**Separation of Powers**

Introduction

The doctrine of separation of powers was touched on in an earlier Constitution Watch. It is one of the essential elements of the rule of law, because without a proper separation of powers the rule of law will be imperilled, but the doctrine has a wider application and this Constitution Watch will examine it in greater detail. It will be seen that although the doctrine represents an ideal which cannot be put into practice absolutely, it does emphasise the need to provide adequate checks and balances within the governmental system.

Doctrine of Separation of Powers

In essence, the doctrine of separation of powers is that for a free and democratic society to exist there must be a clear separation between the three branches of government, namely:

**The Executive**, which is the branch that executes the business of government. It comprises the President, Vice-Presidents and Ministers, the Public Service, the Defence Forces, the Police Force and other law-enforcement organisations. All the administrative, law-enforcement and coercive organs of the State fall within the Executive Branch, making it potentially the most powerful of the three branches of government unless its powers are subject to limitations.

**The Legislature**, which is the law-making branch. In Zimbabwe it consists of the Senate and the House of Assembly.

**The Judicial Branch**, which interprets the law. It comprises judicial officers and the courts over which they preside. In Zimbabwe the courts are divided into superior courts, namely the Supreme Court and the High Court, and the lower courts, which are principally magistrates courts and customary-law courts. There are also specialised courts such as the Administrative Court, the Labour Court and the Fiscal Appeal Court.

If one of these branches encroaches upon the functions of the others, so the doctrine goes, freedom and the rule of law are imperilled. If, for example, the Executive (i.e. the President or a Minister) makes laws and enforces them, then we no longer have the rule of law but rule by a man or woman, and the governmental system will tend towards autocracy and tyranny. In short the doctrine states that, liberty and human rights can flourish only where each branch sticks to its proper role.

**How Each Branch of Government is Appointed**

Logically, the doctrine of separation of powers should extend to the appointment of the members of each branch. For example, according to the strict doctrine of separation of powers the Legislature should not appoint members of the Executive [i.e. Parliament should not elect the President or the Prime Minister]; and for the same reason the Executive should not have a role in electing members of the Legislature. Neither the Executive nor the Legislature should appoint members of the Judiciary, for if they do the Judiciary will lose its independence. And it goes without saying that judges should not appoint the Executive — though that is what may have happened in the United States when the Supreme Court decided the result of the 2000 presidential election.

Who then, according to the doctrine of separation of powers, should appoint members to the three branches of government? In all the principal draft constitutions produced so far — the Kariba draft, the NCA draft and the Law Society draft — it is stated that all legal and political authority derives from the people, so logically the people should elect the President and the Prime Minister as well as all members of Parliament. And judges and other judicial officers should also be directly elected by the people.

**How Each Branch is Financed**

It would be impractical to expect each branch of government to raise its own finances. The financing of all the branches must therefore come from the central government fiscus, and may limit their independence because whichever branch controls the fiscus can starve the other branches of funds. In order to maintain the independence of the different branches, the Constitution could make it obligatory for each branch to be provided with adequate funding to carry out its functions.

Limitations on the Separation of Powers

There is probably no country in the world in which the doctrine of separation of powers is applied strictly and absolutely. There are not always clear dividing lines between administrative, legislative and judicial functions — jurists have wasted oceans of ink and mountains of paper in trying to define those terms precisely — and in a modern State there must be a great deal of co-operation and interaction between the Executive and the Legislature, in particular, if the State’s business is to be efficiently conducted. In modern countries, therefore, there is always some overlapping of functions. For example:

