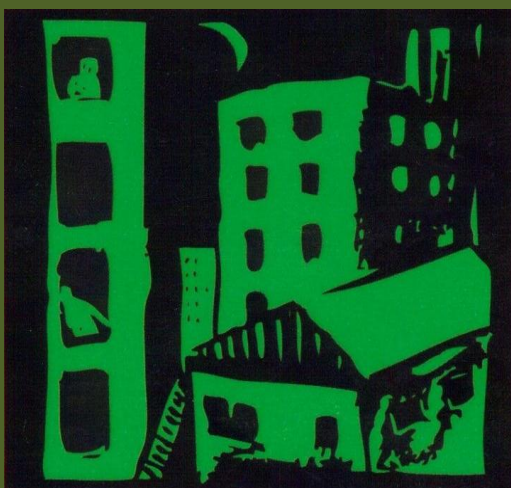


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 17 (2013)

DOI: <http://dx.doi.org/10.4314/idd.v17i1.8>

ISSN: 2077-4907

**Special interest
councillors in
Zimbabwe: A review
of law and practice
in terms of the 2013
Constitution**

JAAP DE VISSER*

*Director, Community Law Centre,
University of the Western Cape*

JEPHIAS MAPUVA

*Lecturer in Development Studies, Bindura
University*

1 INTRODUCTION

The law and practice surrounding the election of local leadership has for long been an area under debate in Zimbabwe. While Zimbabwe has a long history of local government, there is considerable tension with regard to the role of the national Minister of Local Government Rural and Urban Development (hereafter referred to as the Minister) in local government matters. The appointment of “special interest” councillors by the Minister plays a particularly important role in

* The authors wish to thank the Ford Foundation, the Charles Stewart Mott Foundation and South Africa’s National Research Foundation for making this publication possible. Further thanks go to Thulaganyo Selokela for editorial assistance.

this debate because of the tension that exists between the imposition of ministerial appointments and the concept of a democratically elected municipal council. This article examines the legal and policy frameworks surrounding this national instrument. It then discusses the content of a number of key regional instruments on local democracy as well as the content of the recently adopted Constitution of Zimbabwe. It then presents the results of a survey of 20 major urban councils across the country and examines the extent to which the law and practice of appointing special interest councillors respond to the demands of modern democratic local governance.

2 SECTION 4A OF THE URBAN COUNCILS ACT

2.1 Legal framework

The practice of the Minister appointing special interest councillors to local councils was put in place as part of the post-colonial local government reforms. It was initially implemented only in rural areas in terms of the District and Rural Councils Act.¹ In 2008, an interparty consensus among the main political parties, namely, the Zimbabwe African National Union-Patriotic Front (ZANU PF) as well as the two Movement for Democratic Change (MDC) formations, resulted in an amendment to the Urban Councils Act to empower the Minister to appoint “special interest” councillors to every urban council.

In principle, section 4A (1) (a) of the Urban Councils Act enables local voters to elect the local leadership of their choice in terms of the Zimbabwe Electoral Act.² This aspect of the law does not envisage any significant influence of the Minister in the election of these councillors. However, section 4A proceeds to provide for the appointment, by the Minister, of additional councillors, termed “special interest councillors”.

The number of special interest councillors appointed by the Minister with respect to a specific urban council may not exceed one-quarter of the number of elected councillors of that urban council. Therefore, the higher the number of elected councillors in an urban council, the more special interest councillors the Minister may appoint. Within the 25% margin, the Minister has discretion to determine the actual number of special interest councillors. This discretion includes the discretion not to make any appointment.

Section 4A does not provide for any specific process for the appointment of special interest councillors. There is no requirement for the Minister to consult the affected urban council or any of the affected local communities. Neither does it provide for any criteria to be observed by the Minister in making his or her appointments.

¹ S 11 District and Rural Councils Act 1988. See Chakaipa S “Local government institutions and elections” in De Visser J, Steytler N & Machingauta N (eds) *Local government reform in Zimbabwe: A policy dialogue* (2010) at 60.

² Art 23(1) Zimbabwe Electoral Act 2006.

According to section 23(1) of the Zimbabwe Electoral Act, the appointed councillors hold office “during the pleasure of the Minister”.³ The duration of their tenure is thus determined by the Minister who has an unfettered power to dismiss them or have their tenure renewed. There is no reference to any criteria that should underpin the Minister’s decision made in this regard.

The appointed special interest councillors take part in the functioning of the local authority and perform the same functions as their elected counterparts. They receive the same benefits as their elected counterparts. Their salaries are paid by the local authority. Special interest councillors may not vote. However, they are usually very influential for two reasons. First, they provide specialist expertise and skills if they were appointed on the basis of that ticket. Secondly, they enjoy the personal recognition of the Minister and often have a direct line to the Ministry.

