



FACULTY OF LAW

Interrogating the procedure for suspension and removal of elected councilors in Zimbabwe and its impact on devolution and independence of local authorities.

by

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A dissertation submitted to Midlands State University in partial fulfillment of the requirements of Master of Laws (Constitutional and Human Rights Law)

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FACULTY OF LAW

DECLARATION OF ORIGINALITY

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This dissertation titled “**Interrogating the procedure for suspension and removal of elected councilors in Zimbabwe and its impact on devolution and independence of local authorities**”, is my original work to the extent acknowledged in the references and comments made in the body of the dissertation, and that it has not been submitted either wholly or in part for any other degree at any other University.

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Summary

The research report is fairly well written with evidence of revision and self-editing. However, there were a number of repetitions of wording of the same point which point to limited vocabulary which were addressed by the learner and do not appear in the final edit. The report also contained some grammatical errors that were not serious enough to subtract from the overall meaning or impact of the work. The spelling errors were also minimal.

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APPROVAL

This dissertation of Innocent Muchini is approved as partial fulfillment of the requirements for the award of the Master of Laws in Constitutional and Human Rights Law by the University.

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ABSTRACT

The concept of devolution has gained considerable currency in contemporary good governance discourse. Devolution of powers to localized political and administrative units of the State is a means to achieve development, a tool for democracy and a means to achieve good governance. This dissertation interrogates the procedure for the suspension and removal of councilors from office in Zimbabwe and its impact on devolution and independence of the local authorities. A critical comparative analysis of the procedures adopted in Zimbabwe and South Africa is made with a view to determine if the Zimbabwean procedures comply with best international practices.

The dissertation begins by analyzing the devolution concept focusing on its theoretical foundations and undertakes a brief analysis of the devolutionary systems in some African States in order to put the Zimbabwean procedures into proper perspective. The dissertation examines the procedure that is used in Zimbabwe in the suspension and removal of elected councilors from office in terms of the Constitution, Statute, policy and practice in order to examine the development in the devolutionary system from independence to the current constitutional period. The dissertation notes that the current statutory provisions still give too much discretion to the central government Minister in the procedures of suspending and removing elected local government officials from office. It concludes that this wide discretion is inimical to the ideals of devolution.

The dissertation makes a comparative analysis between the Zimbabwean procedures and the South African procedures to determine if the Zimbabwean procedures are compliant or not with best international standards. South Africa is selected as a comparator because it shares a similar legal, political and social background with Zimbabwe. Both countries share a Roman-Dutch common law tradition, both gained independence from a colonial history of oppression under which the white minority who formed central government enjoyed political and economic advantages at the expense of the majority indigenous peoples who resided in the local communities. Both countries have adopted Constitutions wherein devolution is provided for. The dissertation undertakes an overview of the South African legal framework for the suspension and removal of councilors from office and notes that it gives more powers to local authorities in the decision making of matters affecting their running and management. The Code of Conduct empowers the Speaker, the MEC and the council to institute disciplinary processes against errant councilors. Central government plays a very limited role in this regard. The members of the local community in South Africa have a significant input in the making of decisions that affect them in the suspension and removal of councilors.

The dissertation concludes by noting that the current Zimbabwean procedures do not promote devolution and undermine the independence of local authorities. It proposes practical recommendations which address the identified weaknesses in the legal system. It is argued in conclusion that the adoption of the dissertation's recommendations in the procedures used in the suspension and removal of councilors from office will enhance devolution in Zimbabwe and ensure the independence of local authorities from central government.

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DEDICATION

I dedicate this dissertation to my family who were always supportive and inspiring. To Tendai my wife, whose deserved time with me was lost as I worked on this dissertation, I thank you for your ever-enduring love. To Shingi, Shanice and Innocent Junior, you guys are the greatest and I know you will be inspired to do even greater things. Thank you, Baba, for being a good father, I know Mhai would have been proud.

ABBREVIATIONS

MDC.....MOVEMENT FOR DEMOCRATIC CHANGE

MEC.....MEMBER OF EXECUTIVE COUNCIL

ZANU (PF).....ZIMBABWE AFRICAN NATIONAL UNION (PATRIOTIC FRONT)

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CHAPTER 1:

INTRODUCTION

The discussion on the procedural and substantive fairness in the suspension from office of councillors and mayors in terms of the Urban Councils Act¹ is closely linked to the uneasy relationship between central government and local government in Zimbabwe which has a dramatic, turbulent and frictional history that has often seen elected councillors and mayors being removed from office through suspensions by the central government Minister responsible for local government².

The Urban Councils Act³ which governs the procedure of removal from office of councillors sets in motion debate on their right to procedurally and substantively fair administrative conduct. The new Constitutional dispensation⁴ has brought with it a new focus on administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair⁵.

The Minister responsible for local government is empowered to summarily suspend councillors in terms of section 114 of the Urban Councils Act⁶. The Act⁷ affords the Minister power to decide whether to investigate the allegations, whether or not to set up an

¹ Chapter 29:15.

² 'What the Constitution says about suspension of mayors' *Newsday* 19 May 2016

³ Chapter 29:15.

⁴ The current Constitution came into effect in the year 2013, it has some new features including provision for a right to administrative justice in the expanded Bill of Rights.

⁵ Section 68.

⁶ Chapter 29:15.

⁷ Chapter 29:15.

independent tribunal and if he decides to set it up, to choose the persons who will sit as the independent tribunal members⁸. The statute arguably gives the Minister too much discretion⁹.

Upon Independence of Zimbabwe in 1980, the legislative and constitutional framework did not instantly react to the need for devolution of government functions, to the contrary, the laws which were a product of colonialism enabled central government hegemony over local government. The new Zimbabwean government continued to employ the same legislation as a political tool to ensure elected local government public officials were kept in check. Any perceived dissent would be met with suspension from office by the central government minister¹⁰.

In 2013, Zimbabwe adopted a new Constitution hereinafter referred to as the '2013 Constitution'. This Constitution is founded on notions of a democratic society and of interest is its Bill of Rights which provides for the right to administrative justice to every person¹¹.

The 2013 Constitution also envisages devolution of governmental powers and responsibilities¹². This of necessity means that local powers of governance should be relinquished to local authorities to enhance them to participate in the exercise of powers of the State and in making decisions that affect them. Central government's interference in the local affairs by suspending councillors goes against the spirit of devolution. There is usually

⁸ Sections 114 and 114A of the Act which provides for the establishment of independent tribunals empowers the Minister, who would have suspended the councilor, in the first place, to choose from a list of about 9 persons who to be part of the tribunal.

⁹ The law which empowers the Minister to be involved in all the stages of the disciplinary process from suspension, investigation and dismissal of a councilor is arguably unfair. Because of political realities, the central government Minister has been usually a member of a different political party from the urban councilors and there has been a reasonable suspicion of bias in the suspension and disciplinary processes initiated by the Minister. The ZANU (PF) party is the ruling party and its officials usually make up central government whilst the opposition MDC has generally controlled the majority of urban local council seats.

¹⁰ 'What the Constitution says about suspension of mayors' Newsday 19 May 2016.

¹¹ Section 68.

¹² Section 264.

no local input in the decision to suspend councillors and there is a feeling that the suspensions are politically motivated and smack of executive autocracy¹³.

Section 114 of the Urban Councils Act¹⁴ provides a list of grounds upon which councillors may be removed from office in Zimbabwe. These include some indeterminate and undefined terms such as ‘*gross*’ incompetence and misconduct. This leaves room for abuse by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be “*gross*” to justify suspension is not specifically defined by the law.

Law is a double-edged sword. On the one hand, it is an instrument of justice when applied by men of conscience. On the other hand, when it is placed in the hands of wicked men, they use it to oppress and brutalise fellow human beings, especially those they do not share political viewpoints with¹⁵.

In this vein, the dissertation is aimed at assessing the powers afforded to the Minister under the Urban Councils Act¹⁶ to suspend elected local government officials from office. The primary objective shall be to investigate whether the current system creates a balance between the individual suspended councillor’s right to administrative justice and central government’s interests to promote good governance at all levels of government. It is a

¹³ ‘Brian James suspension exposes urgent need for local government reform’ The Zimbabwean 1 February 2012.

¹⁴ Chapter 29:15.

¹⁵ J Obonye ‘Emergency laws in Botswana: Some critical reflections’ <https://www.ufh.ac.za/speculumjuris/files/SJ0114I.PDF> (Accessed: 9 March 2018).

¹⁶ Chapter 29:15.

principle of administrative justice that the decision maker be, and must be reasonably perceived to be, impartial¹⁷.

It should also be noted that the new Constitution envisages devolution of governmental powers and responsibilities. As such, the right to administrative justice by suspended councillors and the devolution discourse go hand in hand. The extent to which the need to balance an individual citizen's fundamental rights and the interests of the central government can be met within the confines of fair and just laws under a democratic Constitution will be explored. Ideals of a civilized society founded on best norms which subscribe to rule of law shall be used in this discussion to draw implications of the current statutory and constitutional framework in Zimbabwe.

The dissertation will focus on the Bill of Rights and devolution provisions of the 2013 Constitution of Zimbabwe, in particular, the right to administrative justice and devolution of governmental powers and responsibilities.

1.1 Background to the study

The right to administrative justice is a very fundamental one¹⁸. The right which is provided in section 68 of the Constitution is essential for constitutional democracy under the rule of law. It guarantees the right to administrative justice to every person that is, both substantively and procedurally fair. The right applying to suspended councillors should be understood in the context of section 264 of the Constitution which provides that governmental powers and responsibilities should be devolved. The constitutionally enshrined principle of devolution, among other objectives, seeks to promote democratic, effective, transparent, accountable and

¹⁷ The *nemo iudex in sua causa* principle demands that a man should not be a judge in a matter in which he has an interest. The involvement of the Minister at almost all stages of the disciplinary process offends against the long held principle of natural justice. *De Lange vs Smuts* NO 1998 (3) SA 785 (CC).

¹⁸ I Currie & J De Waal *The Bill of Rights Handbook* (2016) 645.

coherent government in Zimbabwe as a whole. The conduct of central government, in arbitrarily suspending councillors, is inimical to this objective.

Authors Iain Currie and Johan de Waal¹⁹ discuss the meaning and scope of the right to procedurally and substantively fair administrative conduct. The right is so important that it is usually entrenched in most national Constitutions. The entrenchment of fundamental principles of administrative law in the Bill of Rights must be seen against the background of a long history of abuse of governmental power. The general limitation clauses recognize that these rights are not absolute and may be limited in exceptional cases. However, it is the balancing act that often causes problems and which this dissertation will try to unravel.