* Legislation has become so far-reaching and complex that Parliament cannot enact all of it. Acts of Parliament must leave details to be filled in by regulations made by other authorities, usually Ministers. Hence the Executive branch must be given some law-making powers. At present all subsidiary legislation must be laid before Parliament, but Parliament has no power to repeal it. It would be closer to the ideal of separation of powers if Parliament did have such a power.
* The role of government has expanded so greatly that many decisions which affect peoples’ lives must be made quickly, and some of these decisions require specialised knowledge which is not possessed by judges or magistrates. Many of these decisions are made by administrative tribunals established by and answerable to Ministers. Hence the Executive branch is increasingly given judicial powers. This is not necessarily undesirable so long as the tribunal obey the basic standards of fairness laid down by the law and so long as the courts are able to review their decisions.
* It is generally recognised that in a legal system such as ours, judges do not just interpret the law. They develop and adapt the law to take account of changing circumstances, and in that way they actually make law. Hence the judicial branch has some law-making or legislative powers, but this power should not go beyond refining and developing existing law.
* In some countries the Head of State is elected by Parliament, not by the people. This is usually the case where the Head of State is non-executive, but in South Africa the executive President is elected by the National Assembly. While this violates the strict doctrine of separation of powers it has the advantage of ensuring that the Executive does not get too powerful and is ultimately answerable to Parliament.
* Few modern constitutions provide for the direct election of judges and magistrates. They are usually appointed, subject to safeguards to ensure their independence, by the Executive or the Legislative branch, or by both branches.

Because there cannot be a complete separation between the different branches of Government, the doctrine of separation of powers can best be defined as a governmental system of separated institutions sharing power fairly between them. Relative powers of each branch should be balanced.

Value of the Doctrine of Separation of Powers

Even though the doctrine of separation of powers cannot be applied absolutely, it retains considerable value.

In the first place, it emphasises the need for a State to have strong independent institutions in order to check arbitrary rule by the Executive. This is particularly important in a country such as Zimbabwe which does not have a long history of democratic rule. The Executive will always try to increase its powers by encroaching on the functions of the other branches of Government, sometimes for the best of motives. Without strong institutions to oppose it these encroachments by the Executive will continue until the other branches lose their power to check it.

Secondly, the doctrine provides a yardstick against which constitutional proposals can be assessed in order to determine whether or not there will be adequate checks and balances within the governmental system to ensure that individual rights are protected.

**Separation of Powers Not the Only Test of a Good Constitution**

As a test for determining whether a constitution or governmental system is good or bad, the doctrine of separation of powers must be applied with caution. It is fair to say that constitutions which completely ignore the doctrine are usually bad ones – one of the branches of government will be found to overshadow the others or liable to do so. But constitutions in which the doctrine is observed are not necessarily good ones. If the doctrine is observed so strictly that the different branches do not co-operate with each other, there may be governmental gridlock. And the doctrine has nothing to say about the nature of the powers that can be exercised by each of the branches within its own sphere. If, for example, all the powers of the Executive are vested in one individual and there are no limits on his or her power, then the State will be a dictatorship or nearly so; and if the Legislature, though completely independent, is not elected by universal suffrage, then the State will be undemocratic; and if judges, though completely independent and irremovable from office, are ignorant and corrupt, then there will be no rule of law. So the doctrine of separation of powers has its limits in determining whether or not a State is well governed. It is only one of several tests to be applied.

**Separation of Powers in Current and Various Draft Constitutions**

We now compare our present Constitution and the three main constitutional proposals that have been put forward since 2000 — the Kariba draft, the NCA draft and the recent Law Society model — to see how far they provide for a separation of powers. (In what follows, the effect of the GPA on the present Constitution will be ignored — it is so vaguely worded that in most cases it obscures what was previously clear, and in any event its effect is only temporary).

**Comparison of Provisions for Separation of Powers
in Present Constitution and Proposed Drafts**

Can the Executive (Head of Government or a Minister) exercise legislative powers?

* *Present Constitution*: Parliament can confer legislative functions on anyone. Under the Presidential Powers (Temporary Measures) Act and the Emergency Powers Act, the President has been given almost unlimited, though temporary, power to enact legislation.
* *Kariba draft*: Legislative authority is vested in Parliament and the President and Parliament may confer legislative functions on anyone.
* *NCA draft*: Only subsidiary law-making powers may be delegated by Parliament, and all subsidiary legislation must be laid before the National Assembly.
* *Law Society draft*: Essentially the same as the NCA draft.

Can the President veto legislation?