2.2 Policy rationale

During the introduction of special interest councillors for urban councils, a number of arguments were advanced, justifying the measure. They broadly relate to experience, multi-party democracy, marginalised groups and corruption.

2.2.1 *Bringing experience to the urban councils*

Before 2000, ZANU-PF had not experienced any serious challenges to its rule at local level. As a result, there were very few, if any councillors, not belonging to ZANU-PF. The election of inexperienced councillors, mostly from the MDC, triggered a debate about the need to appoint special interest councillors. The argument was that the integration of experienced councillors and other civic leaders would assist to retain continuity of council business after the election of the inexperienced MDC councillors.⁴

2.2.2 *Multi-party democracy*

After 2000, the MDC started dominating politics in urban areas. Hence, it was argued that limiting the composition of urban councils to elected councillors would not be in the spirit of multi-party democracy. The incorporation of individuals from other political parties would bring a number of advantages. It would give voice to different sections of the local community, bring about cross-fertilisation of ideas in local councils and foster a culture of tolerance among different political parties.⁵ Ultimately, it would promote multi-party democracy.⁶

³ S 4A (2) Urban Councils Act 6 of 2008 (hereafter referred to as the Urban Councils Act).

⁴ Shumba P “Special interest councillors ideal but not necessary” *SW Africa Radio*, 17 SW Africa Radio, (2012). Available at <http://www.swradioafrica.com/special-interest-councillors-ideal-but-not-necessary/> (accessed 18 June 2013). See also Grabmore G “Ignorance Chombo’s primary aim is to frustrate MDC councils” *New Zimbabwe Forum*, (2012) 4. Available at http://forum.newzimbabwe.com/index.php?/topic/57413-even-the-strongest-zanoids-will-be-shocked/page_st_20 (accessed 26 August 2012).

⁵ Shumba (2012) at 3.

⁶ Madhekeni A & Zhou G “Legal and institutional framework: The ‘Achilles Heel’ of local authorities and *raison d’être* of ministerial intervention in Zimbabwe” (2012) 2 *Journal of Public Administration and Governance* 19 at 32.

2.2.3 *Marginalised groups*

In addition, the appointment of different social interest groups within local councils would ensure representation of marginalised groups. Bringing in women, persons with disabilities and the youth would ensure the representation of their interests in local government policy formulation and implementation.

2.2.4 *Avoiding corruption*

It was also argued that the appointment of special interest councillors would provide a check on the activities of elected councillors, particularly those who might want to engage in corrupt practices.⁷ The Ministry claimed that it was informed by the central government's desire to protect residents from unscrupulous councillors. The ministry justified the intervention in local councils as seeking to 'protect residents' from the excesses of inexperienced MDC councillors.⁸

In summary, the introduction of the scheme of appointing special interest councillors was based on the expectation that elected councillors would work alongside appointed councillors and that they would bring two additional dimensions to the council, namely dedicated local government experience and the voice of marginalised groups. The councillors would then be appointed on the basis of expertise in specialist areas, such as, local government administration, education, health, legal issues, or on the basis of them representing the interests of marginalised groups, such as, women, youth and persons with disabilities.

3 THE CONTROVERSY

Despite the official rationale for the appointment of special interest councillors, the appointments are often viewed in a more cynical light and there is little doubt that the measure has indeed been controversial.⁹

Since the enactment of section 4A of the Urban Councils Act in April 2008, numerous elected councillors and mayors belonging to the MDC have been dismissed or suspended on the basis of allegations of corruption and/or incompetence. Partly as a result of these political difficulties, local government services deteriorated. MDC councillors then became easy targets for accusations of incompetence and the appointment of special interest councillors over and above elected councillors was

⁷ Harare Resident Trust "Chitungwiza residents raise concerns with Minister Chombo" *SWAfrica Radio* (2012) 2. Available at <http://www.swradioafrica.com/chitungwiza-residents-raise-concerns-with-minister-chombo/> (accessed 12 June 2012).

⁸ Staff Reporter "Mangwana raps 'undemocratic' Chombo" *New Zimbabwe* (2012) Available at <http://www.newzimbabwe.com/news-8275Mangwana%20raps%20Chombo%20power/news.aspx> .