The Constitution of Zimbabwe will be compared against the South African Constitution. The South African political and constitutional history resonates to some extent with the Zimbabwean situation. The South African constitutional model which has ensured considerable autonomy between the local and the national spheres of government will be discussed as a viable option in Zimbabwe.

Several international human rights instruments have provisions which guarantee individuals a right to administrative justice. Devolution has been accepted as a viable international principle to enhance locals' participation in the exercise of the powers of the State and making decisions that affect them. Regional, sub regional and international instruments will be analyzed as a way of comparing Zimbabwe's position among other States.

Several cases involving the suspension from office of councillors were brought before the Zimbabwean Courts. The range and scope of the discretionary powers afforded to the

¹⁹ Currie & De Waal (n 18 above) 677.

Minister appear to have been enormously expanded by the Urban Councils Act²⁰. The cases will be interrogated to confirm what the judiciary's attitude has been.

The current statutory framework appears to give the central government unbridled powers over local authorities. The responsible minister can suspend from office elected councillors without any participation from the local community. Is there no other way that the State can achieve its purpose to ensure efficient and effective local governance without necessarily encroaching upon elected local officials' right to administrative conduct which is procedurally and substantively fair? Does the central government's conduct promote the constitutional objective of devolution?

The questions have been asked in different *fora* and it appears that no answers have been found. This dissertation will investigate these issues in order to find answers to them and propose the way forward in Zimbabwe.

1.2 Literature Review

The issue of devolution and the procedural and substantive fairness in the suspension and removal of elected councillors from office by the national government minister has prompted a lot of debate and opinion among scholars and experts. This is because the 2013 Constitution specifically provides for devolution and the administrative right to both procedurally and substantively fair conduct by those exercising administrative powers²¹. The conduct of central

²⁰ Chapter 29:15.

²¹ Sections 264 and 68 of the 2013 Constitution provide for devolution and the right to administrative justice, respectively.

government appears inimical to the constitutional concepts of devolution and administrative justice²².

Author De Villiers²³ commenting on the South African scenario notes that the Constitution recognizes Local Government as an autonomous sphere of government. It reveals a concern for the integrity of Local Government and prescribes a hands-off relationship between Local Government and other levels of government. In this dissertation, the conduct of central government will be analysed to determine whether it promotes devolution or not²⁴. The manner in which councillors are suspended and removed from office will be the main point of focus, it will be used as a practical illustration of why it can be concluded that central government has continued to control local governance issues despite the constitutional provisions of devolution. Literature in South Africa will be useful in this regard²⁵.

Scholars Wiechers and Budhu in their very incisive article²⁶ examine the various constitutional provisions and recent court judgments which buttress the view that the current constitutional framework envisages that Local Government is no longer viewed as the small partner in the management of affairs of the State. The scholars reiterate that current judicial trends confirm that local government is viewed as an important vehicle designed to bring development to the people.

²² 'What the Constitution says about suspension of mayors' *Newsday* 19 May 2016. The article by a scholar, Paul Kaseke, analyses the close link between the issue of ministerial interference in the suspension and removal of elected councilors from office and the broader discourse on devolution.

²³ B De Villiers 'Local-provincial intergovernmental relations-a comparative analysis' (1997) 12 *SA PR/PL* 212.

²⁴ RM Dlamini 'Towards a new legal order for a new South Arica' (1992) Volume XV1 *Legal Studies Forum* 131. The author Dlamini RM explores how the issue of devolution of powers from central government to local authorities can be an effective solution in ensuring sharing of political and economic powers in a divided society. His views, though specifically addressed at South African apartheid situation has very much applicability in Zimbabwe, which is also a country suffering from social, political and economic disparity between its citizens. Allowing local authorities to effectively manage their resources and responsibilities can be one effective way of ensuring efficiency.

²⁵ D Brynard "Public participation in local government administration: bridging the gap" 07 April 2009, *UNISA*.

²⁶ M Wiechers & S Budhu "Current judicial trends pertaining to devolution and assignment of powers to local government" (2002) *SAPR/L* 192.

Scholar Pimstone²⁷ gives an opinion on the veracity of the statement that local government is a mere administrative handmaid of central government. He states that this is an unfortunate definition that suggests that local government is nothing more than the administrative arm of other spheres of government, because it gives the impression that local government plays a predominantly administrative role, which is at odds with the description of local government as a sphere that is relatively autonomous, and one that enjoys expansive or original powers²⁸.

The Human Rights Bulletin has a very analytical article wherein the issue of devolution within the Zimbabwean context is discussed. The article gives a comparative analysis of this phenomenon with other countries such as South Africa and Nigeria²⁹. The article was produced before the coming into operation of the 2013 Constitution. It gives an insight on the aspirations of the citizens on devolution. This dissertation will explore whether the current political situation mirrors the dictates of the Constitution as reflected by the wishes of the citizens during the constitutional outreach program.

There is a growing scholarly authorship on the related right to administrative conduct by those wielding state power. The authors Baxter and Hoexter³⁰ explain the concept of administrative justice which should be both procedurally and substantively fair especially in disciplinary matters. What amounts to procedurally and substantively fair conduct is explained in the textbook. This dissertation will compare and contrast the yardsticks provided

²⁷ G Pimstone "Local Government" in Chakalson *et al* Revision Service 5 (199) 6.

²⁸ M Beukes 'Governing the regions: or regional (and local) government in terms of the Constitution of South Africa Act 200 of 1993' (1994) *SAPR/PL* 393 also shows that the new constitutional dispensation envisages more effective participation by local authorities in its own affairs. Whilst central and local government are interlinked and interrelated, a certain degree of autonomy is reserved for local authorities.

²⁹ Human Rights Bulletin number 73 May 2012.

³⁰ L Baxter & C Hoexter *Administrative Law of South Africa* (1984) 56.

by the authors and the current procedures used in the suspension and removal of elected councillors to determine whether they comply with the minimum set standards³¹.

Professor Feltoe in his textbook also analyses the right to administrative conduct which is procedurally and substantively fair. The author analyses the right in the context of the fact that this right is now entrenched in the Constitution. He also gives an enlightening overview of the local government system in Zimbabwe under the new constitutional dispensation³².

An overview of the local current literature appears to show a deficiency in critical analysis of the legislative gaps in the law. Authors do not provide specific examples of how the legislative regimes falls short of achieving devolution principles and achieving administrative justice in the ministerial discharge of his powers in relation to elected local authorities' representatives. This dissertation will fill in that yawning gap by analysing the current laws relating to devolution and giving practical solutions to ensure devolution is achieved in a constitutionally accepted manner.

1.3 Problem Statement

Whereas the Constitution of Zimbabwe provides for devolution of governmental powers and responsibilities to local authorities presided over by elected councillors, the Urban Councils Act gives too much power to the Minister responsible in the procedures for suspension and removal of councillors in a manner that defeats the whole concept of devolution of power and responsibility, thereby affecting the efficiency and independence of local authorities.

³¹ Currie & De Waal (n 18 above) 677 also explore the right to administrative conduct which is fair and just. They note that this right no longer finds its basis on the common law or some abstract sense of justice but is now constitutionally entrenched.

³² G Feltoe *A Guide to Administrative and Local Government law in Zimbabwe* (2013) 10.

1.4 Research Question

The main research question:

- i. Whether the procedure for the suspension and removal of councillors in terms of the Urban Councils Act undermines devolution of powers and responsibilities as envisaged in the Constitution?

The subsidiary questions:

- ii. Whether there is procedural and substantial fairness in the suspension and removal of councillors in terms of the Urban Councils Act?
- iii. How can procedural and substantial fairness be guaranteed in the suspension and removal of councillors in terms of the Urban Councils Act?

1.5 Research Objectives

The Objectives of this research will be to:

- i. analyse the procedural and substantive fairness of the suspension and removal of councillors in terms of the Urban Councils Act.
- ii. assess how the suspension and removal of councillors in terms of the Urban Councils Act impacts on the principle of devolution of power and responsibilities of local authorities.
- iii. make a comparative analysis of the suspension and removal of councillors in Zimbabwe and South Africa.
- iv. Make recommendations on procedural and substantive fairness on suspension and removal of councillors.

1.6 Methodology

This shall be a theoretical research on the procedural and substantive fairness in the removal from office of councillors. The information used in the preparation of the dissertation shall be from the library, making use of textbooks in Constitutional and Administrative law. Journal articles, scholarly articles, case authorities and internet sources will also be used to test whether our laws and State practice follow norms of international law and best practice. The South African legal and constitutional framework shall be the focal comparator³³. The research does not include a field study. It is a desktop research. Propositions will be made for the reform of Zimbabwean laws to ensure they comply with principles of international human rights and constitutional law.

1.7 Significance of the Study

The issue of devolution of power and perceived interference by the central government in the running of affairs of local government is topical. The issue of whether the natural tenets of administrative justice are followed during the process of suspending councillors is of interest amongst the general populace, law students, academics and legal practitioners interested in the fields of human rights, constitutional law and administrative law. It is very important at this stage to undertake research into the interplay between a State's interests in proper local governance and the right to administrative justice of suspended councillors.

International best practice is the guiding principle to ensure constitutionalism and rule of law. This dissertation will give another important voice in the devolution discourse. At this stage, the issues are quite relevant and important as the nation still experiments with the 2013 Constitution. Lack of a thorough study into this area of the law may result in the central

³³ Zimbabwe and South Africa have a similar constitutional framework. There is however a marked attempt at local government autonomy and in South Africa as compared to Zimbabwe.

government continuing to stifle local government autonomy and breaching the right to administrative justice of the affected councillors.

The Urban Councils Act³⁴ provisions relating to removal of councillors from office are arguably unconstitutional. This makes a study into this area of the law important at this stage.

1.8 Synopsis of Chapters.

Chapter 1: Introduction to issues and Chapter Synopsis.

This chapter gives an introduction of issues to be discussed therein which includes; background to the study, statement of the problem, research objectives, significance of study, methodology, literature review, as well as synopsis of chapters.

Chapter 2: Devolution and good governance

This chapter analyses the principle of devolution of governmental power and responsibilities as a tool for democracy, development and good governance.

Chapter 3: Procedure for suspension and removal of councillors.

This chapter analyzes the processes and procedures for the suspension and removal of councillors in Zimbabwe.

Chapter 4: Comparative Study

The chapter adopts a comparative approach with the South African position on the issue pertaining to suspension and removal of councillors.