* *Present Constitution*: The President has 21 days within which to assent to a Bill passed by Parliament. If he refuses assent, the Bill is returned to Parliament and, if the House of Assembly by a 2/3 majority so resolves, the Bill is sent back to the President. He must then assent to it within 21 days or dissolve Parliament.
* *Kariba draft*: As under the present Constitution, the President may refuse to assent to a Bill within 21 days — but only if he or she has reservations about its constitutionality. If the President refuses assent, the Bill is returned to Parliament and, if a 2/3 majority of both the Senate and the House of Assembly so resolves, the Bill is sent back to the President. He must then assent to it within 21 days.
* *NCA draft*: Very much the same as under the Kariba draft.
* *Law Society draft:* Again, very much the same as under the Kariba draft.

Can the Executive appoint members of Parliament?

* *Present Constitution:* Out of 93 Senators, the President appoints five in his complete discretion; a further 10 are Provincial Governors appointed by the President in his complete discretion; and a further 18 are chiefs who owe their appointment to the President.
* *Kariba draft:* Identical to the present Constitution.
* *NCA draft:* Ten Senators will be chiefs, but the manner in which the chiefs will be appointed is unclear.
* *Law Society draft:* All members of both Houses of Parliament will be elected.

Can the Executive impose taxes?

* *Present Constitution*: Probably not, if the Constitution is properly interpreted, but the President has imposed taxes using the Presidential Powers (Temporary Measures) Act.
* *Kariba draft*: No taxes, duties or levies may be imposed unless they have been authorised by an Act of Parliament, but an Act can allow a Minister to impose them.
* *NCA draft*: No tax, duty or imposition may be imposed except under the authority of an Act of Parliament.
* *Law Society draft*: No tax, duty or levy may be imposed except under specific authority of the constitution or an Act of Parliament.

Must the Executive obey judicial decisions?

* *Present Constitution*: Yes, though the Constitution does not say so expressly. Section 31H(2) requires the President to uphold the Constitution and ensure that all laws are faithfully executed; if he fails to do so the only sanction is impeachment, a political measure. Section 18(1a) requires all public officers to uphold the rule of law.
* *Kariba draft*: Much the same as the present Constitution.
* *NCA draft*: Yes. All organs of the State will have to ensure the effectiveness of the courts, and judicial decisions will bind organs of the State.
* *Law Society draft*: The same as the NCA draft.

Are judges appointed by an independent body?

* *Present Constitution*: No. The President appoints judges after consultation with the Judicial Service Commission, which in any event is dominated by his appointees.
* *Kariba draft*: The President will appoint the Chief Justice and his or her deputy after consultation with the Judicial Service Commission, and other judges either with the approval of the Commission or from a list of names submitted by the Commission. Again, the Commission will be dominated by presidential appointees.
* *NCA draft*: The Chief Justice and the Judge President will be appointed by the President from a list of nominees submitted by the Judicial Services Commission; other judges will be appointed by the President on the recommendation of the Commission. All these appointments will be subject to approval by the Senate. The Commission’s membership will be drawn from a variety of sources.
* *Law Society draft*: Very much the same as the NCA draft. A majority of members of the Judicial Services Commission will be elected by the legal profession.

Is judicial independence guaranteed?

* *Present Constitution*: Yes, expressly by section 79B and indirectly by ensuring that judges can be removed from office only on limited grounds and after a proper investigation, and by stating that their remuneration cannot be reduced while they are in office.
* *Kariba draft*: Very much the same as the present Constitution, though gross incompetence is an additional ground for removing judges from office.
* *NCA draft*: Again, much the same as the present Constitution. Gross incompetence is an additional ground for removing judges, and the procedure for doing so is not specified.
* *Law Society draft*: Also much the same as the present Constitution, though again gross incompetence is an additional ground for removing judges (is some message being sent to our current judges?). As in the NCA draft, the precise procedure for removing judges is not specified, though it must be “fair”.

Can the Executive determine whether and when Parliament sits?