⁹ Mushamba S "The Powers and Functions of Local Government Authorities" in De Visser J, Steytler N & Machingauta N (eds) *Local Government Reform in Zimbabwe: a Policy Dialogue* (2010) at 119. See also Shumba (2012).

justified on that basis. It has been argued that the Minister sought to discredit the MDC councillors as incompetent in order to gain political mileage for ZANU-PF.¹⁰

According to some media reports, the main reason for the appointment of the special interest councillors is their utility as spies for the central government. The media reports base this on the cases where the Minister suspended or dismissed MDC councillors. It is argued that the special interest councillors on the affected councils provided information to the Minister about the affairs of those urban councils. As a result, the appointed special interest councillors were fingered as the most likely source of information for the Minister's decisions regarding the suspension and dismissal of councillors for maladministration or mismanagement.¹¹

At times, the appointment of special interest councillors caused the deterioration of relations between the Ministry and urban councils¹² as well as between residents and the Ministry.¹³ In a context where the Minister often resorted to suspending or dismissing elected councillors,¹⁴ the practice of appointing councillors has angered residents and elected councils.¹⁵ The Minister has been accused of abusing this power¹⁶ and some local authority councils have threatened to take legal action over the appointment of special interest councillors.¹⁷

Furthermore, many urban councils regard their visitors as an unwelcome financial burden. The costs of remunerating the appointed councillors are borne by the urban council, quite often an expenditure that they can ill-afford.¹⁸

The fact that the Minister's powers to appoint special interest councillors are seemingly unlimited has fuelled the argument that they are being abused. Consequently,

¹⁰ Ndlovu N "Zimbabwe: Special interest councillors dismissed" *The Standard* (2012). Available at <http://allafrica.com/stories/201204160265.html> (accessed 2 July 2012).

¹¹ Media reports have highlighted that there has been regular suspension and subsequent dismissal of MDC elected councillors as mayors, as cited by the Combined Harare Residents' Association. See Shumba (2012) at 2. The Elected Councillors' Association of Zimbabwe (ECAZ) "Chombo uses councillors as spies" *The Zimbabwean* (2012) (accessed 12 August 2012).

¹² Staff Reporter "Chombo risks lawsuit" *Zimbabwe Daily News* (2010). Combined Harare Residents Association "Brian James suspension exposes urgent need for local government reform!" (2012). Available at <http://www.thezimbabwean.co/news/zimbabwe/56026/brian-james-suspension-exposes-urgent.html> (2012) (accessed 18 June 2013).

¹³ Sibanda A "Bulawayo residents and Chombo to clash over special interest councillors" *Bulawayo24* (2012). Available at <http://bulawayo24.com/index-id-news-sc-local-byo-15273-article-Bulawayo+residents+and+Chombo+to+clash+over+special+interest+councillors.html> (accessed 9 December 2013).

¹⁴ See for example N Machingauta "Supervision of local government" in De Visser J, Steytler N & Machingauta N (eds) *Local government reform in Zimbabwe: A policy dialogue* (2010) at 139-150.

¹⁵ Minister Chombo has, as of January 2012, suspended a total of four MDC councillors in Harare for corruption. These were five in Rusape; one in Nyaminyami Rural District Council; two in Zvimba Rural District Council; and two in Harare Municipality – Councillors Warship Dumba and Casper Takura who had opened a council probe into the question as to why the Minister had acquired so many properties in Harare. Brian James became the latest victim. See also Sibanda (2012).

¹⁶ Harare Residents Trust "Chitungwiza residents raise concerns with Minister Chombo" *SW Africa Radio* (2012). Available at <http://www.swradioafrica.com/chitungwiza-residents-raise-concerns-with-minister-chombo/> (accessed 12 June 2012).

¹⁷ Staff Reporter (2010).

¹⁸ S 4A (2) Urban Councils Act. See also Shumba P (2012).

the argument has been made that the Minister's powers should be reduced.¹⁹ Before assessing this argument, this article presents an overview of regional instruments that can be drawn upon to formulate an opinion on the concept of appointing special interest councillors.

4 REGIONAL INSTRUMENTS ON LOCAL DEMOCRACY

4.1 Introduction

Having discussed the essence of the legal framework for the appointment of special interest councillors, its stated rationale as well as the controversy surrounding it, this article now undertakes a very brief overview of various continental instruments that express views on local democracy. This enables a review of the law surrounding the appointment of special interest councillors as well as the manner in which it is being used.

A number of regional instruments in operation on the African continent refer to the values of local democracy. Four of them are discussed, namely:

1. the African Union Charter on Democracy, Elections and Governance;
2. the Commonwealth's Aberdeen Principles;
3. the All Africa Ministerial Conference on Decentralisation; and
4. the Victoria Falls Declaration.

It should be noted that, with the exception of the first, these instruments constitute soft law, i.e. they contain commitments made by negotiating parties that are not necessarily legally binding in international law. "Soft laws" are characterised by the large amount of discretion which is left to the parties bound by the obligation.²⁰ However, they are not without important legal and political effects. They can be seen as the beginning of a gradual process in which further steps are needed to make such agreements binding rules for states.²¹ This is the premise upon which these instruments are explored in this article.