Chapter 5: Conclusion and recommendations.

This Chapter will give a summary of findings, recommendations and conclusions.

³⁴ Chapter 29:15.

CHAPTER 2

DEVOLUTION AND GOOD GOVERNANCE

2.1 Introduction

The great Greek Philosopher Aristotle believed that it was essential for human welfare to encourage the flourishing incommensurable values and that local autonomy was a means of achieving this. Aristotle further believed that each of the smaller communities that make up the *polis*, such as families, villages, etc, should have autonomy appropriate to its functions. This participatory function would facilitate the education of participants and councillors, act as a check on the central executive, result in the harnessing of local knowledge and ultimately contribute to the efficient delivery of local services. It would further prevent any single group from dominating the community³⁵.

Whilst it is acknowledged that there are various meanings attached to the concept of devolution, the concept can be comprehensively defined as political decentralisation which aims to statutorily transfer some political power, local policy making and administrative responsibilities and resources from central government to citizens and/or their democratically elected regional, provincial or local authorities³⁶.

The 2013 Constitution envisages devolution of governmental powers and responsibilities³⁷. There is general international consensus that devolution is key for democratisation since it

³⁵ M Wiechers & S Budhu (n 26 above) 194.

³⁶ MJ Balogun “The scope for popular participation in decentralization, community governance and development: towards a new paradigm of centre-periphery relations” (2000) 21 (1) *Regional Development Dialogue* 154; see also OD Juma “Devolution of power: Building a case for local government in the new constitutional order” (2003) 12 *University of Nairobi Law Journal* 209.

³⁷ Section 264 Constitution of Zimbabwe (2013).

brings a locally responsible government more accountable to local people³⁸. It is also a fact that the Constitutions of most emerging democracies have embraced provisions for devolution of governmental powers and responsibilities³⁹. Considering the above, it is hardly surprising that devolution as a concept has taken centre stage in public discussions, nationally, regionally and internationally.

This chapter is organized as follows. It begins with an examination of the concept of devolution generally, focussing on what it is, its theoretical underpinnings and the general debates surrounding this concept. This is followed by a more specific assessment of devolution as applied in Zimbabwe. A discussion follows of how devolution can be a tool for democracy, a means to achieve development and a means to achieve good governance. An overview of devolutionary systems in two African countries, namely South Africa and Kenya, follows thereafter. The brief discussion of the devolutionary systems in South Africa and Kenya leads to the conclusion of this chapter.

2.2 Theoretical Justifications for Devolution

The concept of devolution has been the subject of current political and public discussions⁴⁰. Devolution is a form of “separation of powers” albeit not in the sense in which the latter is generally understood⁴¹. Devolution relates to vertical separation of powers which is geographical and territorial and generally touted as a bulwark of constitutional democracy. Countries which have chosen to implement devolution such as Kenya and Uganda are seen

³⁸ P Moyo & C Ncube “Devolution of power in Zimbabwe’s new constitutional order: Opportunities and potential constraints” *Law, Democracy and Development vol. 18 Cape Town* 2014.

³⁹ South Africa, Malawi, Kenya, Uganda and Zimbabwe.

⁴⁰ Human Rights Bulletin Number 73 May 2012.

⁴¹ The principle of separation of powers is generally understood in the sense of its horizontal application, that is, the formal distinction between three independent branches of state authority, the legislative, executive and judicial branches.

and acclaimed as more democratic⁴². South Africa also runs a unique system of devolution based on a three-tier cooperative government structure. Local Government has constitutionally entrenched provisions in the South African Constitution⁴³. It is generally agreed that the first and foremost constitutional application of territorial separation of powers in the modern era is found in the United States of America⁴⁴.

Devolution is a political idea, doctrine or principle. It is a normative and philosophical concept based on the idea that the greatest human fulfilment is to be found through participation in the wider community that, at the same time, favours diversity and protects individuality⁴⁵. It therefore, expresses a philosophical and ideological notion that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters with self-rule on others, that is, through cooperation and autonomy⁴⁶.

One of the main aims of a devolved political system is to ensure that a process exists at the local level through which diverse interests can be heard and negotiated and resource allocation decisions can be made based on public discussions⁴⁷. Authors Barnett CC, Minis HP and Van Stant in their article⁴⁸ stress that the presence of a devolved political system subscribes to the ideals of democratic local governance since it observes and respects pluralism in policy making, and policy choices, and emphasizes greater active citizen participation in decision making which is a sign for respect for their political rights and civil liberties. It ensures the presence of mechanisms for fair local political competition,

⁴² J Ribot "Waiting for democracy: The politics of choice in natural resource decentralization" (2004). *Washington DC: World Resources Institute* 209.

⁴³ Chapter 7 of the Constitution of South Africa 106 of 1996.

⁴⁴ Devolutionary separation of powers is found in the 10th Amendment to the American Constitution.

⁴⁵ M Wiechers & S Budhu (n 26 above) 195.

⁴⁶ A Mangu & Z Jobodwana "*Advanced Constitutional and Fundamental Rights Law*" (2011) 16.

⁴⁷ Barnett CC & Minis HP *et al*, "Democratic decentralization" (1997) http://www.rti.org/pubs/Democr_Dcen.PDF (Accessed: 11 July 2018).

⁴⁸ Barnett CC & Minis HP, *et al*, (n 47 above) (Accessed: 11 July 2018).

transparency, and accountability, government processes that are open to the public, responsible to the public, and governed by the rule of law. Devolution is near in meaning with ‘self-government’. It is justified on the grounds that it is an inherent normative ethical value for humankind. It transfers power to sub-governments so that they may have the capacity to autonomously or discretionarily make fundamental policy decisions without interference from central government⁴⁹. Devolution of powers and government responsibilities is a new governance model ushered in by the 2013 Constitution in Zimbabwe.

The introduction of devolution in Zimbabwe is premised on the notion that devolution is more democratic, citizen centred, participatory, more transparent, accountable and locally relevant development focussed governance system⁵⁰. It ensures that all citizens have a voice over the exploitation, management and distribution of local resources through local decision making and policy formulation. From the foregoing, it is clear that there are several broad arguments for adoption and implementation of devolution. The arguments for devolution are basically that it will bring economic dividends through better management of local resources by a more informed local and autonomous government. It is also inherently valuable to rectify traditional territorial grievances by allowing those areas that are perceivably marginalized to own and manage their own resources, free from central government interference.

2.3 Legal Framework for Devolution in Zimbabwe

Section 5 of the Constitution of Zimbabwe⁵¹ specifically identifies three tiers of government; the national Government, provincial and metropolitan councils and local authorities. Respect

⁴⁹ R Leonard, RY Nanetti & RD Putnam “Devolution as a political process: The case of Italy” (1981) 11 (1) *Publius: The Journal of Federalism* 95.

⁵⁰ P Moyo & C Ncube (n 38 above) 290.

⁵¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

for devolution is enshrined in the Constitution as one of the Zimbabwe's founding values and principles upon which the country is founded⁵². Section 264 of the Constitution provides that wherever possible 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.

Chapter 14 of the Constitution contains the devolution clauses. The objectives of devolution are to give local governance powers to the people and enhance their participation in the exercise of power and decision making, promoting democratic, effective, transparent, accountable and coherent government in Zimbabwe, preserve and foster peace, national unity and indivisibility of Zimbabwe, recognize the right of communities to manage their own affairs and to further their development, to ensure the equitable sharing of local and national resources; and to transfer responsibilities from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority⁵³.

Sections 274 up to 279 of the Constitution of Zimbabwe⁵⁴ provides for local government. Local government in Zimbabwe is essentially urban local authorities which represent and manage the affairs of people in the urban areas of Zimbabwe and local authorities for rural areas which represent and manage affairs of people in rural areas.

There is still little case law on the subject of devolution in Zimbabwe. The Constitutional Court missed the opportunity to decisively deal with this important matter in the case of *Nkomo v Minister, Local Govt, Rural & Urban Development & Others*⁵⁵ wherein a former Minister in the inclusive government and a former Member of Parliament for the main

⁵² Section 3 (2) (1) provides the devolution and decentralization of governmental power and functions as one of the founding values and principles of the country.

⁵³ Section 262 (2) of the Constitution.

⁵⁴ Part 3 of Chapter 14 of the Constitution Amendment (No. 20) Act, 2013.

⁵⁵ Judgment Number CCZ 6/2006.

opposition party filed a court case in the Constitutional Court against government for failing to expeditiously enact an Act of Parliament to give effect to the full operationalization of a devolved government⁵⁶.

2.4 Assessing Devolution in Zimbabwe

In assessing devolution in Zimbabwe, the issue of how elected local authority officials are suspended and removed from office has been taken as the case study to reflect whether devolution is being effectively implemented in the country. Section 278 of the Constitution provides for tenure of local authorities. Subsection 2 thereof provides for the establishment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councilors found guilty on some specified grounds listed there.

The new Constitutional dispensation⁵⁷ has brought with it a new focus on administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair⁵⁸. The Minister responsible for local government is empowered to summarily suspend councillors in terms of section 114 of the Urban Councils Act⁵⁹. The Act⁶⁰ affords the Minister power to decide whether to investigate the allegations, whether or not to set up an independent tribunal and if he decides to set it up, persons who

⁵⁶ The Constitutional Court did not go into the merits of the application after holding that insufficient evidence had been placed before it by the Applicant to show that the respondents had not acted reasonably in enacting the legislation within 12 months of the coming into operation of the Constitution.

⁵⁷ The current Constitution came into effect in the year 2013, it has some new features including provision for the right to administrative justice in the expanded Bill of Rights.

⁵⁸ Section 68.

⁵⁹ Chapter 29:15.

⁶⁰ Chapter 29:15.

will sit as the independent tribunal members⁶¹. The statute arguably gives the Minister too much discretion⁶².

Upon Independence of Zimbabwe in 1980, the legislative and constitutional framework did not instantly react to the need for devolution of government functions, to the contrary, the laws which were a product of colonialism enabled central government hegemony over local government. The new Zimbabwean government continued to employ the same legislation as a political tool to ensure elected local government public officials were kept in check. Any perceived dissent would be met with suspension from office by the central government minister⁶³.

Author Moyo notes that one of the fears of devolution which has been propagated by the central government and some other anti-devolutionists is that devolution in Zimbabwe would threaten the unitary character of the State by encouraging regional secessionist politics, especially in Matabeleland⁶⁴. However, such fears appear largely baseless since there is no real threat in Zimbabwe from such secessionists. The lobby groups for secessionism are largely internet based and have no notable organisational structures, neither do they command any meaningful grassroots support⁶⁵. The cry from Matabeleland has been more about economic development rather than political separation.