* *Present Constitution*: Yes. The President decides when sessions of Parliament begin, but there must be a session of Parliament at least once every six months.
* *Kariba draft*: Much the same as the present Constitution, but the President will have to summon Parliament within 21 days after each general election.
* *NCA draft*: No. The President will have to summon Parliament within 21 days after an election, and thereafter Parliament will determine when it sits.
* *Law Society draft*: The same as the NCA draft, though the President, on the advice of the Prime Minister, will be able to summon Parliament for special business.

Can the President dissolve or prorogue (i.e. suspend) Parliament at his discretion?

* *Present Constitution:* Yes, he or she can do so at any time in his or her absolute discretion, i.e. without consulting the Cabinet.
* *Kariba draft:* The same as the present Constitution.
* *NCA draft:* No. Parliament will be dissolved only if the National Assembly, by a 2/3 majority, so resolves.
* *Law Society draft:* The same as the NCA draft.

Is the head of government dismissible by Parliament?

* *Present Constitution:* Yes. The President can be impeached and removed from office by a 2/3 majority of both Houses of Parliament. Also, if a 2/3 majority of each House passes a vote of no confidence in the Government, the President must either call a general election, or dismiss the Cabinet, or himself resign.
* *Kariba draft*: Yes, by a 2/3 majority the Senate can impeach the President and remove him or her from office. And if a 2/3 majority of both Houses of Parliament pass a vote of no confidence in the Government, the President must either dismiss the Cabinet or call a general election.
* *NCA draft*: Yes. The Prime Minister, who is Head of Government, can be removed from office by a 3/5 majority of the National Assembly (clause 86). And if the National Assembly, by a 3/5 majority, passes a vote of no confidence in the Government, the Prime Minister must resign.
* *Law Soc*iety draft: The same as the NCA draft, though the majority required for the vote in the National Assembly is 2/3, not 3/5.

Is the Attorney-General or the person responsible for criminal prosecutions independent of the Executive and the Legislature?

* *Present Constitution*: No. He is a non-voting member of the Cabinet and of the Senate and House of Assembly.
* *Kariba draft*: The same as the present Constitution.
* *NCA draft*: Yes. The Attorney-General will be appointed in the same way as judges, will enjoy security of tenure and will not be a member of the Cabinet or either House of Parliament.
* *Law Society draft*: Yes. Though the Attorney-General will be a non-voting member of Cabinet, he or she will not be responsible for criminal prosecutions. The Independent Prosecutor-General, who will be responsible for them, will be appointed in the same way as judges, will enjoy security of tenure and will not be a member of the Cabinet or either House of Parliament.

Conclusion

The present Constitution comes out very badly from this brief survey. The Executive dominates the other two arms of government and there are no effective checks on its power. It is hardly surprising that Parliament has become little more than a rubber-stamp for the President’s policies, and that the Judiciary has ceased to be an effective protector of fundamental human rights.

The Kariba draft comes out little better. The President will have the same power to summon, prorogue and dissolve Parliament as he has at present; he will have the same power to appoint members of the Senate; and, at least potentially, he will enjoy the same wide power to enact legislation. He will not, however, have quite so much freedom to appoint judges so the judiciary may be a little more independent. And, if the judges find the strength to apply it, the Declaration of Rights in the Kariba draft is much more comprehensive than the Declaration in the present Constitution. Criminal prosecutions, however, will remain in the hands of an Attorney-General who is closely linked to the politicians who make up the Executive.

Under both the NCA draft and the Law Society draft there will be greater separation between the three branches of government, and the Legislature and the Judiciary will be more independent. The President will not be able to appoint members of Parliament at all under the Law Society draft, and the NCA draft will allow only 10 chiefs to sit in the Senate. Both Houses of Parliament will be able to decide when and how often they sit. The power of the Executive — the Prime Minister and his or her Ministers — to enact legislation will be more restricted. Judges will be appointed by an independent and transparent process and their judicial autonomy will be better protected than under the Kariba draft.

If, therefore, legal theorists are right in believing that separation of powers in a State guarantees the freedom of its citizens, then the fundamental rights and freedoms of Zimbabweans will be better protected if they adopt a new constitution along the lines of the NCA draft or the Law Society draft, than if they opt for the Kariba draft.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_