4.2 African Charter on Democracy, Elections and Governance (ACDEG)

The African Charter on Democracy, Elections and Governance (ACDEG) came into force on 15 February 2012 and seeks "to promote adherence by each State Party to the universal values and principles of democracy and respect for human rights".²² The Charter "states the minimum requirements for the observance of democratic principles

¹⁹ MISA "Residents wants Chombo's powers clipped" *Human Rights-The Zimbabwean* (2010). See also Combined Harare Residents Association (2012). Available at <http://www.thezimbabwean.co/human-rights/34262/residents-wants-chombos-powers-clipped.html> (accessed 18 June 2013).

²⁰ Grnchalla-Wesiershi T "A Framework for understanding soft law" (2001) *McGill Law Journal* 37 at 88.

²¹ Grnchalla-Wesiershi (2001).

²² Lee R "New era for democracy in Africa" (2012) *Open Society Initiative for Southern Africa*.

and the protection of human rights and effective democratic governance in Africa”.²³ The Charter reaffirms the importance of free and fair elections and the need for political stability in African states.²⁴ It seeks to promote best practices in the management of elections for purposes of political stability and good governance.²⁵

The ACDEG shows commitment to the decentralisation and democratisation of local government by requiring state parties to “decentralise power to democratically elected local authorities as provided in national laws”.²⁶ Zimbabwe, being a signatory to the Charter is under an international obligation to implement this provision.

4.3 Aberdeen Agenda

The Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance was adopted at the General Meeting of the Commonwealth Local Government Forum, convened in Aberdeen (Scotland) in 2005.²⁷ It emphasises:

The ability to elect local representatives: citizens should be able to elect their local representatives in conditions of political freedom. It is important for local representatives to reflect the views and needs of the community they serve. We believe that this is best achieved through regular/timely local elections which are both open and inclusive. Whatever the means or processes of local democracy, the results should reflect the wishes of the electorate.

Despite the fact that it is not a legally binding document, the Aberdeen Agenda does make a critical contribution to the body of “soft law” that advocates for local democratic practices. With its large contingent of African signatories, the Aberdeen Agenda resonates strongly on the African continent.

4.4 All Africa Ministerial Conference on Decentralisation (AMCOD)

The All Africa Ministerial Conference on Decentralisation (AMCOD) is a permanent ministerial forum where ministers in charge of local governance deliberate on ways to enhance democratic local governance and share best practices. The AMCOD Constitution sets out several objectives which include “to promote decentralisation, local governance and participation of citizens and social groups in designing and implementing development policies”.²⁸ AMCOD provides for a peer review mechanism, through which countries review each other on the extent to which they implement decentralisation programmes. AMCOD has initiated the drafting of an African Charter on the Values, Principles and Standards of Decentralisation and Local Governance.²⁹

²³ Institute for a Democratic South Africa ‘15 Ratifications of the AU Charter on Democracy, Elections and Governance’ (2012).

²⁴ Art 35 ACDEG 2012.

²⁵ Art 2 (13) ACDEG 2012.

²⁶ Art 3 ACDEG 2012.

²⁷ The Conference was attended by over 500 delegates from 46 countries, including over 20 ministers with responsibility for local government.

²⁸ Part I (2) AMCOD Constitution 2008.

²⁹ Art 2, AMCOD Constitution 2008.

Zimbabwe is a member of AMCOD and as such should consider itself bound by its resolutions and the provisions of its Constitution.

The AMCOD Constitution calls upon AU member states to enact defined laws that empower local authorities to make decisions that address the challenges in the respective constituencies. It points out that leadership should undergo a democratic electoral process.³⁰ It thus appears to see the appointment of local political leadership in a dim light.

4.5 Victoria Falls Declaration (1999)

The Victoria Falls Declaration was the result of deliberations by ministers responsible for local government and decentralisation, mayors and key stakeholders. The Declaration sought to map out a shared vision on local government in Africa and to identify action for strengthening further local governments in Africa. Adopted in 1999, it is a reaffirmation of Africa's commitment to decentralisation of central powers to the sub-national level and of democratisation of local government. The Victoria Falls Declaration emphasises the promotion of democracy and good governance. Furthermore, it calls for the local accountability of public office holders by promoting –

- devolution of power and responsibility to lower echelons;
- local democracy and good governance, with the ultimate objective of improving the people's quality of life;³¹
- local authorities to be representative of, and accountable to all, sectors of the local population, including marginalised and disadvantaged groups;³² and
- effective community participation in local governance;³³

The Declaration urges sub-Saharan African governments to enact and adopt legislation that provides for decentralisation and devolution of power to promote local democracy.³⁴ The Declaration is “soft law” and is thus not binding on signatories but dependent on the commitment of state parties to adopt the normative framework contained in the Declaration. Given that Zimbabwe was part of the group of states that signed the Declaration, it is expected to recognise the contents of the Declaration.

