responsibilities and resources have been devolved it does not mean that governments organised at various levels or within the same level will have to operate independently of each

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<sup>109</sup> See UN-Habitat ‘International guidelines on decentralisation and the strengthening of local authorities’ (2007)9.

<sup>110</sup> Government of Zimbabwe, The 2019 Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, ‘Austerity for Prosperity, 22 November 2018, pp 53.

<sup>111</sup> See Chigwata TC et al ‘Ministerial Directives to Local Government in Zimbabwe: Top-Down Governance in a Decentralized Constitution’ (2017) 42-46.

<sup>112</sup> See Chigwata TC et al ‘Ministerial Directives to Local Government in Zimbabwe: Top-Down Governance in a Decentralized Constitution’ (2017) 43, 55.

other at all times. As stated above, tiers of government will have to work together so that government as a whole delivers.<sup>113</sup> Given that local governments are unlikely to be in position to engage meaningfully with higher tiers of government, with the exception of big cities, it may be prudent to recognise and provide a role for organised local government.<sup>114</sup> The Zimbabwe Local Government Association (ZILGA), the Urban Councils Association of Zimbabwe (UCAZ) and the Association of Rural District Councils of Zimbabwe (ARDCZ) are recognised as the bodies that represent local authorities in Zimbabwe. Evidence from across the world suggests that, with sufficient resources and the right mandate, such associations can be effective in representing and protecting the interests of local authorities. Thus, how co-operative governance will be promoted under a devolved set-up is one of many issues that deserve attention.

## 8. Conclusion

The 2013 Constitution is pregnant with an intent to devolve governmental powers, responsibilities and resources to the provincial and local levels. While the intent is there, there are no corresponding hard rules on devolution that cut across the political, administrative and fiscal aspects of decentralisation. A significant number of provisions on devolution are ambiguous and incapable of being self-enforcing. Whereas the 2013 Constitution may not be perfect, it however enshrines a multi-level system of government instead of levels of administration. The former formulates and implements laws and policies while the latter is a mere implementation machinery. The basic principle that can be deduced from the 2013 Constitution is that governmental power, positions and resources must be shared at horizontal and vertical levels. This entails, among other things, that some of what used to be centrally determined under the old constitutional order will now have to be undertaken by local officials or by community groups and citizens themselves. Adjusting to this new constitutional reality is not going to be easy.

Devolution is about power and resources. It is about sharing the national pie and ensuring that citizens have a stake in issues that directly affect them. Naturally, human beings do not want to part with power and resources. Hence, those in control or in charge will always have a tendency to protect their power and positions, and undermine any efforts to share resources. A political culture that values the idea of final authority for certain issues/institutions in the light of 'national interests', as well as the self-interest of leaders, as has been the case in Zimbabwe for long, do not make the situation any easier.<sup>115</sup> This explains why devolution is often difficult and contested. Difficult though devolution may be, countries, such as, Zimbabwe, that are experiencing a deep political and economic crisis, cannot turn to centralisation and personalisation of power which is partly behind this crisis. Hence,

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<sup>113</sup> Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 389.

<sup>114</sup> Chigwata TC *Provincial and local government reform in Zimbabwe* (2018) 421.

<sup>115</sup> See Bockenforde M, 'Decentralised forms of government' in Bockenforde M, Hedling N and Wahin W (eds) *A practical guide to constitution building* (2011) 9.

it is a duty of every Zimbabwean to fight for a form of government that will truly benefit ordinary citizens. Devolution, among other interventions, can be useful in ensuring that Zimbabwe achieve its vision of attaining the status of an upper middle income society by 2030.

It should be noted that a half-baked devolution programme is just a waste of time and resources. Thus, the design of the devolution programme is always important, as much as its implementation. Whether this requires constitutional or/and legislative reforms is something that can only be determined once a vision for devolution in Zimbabwe has been set by a participatory and consensus driven process. Implementing devolution will not be an event, it will take some time. It will require continuous commitment from those in power and support from those without, including ordinary citizens.

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