⁶¹ Sections 114 and 114A of the Act which provides for the establishment of independent tribunals empowers the Minister, who would have suspended the councilor, in the first place, to choose from a list of about 9 persons who to be part of the tribunal.

⁶² The law which empowers the Minister to be involved in all the stages of the disciplinary process from suspension, investigation and dismissal of a councilor is arguably unfair. Because of political realities, the central government Minister has been usually a member of a different political party from the urban councilors and there has been a reasonable suspicion of bias in the suspension and disciplinary processes initiated by the Minister.

⁶³ *What the Constitution says about suspension of mayors* 'Newsday 19 May 2016.

⁶⁴ P Moyo "The devolution of power debate and the Zimbabwe national project" in SJ Ndlovu-Gatsheni & F Ndlovu *Nationalism and national projects in Southern Africa: New Critical reflections* (Pretoria: Africa Institute of South Africa (2013) 145.

⁶⁵ P Moyo & C Ncube (n 38 above) 145.

The 2013 Constitution envisages devolution of governmental powers and responsibilities⁶⁶. This of necessity means that local powers of governance should be relinquished to local authorities to enhance them to participate in the exercise of the powers of the State and in making decisions that affect them. Central government's interference in the local affairs by suspending councillors arguably goes against the spirit of devolution. Ordinary citizens are not included in the processes that lead to the decision to suspend and remove councillors and as already noted there is a growing perception that the suspensions are politically motivated and smacks of executive autocracy⁶⁷.

Section 114 of the Urban Councils Act⁶⁸ provides a list of grounds upon which councillors may be removed from office in Zimbabwe. These include some indeterminate and undefined terms such as '*gross*' incompetence and misconduct. This leaves room for abuse by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be "*gross*' to justify suspension is not specifically defined by the law. The powers of the central government through the responsible minister in the suspension and removal of elected local authority leaders has been used as the case study to assess devolution in Zimbabwe.

Within the Zimbabwean context, it is still difficult at this stage to comprehensively determine whether devolutionary goals are being achieved, since the Constitution is still relatively new. What is clear is that the drafters of the 2013 Constitution recognised that local government is important and created the constitutional infrastructure for the promotion of devolution. At this stage it is the political will which is required in order to effectively drive the local autonomy agenda of devolution.

⁶⁶ Section 264.

⁶⁷ 'Brian James suspension exposes urgent need for local government reform' The Zimbabwean 1 February 2012.

⁶⁸ Chapter 29:15.

2.4.1 Devolution as a Tool for Democracy

Democracy is one of the core values on which the 2013 Constitution is based. The words, ‘*democracy*’ and ‘*democratic*’, feature prominently in the Constitution⁶⁹. Democracy is a most valued but often very vague political concept⁷⁰. In its most basic form democracy envisages that the right to govern does not vest in a single person or a class of persons but in the people as a whole. It presupposes free political discussion, tolerance of differences between people and the right of all citizens to participate in political decision making.

Zimbabwe consists of 10 provinces whose economic, social and geopolitical characteristics differ. The Matabeleland Provinces (and to some extent Midlands Province) have a perception that they are marginalised in terms of political participation⁷¹. Devolution addresses the nation’s ‘*democratic deficit*’ by promoting democratic representation and legitimacy⁷². Author Vernon Bogdanor notes that devolution addresses this democratic deficit when the new local governments create new centres of power or separate political wills better placed to represent the interests of the people in the different regions⁷³.

Devolution, thus, is a tool for democracy. It encourages rule of a nation by the whole people and not a single person or class of persons. Devolution, self-government or territorial autonomy need not be conflated with secessionism⁷⁴.

⁶⁹ Sections 1, 3, 8, 46, and 67 among other sections.

⁷⁰ The word is derived from two ancient Greek words: *demos* (the people) and *Kratos* (strength)

⁷¹ The provinces are mainly inhabited by the minority Ndebele speaking peoples of Zimbabwe. The capital city of Zimbabwe is in Harare and the majority of the national leaders including presidents and prime ministers have origins from other provinces other than Matabeleland.

⁷² J Bradbury “The devolution debate in Wales during the Major governments: the politics of a developing union state?” (2007) 8 (1) *Regional and Federal Studies* 120.

⁷³ V Bogdanor “Devolution: Decentralization or disintegration” (1999) 70 (2) *The Political Quarterly* 185.

⁷⁴ The term refers to a belief or policy in favor of withdrawal from a nation, state, organization, or alliance.

2.4.2 Devolution as a Means to Achieve Development

Development can be defined as the process of changing and becoming larger, stronger, or more impressive, successful, or advanced, or of causing somebody or something to change in this way⁷⁵. The argument for devolution in some Zimbabwean provinces emanates from distinct provincial grievances brought about as a result of different patterns of development between the regions. The different patterns emerge in income levels, employment opportunities, infrastructural development, business and economic activity⁷⁶.

Manicaland, Midlands and Matabeleland provinces have been yearning for devolution because they have a perception that although they have immense local resources they have not benefitted from the resources. The provinces blame their underdeveloped public and social infrastructure on a deliberate policy of marginalisation by central government which favours other provinces for political expediency⁷⁷.

The provinces have immense natural resources which could have uplifted their local's socio-economic lives and public infrastructure investment but the central government systematically neglects them and uses the resources for the benefit of other provinces⁷⁸.

Manicaland has the country's largest sugar estates, logging forests and alluvial diamond deposits but there is little development in the province to show for the resources.

Midlands has platinum and gold mines yet there is little evidence of locals benefiting from their local resources. The same can be said of Matabeleland provinces which have electricity stations, three busy border posts at Beitbridge, Plumtree and Victoria Falls Kazungula with

⁷⁵ Thesaurus: English (UK).

⁷⁶ P Moyo & C Ncube (n 38 above) 290.

⁷⁷ P Moyo "The devolution of power debate and the Zimbabwe national project" in SJ Ndlovu-Gatsheni & F Ndlovu (n 64 above) 140.

⁷⁸ P Moyo "The devolution of power debate and the Zimbabwe national project" in SJ Ndlovu-Gatsheni & F Ndlovu (n 64 above) 140.

huge daily revenues, tourist resorts and timber forest but little evidence of local benefit accruing to the residents. Because of these imbalances devolution as envisaged in the Constitution would encourage local participation in the management of local resources, thereby resulting in devolution being a means of development.

There is a pool of case law from South Africa which clearly acknowledges the fact that local government is not only a cornerstone in the system of government but also constitute an important vehicle to bring development to the people⁷⁹. The South Africa constitutional framework shares similarities with the Zimbabwean one.

2.4.3 Devolution as a Tool to Achieve Good Governance

The Constitution lists good governance as one of the objectives to guide the State and all institutions and agencies of government⁸⁰.

The potential benefits of devolution that have been noted include; better public services since the locals who benefit from the services will be responsible for managing the provision of the services, better democratic governance, accountability and transparency on the part of government officials, willingness to pay for services by residents, self-government resulting in efficient allocation of services, enhanced local resources mobilization, enhanced mechanisms to reduce poverty, active involvement of the community, sustainable community projects and general efficiency and effectiveness⁸¹.

⁷⁹ In *Executive Council of the Western Cape Legislature v Minister for the Provincial Affairs and Constitutional Development of the RSA* 1999 (12) BCLR 1360 (CC) the court noted that local government is the closest government can get to the people. That is where the delivery must be seen to be taking place. The challenge facing the government at local level is profound.

⁸⁰ Section 9 of the Constitution of Zimbabwe.

⁸¹ Human Rights Bulletin Number 73 May 2012 page 2.

Devolution ensures good governance because the beneficiaries of the goods and services produced in the community will be responsible for the management and administration of the resources.

2.5 Overview of Some Devolutionary Political Systems

The Human Rights Bulletin gives a very analytical article wherein the issue of devolution within the Zimbabwean context is discussed⁸². The article gives a comparative analysis of this phenomenon in other countries such as South Africa and Nigeria⁸³. The article was produced before the coming into operation of the 2013 Constitution in Zimbabwe. It gives an insight on the aspirations of the Zimbabwean citizens on devolution. As already highlighted this dissertation will explore whether the current political situation mirrors the dictates of the Constitution as reflected by the wishes of the citizens during the constitutional outreach program.

2.5.1 South Africa

Author De Villiers⁸⁴ commenting on the South African scenario notes that the Constitution recognizes Local Government as an autonomous sphere of government. It reveals a concern for the integrity of Local Government and prescribes a hands-off relationship between Local Government and other levels of government.

The South African Constitution provides that the objects of local government are to provide democratic and accountable government for local authorities, ensure provision of services to communities in a sustainable manner, promote social and economic development, promote a

⁸² Human Rights Bulletin Number 73 May 2012.

⁸³ Human Rights Bulletin Number 73 May 2012 page 1.

⁸⁴ B De Villiers 'Local-provincial intergovernmental relations-a comparative analysis' (1997) 12 *SA PR/PL* 132.

safe and healthy environment and encourage participation in the matters of government by communities and community organisations⁸⁵.

The South African framework envisages the recognition of local government as an autonomous sphere of government which is necessary to improve the communities' quality of life and provide community members with a sense of involvement in the political processes that govern their daily lives⁸⁶.

The devolutionary agenda was reiterated by the Constitutional Court when it held that the New Text sought to realise a structure for local government that reveals a concern for the autonomy and integrity of local government and prescribes a hands-off relationship between local government and other levels of government⁸⁷.

2.5.2 Kenya.

It has been suggested that the political upheavals that emanated from the contested legitimacy of the government that followed the violent 2007 Kenyan elections provided the impetus for the current devolved system of governance⁸⁸.

Devolution of power was then made part of Kenyan law to address both the democratic deficits related to the disputed elections and also to widen the issues of citizen participation in local development and local government accountability⁸⁹. The Kenyan Constitution⁹⁰ provides that devolution of power provisions are an effort to encourage democratic control in

⁸⁵ Section 152 of the South African Constitution.

⁸⁶ D Brynard (n 25 above) 78 See also RM Dlamini (n24 above) 131.

⁸⁷ *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1399 paragraph 373.

⁸⁸ P Moyo & C Ncube (n 38 above) 290.

⁸⁹ P Moyo & C Ncube (n 38 above) 290.