4.6 In Sum

It follows from the above overview that various regional instruments, both legally binding and of a “soft law” character, emphasise the importance of local democracy. The strongest indication, both in terms of substantive content and legal force, comes from the ACDEG as it contains a commitment on the part of the state parties to decentralise power to local authorities that are democratically elected. The Aberdeen Agenda provides that local representatives should reflect the views and needs of the community

³⁰ Art 17, ACDEG 2012.

³¹ Art 3 (3) Victoria Falls Declaration 1999.

³² Art 3 (b) Victoria Falls Declaration 1999.

³³ Art 3 (c) Victoria Falls Declaration 1999.

³⁴ Art 3 (1) Victoria Falls Declaration 1999.

they serve and posits that this is best achieved through regular/timely local elections, which are both open and inclusive. The AMCOD Constitution points out that leadership should undergo a democratic electoral process. The Victoria Falls Declaration echoes all these calls and also emphasises that local authorities should be representative of, and accountable to all sectors, of the local population, including marginalised and disadvantaged groups.

The next part of this article briefly discusses Zimbabwe's new Constitution with a specific focus on the provisions pertaining to devolution and local democracy. Thereafter, the outcomes of a small survey of appointments will be discussed against the backdrop of both the regional discourse as well as the new Constitution of Zimbabwe.

5 THE CONSTITUTION OF ZIMBABWE

The political and economic crises of the 1990s and the disputed elections of 2008 led to the signing of the interparty Global Political Agreement (GPA)³⁵ in Zimbabwe which paved way for the formation of the government of national unit (GNU) in 2009. The Inclusive Government was a three-year transitional political arrangement during which various political reforms would be implemented, including the drafting of a new Constitution.³⁶ This Constitution was drafted under the aegis of the Zimbabwe Constitution Select Committee (COPAC), approved in a national referendum, adopted by Parliament and ultimately signed into law by the President in May 2013. It contains a chapter dedicated to devolution. Key provisions of this chapter will be discussed with a view to inform the discussion of the Minister's power to appoint special interest councillors.

The Constitution is unequivocal in stating that Zimbabwe is a unitary state.³⁷ However, the devolution and decentralisation of powers and functions is listed as one of the principles of good governance.³⁸ Section 5 of the Constitution establishes local government as a tier of government and within that "urban councils, by whatever name called, to represent and manage the affairs of people in urban areas".³⁹ The system of urban local authorities is therefore recognised in the Constitution.

In a significant shift from the current configuration, the 2013 Constitution exhibits a desire to reform local government by empowering local councils and enhancing their autonomy. A number of provisions attest to this commitment to devolution. The first is found in the preamble to Chapter 14. It contains a strong statement that "there must be devolution". The preamble links this call for devolution to various reasons, namely, preserving national unity, preventing disunity and secessionism, ensuring democratic participation, ensuring the equitable allocation of

³⁵ Ndlovu-Gatsheni SJ "Elections in Zimbabwe: A recipe for tension or remedy for reconciliation" *Institute for Justice and Reconciliation* (2012).

³⁶ Art VI, GPA 2009.

³⁷ S 1 Constitution.

³⁸ S 3(2)(l) Constitution.

³⁹ S 5(c) Constitution.

national resources, and participatory planning.⁴⁰ The second is found in section 264(1) which provides that “governmental powers and responsibilities must be devolved to provinces and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively”.⁴¹ Finally, in what could be termed an expression of original power for local authorities, the Constitution provides that 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 shall have all the powers necessary for it to do so”.⁴² The precise meaning of these provisions and the extent to which they will translate into constitutional protection for local government autonomy are as yet unclear. Much will also depend on the jurisprudence that will be developed by the Constitutional Court in terms of its jurisdiction to decide on constitutional matters.⁴³

There is no doubt, however, that the Constitution changes the role and status of local government in Zimbabwe. In 2010, Kudzai wrote about the structural contradiction in Zimbabwean local government. The contradiction lies in the fact that the central government professes participatory and democratic notions in relation to local government while holding on to strict central tutelage over local authorities.⁴⁴ If the ambitious rhetoric on devolution in the new Constitution is anything to go by, the central government will have little choice but to reform local government to fall in line with the spirit of devolution expressed in the Constitution.

Turning to the manner in which the Constitution treats the issue of councillors and elections of urban local authorities, it is apposite to highlight the emphasis put by the Constitution on democratic participation as a prominent rationale for devolution.⁴⁵ For the first time in the history of Zimbabwe, the constitutional framework envisages the ceding of state powers to communities and the incorporation of communities in the decision making processes through representative and participatory democracy.