⁹⁰ Kenyan Constitution (2007).

local decision making, democratic local governance, popular participation in local government initiatives, financial sobriety and communitarianism⁹¹.

The Kenyan principles are replicated in the Zimbabwean Constitution which provides that whilst the country remains unitary, governmental powers and functions are devolved through a three-tier cooperative system that includes the national government, provincial and metropolitan councils as well as local authorities⁹².

2.6 Conclusion

This chapter has demonstrated the critical nature of a devolved State in modern day governance systems. It set out to explore the theoretical foundations of devolution as an important element of constitutionalism. Even though the concept of devolution is not universally accepted, the virtues of a devolved governmental system cannot be underestimated especially in emerging democracies in Africa.

To put the devolution subject matter into perspective, this chapter explored the Zimbabwean constitutional and statutory framework for devolution, an assessment of the concept as applied in Zimbabwe was also made. The concept of devolution as a tool for democracy, a means to achieve development and as a means to achieve good governance was discussed. Furthermore, an overview was made of the different African government systems where devolution has been entrenched in the national Constitutions.

With this introduction of the concept of devolution, the next chapter will analyze the processes and procedures for the suspension and removal from office of councillors in

⁹¹ Kenyan Constitution Chapter 2.6:2.

⁹² Section 5 of the Zimbabwean Constitution 2013.

Zimbabwe, with a view to determine if the processes and procedures promote devolution in the Zimbabwean context.

CHAPTER 3

PROCEDURE FOR SUSPENSION AND REMOVAL OF COUNCILLORS

3.1 Introduction

The preceding chapter has demonstrated the critical nature of a devolved State in modern day governance systems. It set out to explore the theoretical foundations of devolution as an important element of constitutionalism. The chapter explored the Zimbabwean constitutional and statutory framework for devolution, an assessment of the concept as applied in Zimbabwe was also made. The concept of devolution as a tool for democracy, a means to achieve development and as a means to achieve good governance was discussed. Furthermore, an overview was made of the different African government systems where devolution has been entrenched in the national Constitutions.

The Constitution of Zimbabwe provides for devolution of governmental powers and responsibilities to local authorities presided over by elected councillors⁹³. The Urban Councils Act⁹⁴ which governs the procedures for the removal from office of councillors sets in motion debate on whether the procedures promote devolution and protect the right to procedurally and substantively fair administrative conduct of the affected elected officials. This should be understood in light of the fact that the new Constitutional dispensation⁹⁵ has brought with it a new focus on administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair⁹⁶.

⁹³ Section 264.

⁹⁴ Chapter 29:15.

⁹⁵ The current Constitution came into effect in the year 2013, it has some new features including provision for a right to administrative justice in the expanded Bill of Rights.

⁹⁶ Section 68.

This chapter will analyse the procedures employed in Zimbabwe in the suspension and removal of councillors from office. It begins with a discussion of the legal framework for suspension and removal of councillors from office. The pre-2013 Constitutional framework is discussed before the current constitutional and legislative framework is also discussed. The discussion is followed by an assessment of the procedures. The assessment focuses on the right to administrative justice of the affected councillors during the three critical stages of the process of suspension and removal. These are the suspension, appointment of tribunal members and decision to remove them from office. The discussion on whether the procedures promote devolution leads to the conclusion.

3.2 Legal Framework Governing Suspension and Removal of Councillors

As already noted in the introductory sections of the dissertation, upon independence of Zimbabwe in 1980, the legislative and constitutional framework did not instantly react to the need for devolution of government functions, to the contrary, the laws which were a product of colonialism enabled central government hegemony over local government. It has also been noted that the Zimbabwean government that took over power upon independence continued to employ the same legislation as a political tool to ensure elected local government public officials were kept in check. Any perceived dissent would be met with suspension from office by the central government minister⁹⁷. In this regard the legal framework mirrors the fact that central government which sponsors the promulgation of legislation has not promoted the passing of laws which ensure that there is independence of local authorities and devolution.

The pertinent pieces of legislation that govern the operation of local authorities and their relationship with central government will be explored in this Chapter. The provisions of the

⁹⁷ 'What the Constitution says about suspension of mayors' *Newsday* 19 May 2016.

Constitution and the Urban Councils Act will be discussed. In 2013, Zimbabwe adopted a new Constitution hereinafter referred to as the ‘2013 Constitution’. This Constitution is founded on notions of a democratic society and of interest is its Bill of Rights which provides for the right to administrative justice to every person⁹⁸.

The 2013 Constitution also envisages devolution of governmental powers and responsibilities⁹⁹. This of necessity means that local powers of governance should be relinquished to local authorities to enhance them to participate in the exercise of the powers of the State and in making decisions that affect them. The recurring observation in devolution discourses is that the central government’s interference in the local affairs by suspending councillors goes against the spirit of devolution and that there is usually no local input in the decision to suspend councillors giving rise to the feeling that the suspensions are politically motivated and smacks of executive autocracy¹⁰⁰.

Section 114 of the amended Urban Councils Act¹⁰¹ provides a list of grounds upon which councillors may be removed from office in Zimbabwe. These include some indeterminate and undefined terms such as ‘*gross*’ incompetence and misconduct. This leaves room for abuse by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be “*gross*’ to justify suspension is not specifically defined by the la

⁹⁸ Section 68.

⁹⁹ Section 264.

¹⁰⁰ ‘Brian James suspension exposes urgent need for local government reform’ The Zimbabwean 1 February 2012.

¹⁰¹ Chapter 29:15.

3.2.1 Pre-2013 Constitutional Era

Prior to the operation of the 2013 Constitution, the previous Constitutions since independence in 1980, did not deal with local government at all, and consequently did not regulate the procedures for the suspension and removal of councillors from office. The procedure for the suspension and removal from office of elected local government officials was exclusively dealt with in terms of the provisions of the Urban Councils Act¹⁰² (hereinafter ‘the Act’). The most operative provision for the purposes of removal and suspension of councillors was section 114 of the Act.

In terms of section 114 (1) of the Act which was headed ‘Suspension and dismissal of councillors’, the Minister, on reasonable grounds for suspecting that a councillor had contravened any provisions of the Prevention of Corruption Act¹⁰³, contravened section 107, 108 or 109 of the Act¹⁰⁴, committed any offence involving dishonesty in connection with the funds or other property of the council, causing through serious negligence loss of council property or gross mismanagement of council funds, property or affairs or had not relinquished office after vacancy of his her seat, could suspend a councillor.

As soon as practicable after the suspension of the councillor, and in any case within 45 days, the minister was obliged to cause a thorough investigation with all reasonable dispatch to determine if the councillor was guilty of any act, omission or conduct giving rise to his or her suspension¹⁰⁵. If following the investigation, the Minister was satisfied that the grounds of suspicion based on which he suspended a councillor had been established as fact, he could by

¹⁰² Chapter 29:15.

¹⁰³ Chapter 9:16.

¹⁰⁴ These sections mainly dealt with fraudulent non-disclosure by a councilor of pecuniary interest in council business or transactions in which a councilor was involved.

¹⁰⁵ Section 114 (3).

written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat would be declared vacant¹⁰⁶.

The old Urban Councils Act apparently gave the central government minister exclusive powers in the suspension, investigation and removal from office of councillors. The central government was accused of using the law as a political tool to ensure elected local government public officials were kept in check since any perceived dissent would be met with suspension from office by the central government minister¹⁰⁷.

3.2.2 The 2013 Constitution

The 2013 Constitution expressly provides in section 278 (2) that an Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councillors¹⁰⁸. The 2013 Constitution also provides an exhaustive list of grounds upon which mayors, chairpersons and councillors may be removed. The grounds are; inability to perform the functions of the office due to mental or physical incapacity, gross incompetence, gross misconduct, conviction for a crime involving dishonesty, corruption or abuse of office or wilful violation of the law or by-law. The section also provides, for good measure and emphasis, that a mayor, chairperson or councillor of a local authority shall not vacate his or her seat except in accordance with the provisions of the section¹⁰⁹. The 2013 Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency¹¹⁰.

¹⁰⁶ Section 114 (4).

¹⁰⁷ 'What the Constitution says about suspension of mayors' Newsday 19 May 2016.

¹⁰⁸ The section is a major break from the old position where the Minister responsible for Local Government was exclusively responsible for exercising the function of removing from office mayors, chairpersons and councilors. In terms of the 2013 Constitution such functions are now reposed in the independent tribunal.

¹⁰⁹ Section 278 (3).

¹¹⁰ Section 2.

Section 68 of the Constitution provides the right to administrative justice. It states that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial, and both substantively and procedurally fair¹¹¹. The powers vested in the central government in the procedures to suspend and remove elected local authority officials amounts to administrative conduct which should comply with the dictates of the Constitution. In the exercise of his ministerial powers the Minister should be alive to the principle of good governance, which binds the State and all institutions and agencies of government at all levels of devolution and decentralisation of governmental power and functions¹¹².

Section 264 of the Constitution provides that whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan and local authorities which are competent to carry out those responsibilities efficiently and effectively¹¹³. The objectives of devolution are; 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 decisions affecting them; to promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole, to preserve and foster the peace, national unity and indivisibility of Zimbabwe; to recognise the right of communities to manage their own affairs and to further their development; to ensure the equitable sharing of local and national resources; and 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 authority¹¹⁴.

¹¹¹ Section 68 (1).

¹¹² Section 3 (2) (1).

¹¹³ Section 264 (1).

¹¹⁴ Section 264 (2).

3.2.3 The *Lacuna* in the Law and the Amendment of the Urban Councils Act.

The 2013 Constitution was apparently a drastic break from the past, especially in the relationship between central government and local government¹¹⁵. The provisions of section 178 of the 2013 Constitution meant that the Minister could no longer purport to remove mayors and councillors in terms of the Urban Councils Act. The 2013 Constitution is the supreme law of Zimbabwe and overrides anything to the contrary in the Urban Councils Act or any other law. The old Urban Councils Act provided that the Minister could suspend, cause an investigation and remove a councillor or mayor from office. The 2013 Constitution provided to the contrary that an Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors and councillors¹¹⁶.

The apparent misalignment between the Urban Councils Act and the 2013 Constitution was a recipe for legal battles and it culminated in several cases wherein the Minister of Local Government had acted in terms of the Urban Councils Act to dismiss councillors and mayors from office and sued¹¹⁷. In the cases the courts indicated the illegality of suspension of the mayors and councillors where no independent tribunal had been established in accordance with section 278 of the 2013 Constitution. The Minister could not appoint the independent tribunal at that stage because no Act of Parliament authorised him to do so. So, under the

¹¹⁵ The Old Constitutions did not provide for local government yet section 5 of the 2013 Constitution specifically provides for 3 distinct tiers of government in Zimbabwe, the national, provincial and metropolitan councils and local authorities.