In terms of the Constitution “[a]ll members of local authorities must be elected by registered voters within the areas for which the local authorities are established”.⁴⁶ These areas, called wards, are to be demarcated by the Zimbabwe Electoral Commission.⁴⁷ Elections are managed by the Zimbabwe Electoral Commission.⁴⁸ The Constitution recognises the importance of elected councillors in the management of urban council affairs by stating that “urban local authorities are managed by councils composed of councillors elected by registered voters in the areas concerned”.⁴⁹ Section 158(2) provides that general local government elections must be held concurrently

⁴⁰ Chapter 14 (Preamble) Constitution.

⁴¹ S 264(1) Constitution.

⁴² S 276(1) Constitution.

⁴³ S 167 Constitution. See below at para 7.

⁴⁴ Chatiza K “Can local government steer socio-economic transformation in Zimbabwe?” in De Visser J, Steytler N & Machingauta N *Local government reform in Zimbabwe: A policy dialogue* (2010) at 8.

⁴⁵ See for example s 13, Preamble Chapter 14 and s 264(2).

⁴⁶ S 265(2) Constitution.

⁴⁷ S 160(2) Constitution.

⁴⁸ S 239(a)(ii) Constitution.

⁴⁹ S 274(2) Constitution.

with presidential and parliamentary general elections.⁵⁰ The Constitution also safeguards the democratic nature of the executive leadership of urban local governments by providing that they are to be elected.⁵¹

Mayors, chairpersons and councillors may only be removed from office by an independent tribunal on the basis of one or more of the grounds listed in the Constitution. The grounds for removal of a councillor from office are mental or physical incapacity, gross incompetence, gross misconduct, dishonesty, corruption or abuse of office or wilful violation of the law. The fact that this power will no longer vest in the Minister and that the grounds are limited are clearly intended to be a break from the current framework, in terms of which the Minister had wide powers to remove councillors.⁵² Chapter 10 of the Constitution provides a framework for a national civil service, to which the employees of local authorities presumably belong. In a clear attempt to separate the operations of the state machinery from political parties, the Constitution provides that employees of provincial and metropolitan councils and local authorities must not be office-bearers of any political party.⁵³

The Constitution does not make any reference to the appointment of councillors by the central government. It is clearly premised on the notion that local authorities will be governed by a leadership that is locally elected. To that extent, the Constitution follows the call made by ACDEG, the AMCOD and other regional instruments that were discussed in the previous section.

With this new Constitution in place, the question arises whether the law and practice of the Minister appointing special interest councillors can pass muster under it. Before formulating an answer to this question, this article first presents a review of what happens in practice with the appointment of special interest councillors.

6 SURVEY OF 20 URBAN COUNCILS

6.1 Introduction

In order to examine the practice of the appointment of special interest councillors a survey of 20 major urban councils was conducted. The objective of the survey is to assess whether the practice of appointing special interest councillors conforms to the policy objective of injecting special expertise and/or representation of the marginalised into urban councils. A further objective is to assess whether the trends suggest even-handedness on the part of the Minister in considering special interest councillors from across the political spectrum. The outcomes will assist in the assessment as to whether the law and practice surrounding the appointment of special interest councillors are in line with the text and spirit of the new Constitution of Zimbabwe.

The table below presents the outcome of the survey. It presents the total number of elected councillors, the total number of appointed councillors, and the gender and

⁵⁰ Ss 158(2) and 277(1)(a) Constitution.

⁵¹ S 274(2) Constitution.

⁵² See para 2.1 above.

⁵³ S 266(3) Constitution.

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political affiliation of the appointed councillors. The final column contains the information that could be obtained about the specialist interest or expertise that the appointed councillors brought to a council. The survey represents the situation in the local authorities as at October 2012.

City/Town	Elected	Appointed	Percentage	Gender		Party affiliation		Skill/expertise
				M	F	ZANU	MDC	
Bulawayo	29	7	25%	7	-	7	-	All rejected by residents
Chinhoyi	15	1	7%	-	1	1	-	Unconfirmed
Gweru	18	4	22%	4	-	4	-	Residents association, persons with disabilities, commerce, education
Kadoma	17	4	24%	1	3	4	-	1 former mayor (m) 3 females- medical doctor, education, media
Kwekwe	14	0	-	0	0	0	0	No appointments made
Marondera	12	3	25%	2	1	3	-	Former mayor, former deputy mayor, former finance chair
Mutare	18	4	22%	4	0	4	0	Legal, finance, administration
Redcliff	9	2	22%	2	0	2	0	Business, artisan
Shurugwi	13	0	0%	0	0	0	0	No appointments
Vic Falls	11	1	9%	1	0	0	1	Business
Harare	46	11	24%	9	2	11	0	1 person with disability, 1 residents association, 1 business, 8 former councillors
Gwanda	11	2	18%	2	0	2	0	Business, former councillor
Kariba	9	1	11%	1	0	1	0	Former mayor
Karoi	10	3	30%	2	1	3	0	Former mayors
Zvishavane	12	2	17%	1	1	2	0	Business, former mayor
Masvingo	17	3		2	1	3	0	Disabled, business, education
Rusape	13	2	15%	1	1	1	1	Former councillor, education
Chegutu	15	1	7%	1	0	1	0	Former mayor
Bindura	8	2	25%	2	0	2	0	Former councillors
Chitungwiza	23	4	17%	4	0	4	0	Business, former mayor, 2 former councillors
TOTAL	320	57	18%	46	11	55	2	44 skills/expertise