¹¹⁶ Section 278.

¹¹⁷ *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 188/15, *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 57/16, *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 274/16 and *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 385/16.

circumstances, even if the Minister had good grounds for suspending a mayor or a councillor he could not do so in the absence of an Act of Parliament authorising him to do so.

Despite the court rulings the minister persisted in trying to suspend councillors under section 114 of the old Urban Councils Act. Veritas a constitutional law watch dog in one of its bulletins concluded that it was most regrettable that the Minister had persisted in trying to suspend councillors under section 114 of the Urban Councils Act after being told by two judges of the High Court that he had no power to do so. It went on to opine that whatever the central government Minister's motive, his conduct undermines the independence of local authorities and the devolution of governmental powers that are keynotes of chapter 14 of the Constitution¹¹⁸.

Following the court judgments, to ensure that the central government could continue to lawfully suspend and remove elected local government officials, the amendment to the Urban Councils Act was inevitable. The central government acted by promulgating the Local Government Amendment Bill, 2016 whose purpose was given as to amend the Rural District Councils Act [Chapter 29.13] and the Urban Councils Act [Chapter 29.15] to align certain provisions of the Acts with section 278 (2) and (3) of the Constitution¹¹⁹.

The Bill which was presented by the Minister of Local Government, Public Works and National Housing was assented to and passed into law and its short title provides that it may be cited as the Local Government Laws Amendment Act, 2016. In its Part III it wholesomely substitutes section 114 of the old Urban Councils Act with a new section 114, it introduces a new section 114A which provides for independent tribunals and procedure. It also amends the

¹¹⁸ Constitution Watch 7/2016 'Suspension of Mayor of Harare-Constitutional?' [11th May 2016] www.veritaszim.net [Accessed 8 August 2018].

¹¹⁹ The section provides the grounds of removal from office of mayors, chairpersons and councilors and reiterates that the local government officials shall not vacate their seats except in accordance with the section.

old Urban Councils Act by insertion after the Third Schedule of a Fourth Schedule titled Rules of Independent Tribunals.

3.4 Assessment of the Current Procedures of Suspension and Removal of Councillors

The current procedures of suspension and removal of councillors are effectively provided for in the 2016 amendment to the Urban Councils Act. The amendment which was made to the Urban Councils Act to align it with the Constitution appears to be a rushed job which did not address all the dictates of the Constitution. The amendment appears narrow in its scope as it leaves out other key issues pertaining to local government legislation¹²⁰.

The amendment still leaves the effective powers to decide the affairs of local authorities to the central government. The minister is still empowered to have a decisive say on how local authorities should be run. If he does not agree with the decisions made by elected local authorities he is empowered to suspend them. The Amendment has been described as piecemeal, unconstitutional and designed to ensure the central government Minister retains the powers to rid city councils of their mayors and councillors who do not agree with the Minister¹²¹.

3.4.1 Right to Administrative Justice

The minister is given powers to suspend a councillor or mayor without hearing his side of the story first¹²². Although the Minister is part of the executive, when he exercises his powers to suspend he exercises an administrative power. His powers are therefore subject to the

¹²⁰ Whilst the amendment of the Act provided for compliance with section 278 of the Constitution, it does not address the dictates of section 264 which provides for devolution. It just addressed the procedural aspects of the law in removal of councillors without addressing the substantive devolutionary agenda.

¹²¹ Position Paper on the Local Government Amendment Bill by the Harare Residents Trust. www.hrt.org.zw [Accessed: 8 August 2018].

¹²² Section 114 (2) of the Urban Councils Act [Chapter 29:15].

provisions of the Administrative Justice Act and the Constitution. The tenets of natural justice provide for a chance of being heard to the affected party before an adverse decision is made¹²³.

The Minister is also given immense powers to decide whether an investigation should be carried out or not. The Act provides in section 114 (4) that after receiving a response by the affected councillor which is not satisfactory to him or if no response is received, the Minister shall cause a thorough investigation where necessary to be conducted. Under the circumstances the Minister is given discretion on whether to cause a thorough investigation or not. Each case in which the rights of an individual may potentially be affected requires that a thorough investigation be made before adverse decisions are made.

3.4.2 Procedure for Suspension

The Amendment provides that once the Minister has reasonable grounds for suspecting a mayor, chairperson or councillor he is obliged, by written notice to suspend the mayor, chairperson or councillor¹²⁴. Section 114 of the Urban Councils Act¹²⁵ provides a list of grounds upon which councillors may be removed from office in Zimbabwe. These include some indeterminate and undefined terms such as ‘*gross*’ incompetence and misconduct. This leaves room for abuse by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be “*gross*’ to justify suspension is not specifically defined by the law.

The provision is peremptory. The Minister has no discretion once he forms this reasonable suspicion. The affected elected official is not given any chance to state his case against

¹²³ The *audi alterum partem* rule.

¹²⁴ Section 114 (2) of the Urban Councils Act [Chapter 29:15].

¹²⁵ Chapter 29:15.

suspension at this stage. The failure to give the affected councillor a chance to give his side of the story even at this early stage is an affront to the age-old tenet of natural justice that a man should also be heard before an adverse judgment may be made against him¹²⁶.

3.4.3 Appointment of Tribunal Members

The section 114A provides for the appointment of the independent tribunal. Subsection thereof provides that a chairperson is appointed by the Minister from a list of about three and not more than nine registered legal practitioners with at least five years' experience in private or public practice. The other two members are also appointed by the Minister from persons nominated by the Civil Service Commission.

The involvement of the central government Minister goes against the spirit of devolution of powers and responsibilities to local authorities. The residents do not play a part in the appointment of tribunal members. Devolution envisages that locals are given powers to make decisions affecting them¹²⁷.

The Minister who is the complainant and an interested party in the disciplinary proceedings is also afforded the powers to appoint people who preside over a case in which he has an interest. It is a principle of administrative justice that the decision maker must be, and must be reasonably perceived to be, impartial¹²⁸.

Whereas the Constitution of Zimbabwe provides for devolution of governmental powers and responsibilities to local authorities presided over by elected councillors, the Urban Councils Act gives too much power to the Minister responsible in the procedures for suspension and

¹²⁶ The *audi alterum partem* rule.

¹²⁷ Section 264 (2) (a) of the Zimbabwean Constitution (2013).

¹²⁸ The *nemo iudex in sua causa* principle demands that a man should not be a judge in a matter in which he has an interest. The involvement of the Minister at almost all stages of the disciplinary process offends against the long-held principle of natural justice. *De Lange vs Smuts* NO 1998 (3) SA 785 (CC).

removal of councillors in a manner that defeats the whole concept of devolution of power and responsibility, thereby affecting the efficiency and independence of local authorities.

The Minister responsible for local government is empowered to summarily suspend councillors in terms of section 114 of the Urban Councils Act¹²⁹. The Act¹³⁰ affords the Minister power to decide whether to investigate the allegations, set up an independent tribunal and if he decides to set it up, persons who will sit as the independent tribunal members¹³¹. The statute arguably gives the Minister too much discretion¹³².

3.4.4 Procedure for Removal from Office

Once the tribunal has determined that the councillor or mayor is guilty of the misconduct as alleged the respondent is deemed to be removed from office¹³³. The law does not provide for any other penalty other than removal from office¹³⁴. The law appears too harsh in as far as it does not allow the affected councillor to mitigate before a penalty is imposed. There may be extenuating circumstances in each different case of breach of the law, and to provide for one blanket penalty is arbitrary.

The Urban Councils Act provides that it shall be competent for the independent tribunal to find the affected councillor guilty of an act of misconduct other than the act which the

¹²⁹ Chapter 29:15.

¹³⁰ Chapter 29:15.

¹³¹ Sections 114 and 114A of the Act which provides for the establishment of independent tribunals empowers the Minister, who would have suspended the councilor, in the first place, to choose from a list of about 9 persons who to be part of the tribunal.

¹³² The law which empowers the Minister to be involved in all the stages of the disciplinary process from suspension, investigation and dismissal of a councilor is arguably unfair. Because of political realities, the central government Minister has been usually a member of a different political party from the urban councilors and there has been a reasonable suspicion of bias in the suspension and disciplinary processes initiated by the Minister.

¹³³ Once a councilor has been convicted by the Tribunal in terms of the Urban Councils Act, the law does not provide for any other penalty other removal from office. The removal from office is automatic through operation of the law. Paragraph 4 (1) to the Fourth Schedule of the Urban Councils Act does not provide the Tribunal or any other lawful constituted body with powers to determine any other appropriate penalty for a convicted councilor other than removal from office.

¹³⁴ Paragraph 4 (1) to the Fourth Schedule of the Urban Councils Act.

respondent was originally alleged to have committed if the facts disclose such other act¹³⁵. The powers given to the independent tribunal are wide and far reaching in this regard since an affected councillor would only reasonably be expected to have directed his defence to the actual charge preferred against him. This makes the hearing potential unfair.

The tribunal is also empowered to refer the matter back for further investigation by the Minister if it has made a finding of not guilty but believes that the councillor is guilty of some other act¹³⁶. This amounts to double harassment. The tenets of natural justice provide that a man who has been acquitted may not be re-indicted on materially similar facts before another tribunal¹³⁷.

3.4.5 Central Government and Devolution

The 2013 Constitution specifically provides for devolution¹³⁸. The conduct of central government appears inimical to the constitutional concepts of devolution and administrative justice¹³⁹. This of necessity means that local powers of governance should be relinquished to local authorities to enhance them to participate in the exercise of the powers of the State and in making decisions that affect them. Central government's interference in the local affairs by suspending councillors runs against the spirit of devolution. There is usually no local input in

¹³⁵ Paragraph 4 (4) to the Fourth Schedule of the Urban Councils Act.

¹³⁶ Paragraph 4 (5) to the Fourth Schedule of the Urban Councils Act.

¹³⁷ In terms of the common law principle such an individual can plead *autre fois acquit* since the law cannot be seen to allow double harassment of a citizen on the same facts.

¹³⁸ Section 264 of the 2013 Constitution provide for devolution. Sections 3 of the Constitution mentions devolution as one of the principle of good governance which bind the State and all institutions and agencies of government at every level.