Table 1: Survey of appointments in 20 urban local authorities

6.2 Assessing the trends

An assessment of the above sample reveals a number of important trends that are presented below.

6.2.1 Arbitrary implementation

The appointment of special interest councillors does not appear to be a standardised or uniform practice. The Minister does not make appointments to every urban council. In the cases of the Kwekwe City Council and the Shurugwi Town Council no appointments were made, for example. The number of special interest councillors relative to the number of elected councillors is not consistent either. On average the Minister appointed special interest councillors amounting to 17% of the elected councillors. However, in some cities the number of appointments exceeded the permitted 25% threshold (e.g. Karoi 30%), while in other areas the number fell far below the

threshold (Chinhoyi, Chitungwiza, Kariba and Victoria Falls). In other towns the number of appointments coincided with the 25% threshold (Bindura, Harare and Marondera). This indicates that the Minister used the discretion to appoint lower or higher numbers and sometimes even went beyond the discretion afforded (and arguably made illegal appointments). Since there are no criteria for the determination of the actual number of special interest councillors, this practice then easily attracts the criticism of being arbitrary.

6.2.2 *Political favouritism*

The trend in the actual appointments that were made suggests a one-sided use of the instrument even though ensuring political pluralism was an important consideration behind the introduction of the special interest councillor in urban local authorities. Of the 57 special interest councillors appointed by the Minister, two belong to the MDC while the other 56 belong to ZANU-PF, the party which the incumbent Minister represents.

6.2.3 *Accommodation of marginalised groups*

The survey of local authorities suggests that the practice of appointing special interest councillors did not result in a marked increase in political participation of marginalised groups. The inclusion of special interest councillors could have been an instrument to promote the accommodation of marginalised groups, such as, persons with disabilities, the youth and women, but out of a cumulative total of 57 special interest councillors for 18 urban councils, only eight are women and three represent the interests of persons with disabilities (Harare, Gweru and Masvingo). The rest of the special interests councillors have been appointed on the basis of skills, such as, business, legal, medical and educational skills. In the application of this measure, there seems to be no focus on promoting the representation of marginalised groups.

6.2.4 *Consultation*

As discussed above, the law does not require the Minister to consult residents or local councils before appointments are made. The Minister is of course not precluded from seeking input from the affected urban council or from consulting the affected local communities on the proposed appointment. The survey did not include an elaborate analysis of the process leading up to the actual appointments so it is difficult to assess with certainty how inclusive the various processes were. However, the fact that local residents rejected all of the seven appointed councillors in Bulawayo, combined with the fact that media reports castigated the practice, suggests that the practice is, at best, unpopular with residents.

6.2.5 *Special skills*

Within the limited scope of the survey (which did not include any qualitative assessment), it is very difficult to assess the extent to which the appointment of special interest councillors contributed to inserting special skills into council affairs. The survey

does indicate that in nine out of the 20 local authorities, the appointment resulted in the injection of some level of expertise and experience into the council. 'Business skills' was mentioned five times, while the (rather ill-defined) 'education' skill was mentioned three times. Other skills mentioned were 'finance', 'legal' and 'administration'. Although special interest councillors have no vote, their existence as advisors to the councils enables councils to make informed decisions on policy formulation and implementation. Taking cognisance of these skills and experience, the special interest councillors may very well have raised the level of debate and engagement in the local council. However, there is no evidence that their inclusion enhanced the quality of decisions made. In fact, against the backdrop of a local government system that is struggling to deliver basic services,⁵⁴ it is difficult to argue that the measure has been a resounding success in enhancing the quality of local government services. What is more, it is not unlikely that the imposition of special interest councillors from a party that is different to the majority party in the council may result in inefficiencies. The differences in political ideologies of elected and appointed councillors should not be taken lightly. There is evidence from media reports that the political rivalry between the elected MDC councillors and the appointed special interest councillors, has led to fraught relationships that negatively impact upon sound decision making.

7 CONSTITUTIONALITY OF THE APPOINTMENT OF SPECIAL INTEREST COUNCILLORS

Given its recent adoption, the Constitution adds a critical dimension to the review of the law and practice on appointing special interest councillors. The Constitution is now the supreme law of Zimbabwe and section 2 makes it clear that "any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".

Is section 4A of the Urban Councils Act inconsistent with the Constitution? The text of the Constitution does not unequivocally rule out the appointment of advisory councillors because the general provisions pertaining to locally elected leadership do not explicitly prohibit the appointment of external advisory members. Section 274(2) of the Constitution stipulates that urban local authorities are managed by councils composed of elected councillors. However, the argument could be that this is complied with as long as the voting members are elected. The appointed councillors will not *manage* the council. A comparison could be made with the South African legal framework for the appointment of traditional leaders as advisory members of municipal councils. The Municipal Structures Act provides that the provincial minister responsible for local government may appoint traditional leaders to participate in municipal council proceedings.⁵⁵ Similar to the special interest councillors, these additional members do not have the right to vote and play no part in the *management* of the council but they operate as advisors to the council.⁵⁶ It has never been argued that this configuration

⁵⁴ Combined Harare Residents' Association (2010).

⁵⁵ S 81 Local Government: Municipal Structures Act 117 of 1998 (hereafter referred to as Municipal Structures Act).

⁵⁶ S 81(2)(c) Municipal Structures Act.

violates section 157 of the South African Constitution⁵⁷, which requires municipal councillors to be elected.

It is argued that section 265(2) of the Constitution presents a greater difficulty for the constitutionality of section 4A of the Urban Councils Act. The rule that “all members of local authorities” must be elected⁵⁸ bars the inclusion of appointed councillors as members of local authorities. Their advisory status does not prevent them from being considered “members”, particularly given the fact that they enjoy all other privileges and are remunerated by the local authority. It is thus argued that section 4A of the Urban Councils Act is inconsistent with section 265(2) of the Constitution. What is the likely consequence of this? It is argued that, barring a repeal of the law as part of the reform measures to facilitate the new electoral system, the issue falls to be decided by a new Constitutional Court, which will be “the highest court in all constitutional matters”. The Constitutional Court makes the final decision whether an Act of Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.⁵⁹

In addition to the abovementioned interpretation of the text of the Constitution, it is argued that the practice surrounding the appointment of special interest councillors is inconsistent with the spirit and intention of the Constitution, with its emphasis on devolution, transparency and democratic participation. A number of arguments, based on the trends in actual appointments, can be advanced in this regard.

First, the fact that special interest councillors were appointed in some urban councils but not in others suggests that the measure is being implemented in an arbitrary fashion. This is further supported by the fact that the numbers appointed to the various urban councils vary strongly. There appears to be no official explanation or rationale for the differentiation.

Secondly, in regulating the appointment of special interest councillors, the law assumes that the Minister will appoint people with the required skills, experience and/or expertise but provides no criteria to limit the Minister’s authority to appoint a special interest councillor or keep him or her in office. Comparing again to the appointment of traditional leaders as advisory members of councils in South Africa, there are obvious differences. In the South African context, the provincial minister’s discretion to appoint advisory members is limited and it is clear that certain criteria (with regard to observing a system of customary law) must be met before someone can be eligible to be appointed as an advisory member of a municipal council.⁶⁰ Under the Urban Councils Act, anybody may be appointed as a special interest councillor. As a result, the practice has become shrouded in mystery and it would seem that, based on the breakdown of the party allegiance of the appointed councillors, appointments are made on the basis of political allegiance rather than special skills or special interests. If this is compared with the vigour with which section 266(3) of the new Constitution

⁵⁷ Constitution of the Republic of South Africa 1996.

⁵⁸ S 265(2) Constitution.

⁵⁹ S 167(3) Constitution.

⁶⁰ Section 81(2), read with Schedule 6 of the Municipal Structures Act prescribe the criteria and procedure.

condemns the combination of party membership and being a civil servant, it becomes clear that the Constitution seeks to part ways with such practices.

Thirdly, residents are not consulted in the appointment of special interest councillors and the instances of appointed councillors being rejected by local residents suggests that they do not accept them as legitimate. The law states unequivocally that special interest councillors are accountable exclusively to the Minister. In other words, they do not represent local interests but rather represent the interests of the Minister who appointed them. Lastly, despite the existence of an opportunity presented by this provision to promote the political participation of marginalised groups, such as, the youth, women and people with disabilities, it appears that advantage was not taken of this. While the intention of accommodating marginalised communities may have been present in the design of the instrument, the Minister appears to have limited its use to the injection of skills and the accommodation of the political interests of his own political party.

Zimbabwe faces a formidable task in implementing its new Constitution. A number of institutions will have to be reformed and many laws will have to be revisited to bring them in line with the Constitution. It was argued in this article that section 4A of the Urban Councils Act should be considered in this review as both the legal framework and the practice of the Minister appointing special interest councillors appear to be inconsistent with the Constitution.

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