¹³⁹ 'What the Constitution says about suspension of mayors' *Newsday* 19 May 2016. The article by a scholar, Paul Kaseke, analyses the close link between the issue of ministerial interference in the suspension and removal of elected councilors from office and the broader discourse on devolution.

the decision to suspend councillors and there is a feeling that the suspensions are politically motivated and smacks of executive autocracy¹⁴⁰.

The right applying to suspended councillors should be understood in the context of section 264 of the Constitution which provides that governmental powers and responsibilities should be devolved. The constitutionally enshrined principle of devolution, among other objectives, seeks to promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole. The conduct of central government, in arbitrarily suspending councillors, is inimical to this objective.

3.5 Conclusion

This chapter has demonstrated the procedures employed in Zimbabwe in the suspension and removal of councillors from office. It began with a discussion of the legal framework for suspension and removal of councillors from office. The pre-2013 Constitutional framework was discussed before the current 2013 constitutional and legislative framework was also discussed. The discussion is followed by an assessment of the procedures.

The assessment focuses on the right to administrative justice of the affected councillors during the three critical stages of the process of suspension and removal. These are the suspension, appointment of tribunal members and decision to remove them from office. The discussion on whether the procedures promote devolution leads to the conclusion. The shortcomings in the current law have been highlighted in this chapter. The identified and observed shortcomings highlighted in this chapter leads to the view that Zimbabwe is not using the best international practices in its procedures for the suspension and removal of councillors from office.

¹⁴⁰ 'Brian James suspension exposes urgent need for local government reform' The Zimbabwean 1 February 2012.

In order to make a proper and definitive determination of whether the local procedures measure up to best international practices, the next chapter provides a detailed comparative analysis of the procedures for suspension and removal of councillors between Zimbabwe and South Africa. These discussions will not only be based on the contextual analysis given in this chapter. They will further explore the compliance of the procedures in the two countries to the devolutionary agenda.

CHAPTER 4

COMPARATIVE ANALYSIS OF SUSPENSION AND REMOVAL OF COUNCILLORS PROCEDURES BETWEEN ZIMBABWE AND SOUTH AFRICA

4.1 Introduction

The previous chapter analysed the procedures employed in Zimbabwe in the suspension and removal of councillors from office. It began with a discussion of the legal framework for the suspension and removal of councillors from office. The pre-2013 constitutional framework was discussed before the current constitutional framework was also extensively discussed. An assessment of the procedures was thereafter undertaken. The assessment focused on the right to administrative justice of the affected councillors during the three critical stages of the suspension and removal process, that is, the suspension, appointment of tribunal members and the removal from office stages. The discussion on whether the procedures promote devolution led to the conclusion of the chapter.

The South African Constitution¹⁴¹ is regarded as one of the most progressive Constitutions in the world¹⁴². The Zimbabwean legal framework has several similarities with the South African one¹⁴³. The South African Constitution¹⁴⁴ is older than the Zimbabwean one. Several cases have been dealt with in the South African courts in which the issue of devolution and the attendant administrative justice issues relating to the affected councillors have been decisively dealt with. The South African framework has been specifically identified as an appropriate framework to make a comparative analysis with the Zimbabwean situation in

¹⁴¹ No. 108 of 1996.

¹⁴² The Constitution is product of extensive consultation between the different peoples of South Africa. It was certified by the Constitutional to show that it complied with some 34 important constitutional principles.

¹⁴³ Both countries share a Roman Dutch law common law origin. The countries all came out from a brutal past of racial segregation in which local authorities were divided on the basis of racial classification. The two countries have both adopted Constitutions which seek to promote devolution and autonomy of local authorities.

¹⁴⁴ No. 108 of 1996.

order to determine if the local procedures promote and fulfil devolution and comply with international best practices.

This chapter will provide a general overview of the South African legal framework for suspension and removal of councillors. The overview of the South African legal framework encompasses an assessment of the current statutory framework for the suspension and removal of councillors in South Africa, the Code of Conduct for councillors will be extensively discussed. Thereafter a discussion on the general background of Zimbabwe and the evolution of its legal system in the context of the removal of councillors from office will follow. The discussion is followed by a comparative analysis of the procedures employed in the two countries which leads to the conclusion of the chapter.

4.2. Overview of the South African legal framework for suspension and removal of councillors.

The South African legal framework on local government is based on an important principle; that of local government autonomy. Local government must stand on its own feet and partake in the national development exercise as a mature partner of national and provincial governments¹⁴⁵. The most important pieces of law that govern the legal framework for the suspension and removal of councillors are the Constitution¹⁴⁶, the Municipal Systems Act¹⁴⁷, the Municipal Structures Act¹⁴⁸ and the Municipal Finance Management Act¹⁴⁹.

¹⁴⁵ *Ukhutela District Municipality v President of the RSA* 2002 (5) BCLR 479 (N).

¹⁴⁶ No. 108 of 1996.

¹⁴⁷ 32 of 2000.

¹⁴⁸ 117 of 1998.

¹⁴⁹ 56 of 2003.

The Constitution of South Africa¹⁵⁰ establishes municipalities as part of a distinctive sphere of government with their own assemblies of locally elected representatives. Chapter 7 of the South African Constitution¹⁵¹ deals with local government and embodies the core principles upon which local government is founded. Section 152 (1) (a) of the South African Constitution¹⁵² provides that the government is under an obligation to pursue the object of providing accountable government for local communities.

The Municipal Structures Act¹⁵³ provides for the establishment of municipalities and lays down the basis for a new system of local government in South Africa. The Municipal Systems Act¹⁵⁴ defines the legal nature of a municipality and the framework for local administration. The Municipal Finance Management Act¹⁵⁵ is intended to ensure good and sound financial management in municipalities. Its main aim is to develop sound financial governance within all municipalities. The three statutes read together provide a clear guidance on the roles and responsibilities of councillors and officials in South Africa¹⁵⁶.

The Municipal Systems Act¹⁵⁷ provides that council has the duty to provide, without favour or prejudice, accountable government. Members of the local community have the right to demand that the proceedings of the council and its committees are conducted impartially, without prejudice and untainted by personal self-interest. The Municipal Systems Act¹⁵⁸ has a

¹⁵⁰ No. 108 of 1996.

¹⁵¹ No. 108 of 1996.

¹⁵² No. 108 of 1996.

¹⁵³ 117 of 1998.

¹⁵⁴ 32 of 2000.

¹⁵⁵ 56 of 2003.

¹⁵⁶ Guideline Document on the Roles and Responsibilities of Councillors and Officials [https://www.salga.org.za/Documents/Municipalities/Guidelines%20for%20Municipalities/Guideline-Documents-On-The-Roles-and-Responsibilities-of-Councillors-and-Officials-\(2\)-\(1st-Draft\).pdf](https://www.salga.org.za/Documents/Municipalities/Guidelines%20for%20Municipalities/Guideline-Documents-On-The-Roles-and-Responsibilities-of-Councillors-and-Officials-(2)-(1st-Draft).pdf) [Accessed: 8 August 2018].

¹⁵⁷ 32 of 2000.

¹⁵⁸ 32 of 2000.

Code of Conduct for councillors which provides for the procedures for the suspension and removal of councillors.

The Constitutional and statutory local government framework in South Africa reiterates the principle that although local municipalities are independent and mature partners in national development they must be accountable¹⁵⁹. The Code of Conduct in the Municipal Systems Act is a key component of the framework for local accountability. It is concerned with the integrity of councillors and their accountability towards local communities¹⁶⁰. The Code of Conduct provides for several and detailed acts and omissions that amount to grounds for suspension or removal of councillors from office. It also provides the procedures to be followed in the suspension and removal of councillors from office.

4.2.1 The Provisions of the Code of Conduct.

Councillors must be accountable to local communities and report back at least quarterly to constituencies on council matters, including the performance of the municipality in terms of established indicators. The councillors must perform their duties in good faith, honestly, in a transparent manner, in the best interests of the municipality and without compromising the municipality's credibility or integrity¹⁶¹. A councillor may not be in arrears for rates and service charges for a period longer than three months¹⁶².

Councillors must attend meetings of the council or committees of which they are members unless they have obtained leave of absence or are required to withdraw from a meeting¹⁶³. Failure to attend three or more consecutive meetings or committee meetings without having

¹⁵⁹ Section 152 (1) (a) of the Constitution. Section 4 (2) (b) of the Municipal Systems Act.

¹⁶⁰ Preamble to Schedule 1 of the Municipal Systems Act.

¹⁶¹ Item 2(a) and (b) Schedule 1 Municipal Systems Act.

¹⁶² Item 12A Schedule 1 Municipal Systems Act.

¹⁶³ Item 3 Schedule 1 Municipal Systems Act.

obtained leave of absence must result in removal from office of that councillor. The Code of Conduct provides that the imposition of a fine or the removal from office must be conducted in accordance with a standard standing procedure which each municipality must adopt. The procedure must comply with the rules of natural justice¹⁶⁴.

Within 60 days of his or her election or appointment each councillor must declare to the municipal manager, in writing, any financial interests he or she may have in any business or property. The councillor is also enjoined to declare any gifts above an amount prescribed by the Minister for local government¹⁶⁵. Personal interest in a council matter must be disclosed by a councillor and unless the council or committee decides the interest is trivial or irrelevant a councillor must withdraw from council or committee meetings about such matters¹⁶⁶.

A councillor or whose immediate family acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit to the council at the first meeting which it is possible to do so¹⁶⁷. Fulltime councillors are not permitted to engage in any other paid work without the consent of council¹⁶⁸. Councillors may not use their position, privileges or confidential information for private gain or to improperly benefit another person¹⁶⁹.

Bribery is not allowed. Councillors may not request, solicit or accept rewards, gifts or favours for doing or not doing something in connection with council work¹⁷⁰. Councillors may not disclose privileged or confidential information¹⁷¹. The Code of Conduct also prohibits a councillor from interfering in the administration of the municipality, unless the council has

¹⁶⁴ Item 4 (3) Schedule 1 Municipal Systems Act.

¹⁶⁵ Item 7 (3) Schedule 1 Municipal Systems Act.

¹⁶⁶ Item 5 Schedule 1 Municipal Systems Act.

¹⁶⁷ Item 5 (3) Schedule 1 Municipal Systems Act.

¹⁶⁸ Item 8 Schedule 1 Municipal Systems Act.

¹⁶⁹ Item 6 (1) Schedule 1 Municipal Systems Act.

¹⁷⁰ Item 9 Schedule 1 Municipal Systems Act.

¹⁷¹ Item 10 Schedule 1 Municipal Systems Act.

given the councillor a mandate. It is a criminal offence for a councillor to attempt to influence the municipal manager, any other staff or an agent of a municipality not to enforce an obligation in terms of the Act, other legislation, a by-law or a council resolution¹⁷².

4.2.2 South African Procedure for Suspension and Removal from Office.

The Code of Conduct contains provisions dealing with enforcement. The role players are the Speaker, the Council and the Member of the Executive Council for local government (hereinafter ‘the MEC’). The Speaker plays a pivotal role in the enforcement of the Code of Conduct for councillors. The Speaker’s role is defined by the Municipal Systems Act Code of Conduct¹⁷³, assigned to the Speaker in the Municipal Structures Act¹⁷⁴, as well as the traditional role of Speakers as the guardians of the integrity of the local legislators.

The Speaker must ensure compliance with the Code of Conduct in the council and committees. He must ensure that every councillor receives a copy of the Code and that the Code is available whenever the council meets¹⁷⁵. The Speaker has the duty to investigate possible breaches of the Code if he has reasonable suspicion that it has been breached. The Speaker must authorise an investigation, give the councillor a reasonable opportunity to respond in writing; and report to a council meeting¹⁷⁶. The report must be open to the public and the Speaker must report the outcome of the investigation to the MEC for local government¹⁷⁷. The MEC may be informed after the council has had an opportunity to discuss the report¹⁷⁸.

¹⁷² Section 119 (1) of the Municipal Systems Act.

¹⁷³ 32 of 2000.

¹⁷⁴ 117 of 1998.

¹⁷⁵ Section 37 (e) of the Municipal Structures Act. Item 13 (4) Schedule 1 Municipal Systems Act.

¹⁷⁶ Item 13 (1) Schedule 1 Municipal Systems Act.

¹⁷⁷ Item 13 (2) Schedule 1 Municipal Systems Act.

¹⁷⁸ *Van Wyk v Uys NO* (2000) JOL 8976 (C).

The council can also investigate and make a finding on an alleged breach of the Code¹⁷⁹. It may establish a special committee to investigate and make recommendations to the council¹⁸⁰. The investigation by council or its committee should be in accordance with the rules of natural justice¹⁸¹. Where an investigation is conducted by the Speaker, he does it by himself without the involvement of councillors but where it is done by council, it involves a committee of councillors¹⁸².

The authority to impose a penalty is vested in the municipal council or, alternatively, the MEC¹⁸³. The council may punish an errant councillor by issuing a formal warning, reprimanding the councillor, fining the councillor, requesting the MEC to suspend the councillor for a period or requesting the MEC to remove the councillor from office¹⁸⁴. The council cannot suspend or remove the councillor from office but the MEC is empowered to do so¹⁸⁵.

A councillor may appeal to the MEC against a punishment meted out by the council within 14 days and a copy of the appeal must be provided to council¹⁸⁶. The council may within 14 days of receipt of the appeal respond to the MEC. The MEC can after having considered the appeal, confirm, set aside or vary the decision taken by the council¹⁸⁷.

The MEC is also himself empowered by the Code of Conduct to appoint a person or committee to investigate any alleged breach and to recommend whether or not the councillor

¹⁷⁹ Item 14 (1) (a) Schedule 1 Municipal Systems Act.

¹⁸⁰ Item 14 (1) (b) Schedule 1 Municipal Systems Act.

¹⁸¹ Item 14 (7) Schedule 1 Municipal Systems Act.

¹⁸² *Nala Local Municipality and another v Lejweleputswa District Municipality and others* 2005 (12) BCLR 1280 (0) at para 15.

¹⁸³ Item 14 (2) and Item 14 (6) Schedule 1 Municipal Systems Act.

¹⁸⁴ Item 14 (2) Schedule 1 Municipal Systems Act.

¹⁸⁵ Item 14 (6) Schedule 1 Municipal Systems Act.

¹⁸⁶ Item 14 (3) (a) Schedule 1 Municipal Systems Act.

¹⁸⁷ Item 14 (3) (d) Schedule 1 Municipal Systems Act.

should be suspended or removed from office¹⁸⁸. The investigation should be in accordance with the rules of natural justice¹⁸⁹. A fair hearing must take place and the concerned councillor must be notified of the intended action and be given a proper opportunity to be heard¹⁹⁰.

4.3 General background of Zimbabwe, and evolution of its legal system in the context of the removal of elected local government officials from office

Before the 2013 Constitution, the previous Constitutions did not deal with local government, and consequently did not regulate the procedures for the suspension and removal of councillors from office. The procedure for the suspension and removal from office of elected local government officials was exclusively dealt with in terms of the provisions of the Urban Councils Act¹⁹¹. The most operative provision for the purposes of removal and suspension of councillors was section 114 of the Act.

In terms of section 114 (1) of the Act, the Minister, on reasonable grounds for suspecting that a councillor had contravened any provisions of the Prevention of Corruption Act¹⁹², contravened section 107, 108 or 109 of the Act¹⁹³, committed any offence involving dishonesty in connection with the funds or other property of the council, causing through serious negligence loss of council property or gross mismanagement of council funds, property or affairs or had not relinquished office after vacancy of his her seat, could suspend a councillor.

¹⁸⁸ Item 14 (4) Schedule 1 Municipal Systems Act.

¹⁸⁹ *Van Wyk v Uys NO* (2000) JOL 8976 (C).

¹⁹⁰ Local accountability; enforcing the Code of Conduct for councillors.

¹⁹¹ Chapter 29:15.

¹⁹² Chapter 9:16.

¹⁹³ These sections mainly dealt with fraudulent non-disclosure by a councilor of pecuniary interest in council business or transactions in which a councilor was involved.

As soon as practicable after the suspension of the councillor, and in any case within 45 days, the minister was obliged to cause a thorough investigation with all reasonable dispatch to determine if the councillor was guilty of any act, omission or conduct giving rise to his or her suspension¹⁹⁴. If following the investigation, the Minister was satisfied that the grounds of suspicion based on which he suspended a councillor had been established as fact, he could by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat would be declared vacant¹⁹⁵.

In 2013, Zimbabwe adopted a new Constitution. This Constitution provides for the right to administrative justice to every person¹⁹⁶ and devolution of governmental powers and responsibilities¹⁹⁷. It also expressly provides in section 278 (2) that an Act of Parliament must provide for the establishment of an independent tribunal to exercise the function of removing from office mayors, chairpersons and councillors¹⁹⁸. The 2013 Constitution also provides an exhaustive list of grounds upon which mayors, chairpersons and councillors may be removed. The grounds are; inability to perform the functions of the office due to mental or physical incapacity, gross incompetence, gross misconduct, conviction for a crime involving dishonesty, corruption or abuse of office or wilful violation of the law or by-law.

The section also provides that a mayor, chairperson or councillor of a local authority shall not vacate his or her seat except in accordance with the provisions of the section¹⁹⁹. The 2013

¹⁹⁴ Section 114 (3).

¹⁹⁵ Section 114 (4).

¹⁹⁶ Section 68.

¹⁹⁷ Section 264.

¹⁹⁸ The section is a major break from the old position where the Minister responsible for Local Government was exclusively responsible for exercising the function of removing from office mayors, chairpersons and councillors. In terms of the 2013 Constitution such functions are now reposed in the independent tribunal.

¹⁹⁹ Section 278 (3).

Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency²⁰⁰.

In 2016 the Urban Councils Act was amended to align it with the provisions of the 2013 Constitution. Section 114 of the amended Urban Councils Act²⁰¹ provides a list of grounds upon which councillors may be removed from office in Zimbabwe. Section 68 of the Constitution provides the right to administrative justice. It states that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial, and both substantively and procedurally fair²⁰².

In terms of amended Act the Minister who has reasonable grounds for suspecting that a mayor or councillor has contravened section 114 of the Urban Councils Act²⁰³ shall write to the concerned councillor and the council suspending the mayor²⁰⁴. After 14 days of suspending the councillor the Minister shall cause an investigation if he does not receive a response or the response from the councillor is not satisfactory to him. The Minister shall refer the matter to an independent tribunal for determination of the issues of whether the councillor should be removed²⁰⁵.

The Minister is the one who is empowered to appoint the tribunal that determines the veracity of the allegations against the councillor. The Urban Councils Act²⁰⁶ was also amended by the insertion of the Fourth Schedule which provides the rules of the Independent Tribunals.

²⁰⁰ Section 2.

²⁰¹ Chapter 29:15.

²⁰² Section 68 (1).

²⁰³ Chapter 29:15.

²⁰⁴ Section 114 (2) (c).

²⁰⁵ Section 114 (5).

²⁰⁶ Chapter 29:15.

4.4 Comparative Analysis of Procedures in the Two Countries

The preceding sections have detailed the procedures used in South Africa and Zimbabwe in the suspension and removal of councillors from office. This section deals with a comparative discussion of the key issues emanating from the two countries. The discussion brings out the distinctive features of each system. The discussion is broken down into three stages of the disciplinary process, that is, the suspension stage, investigation stage and removal stage. The objective of the analysis is to determine if the procedures in the two countries promote devolution.

The South African Code of Conduct²⁰⁷ spells out in detail what conduct, either by commission or omission, amounts to grounds for disciplinary action against a councillor whereas the Section 114 of the Urban Councils Act²⁰⁸ of Zimbabwe provides a list of grounds, among them some indeterminate and undefined terms such as ‘*gross*’ incompetence and misconduct. This leaves room for abuse in Zimbabwe by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be “*gross*’ to justify suspension is not specifically defined by the law.

In South Africa the council itself, the Speaker or the MEC are empowered to initiate disciplinary proceedings against a councillor for breach of the Code of Conduct. Central or National government has no direct role in the initiation of the proceedings against a councillor. In Zimbabwe on the other hand it is the Minister of local Government who is empowered to initiate proceedings against a councillor. In Zimbabwe the council has no such powers afforded to initiate proceedings against a fellow councillor. The powers to initiate

²⁰⁷ Schedule 1 Municipal Systems Act.

²⁰⁸ Chapter 29:15.

such proceedings are devolved to local authorities as opposed to the position in Zimbabwe where the National or central government wields such power.

The procedures in South Africa are mainly initiated by council itself, the Speaker and the MEC may only be informed of an investigation which would have been already commenced. The process starts from the grassroots going up. In Zimbabwe it is the Minister of the central government who initiates proceedings and the council is only informed when a decision has been made. In Zimbabwe it is '*top to down*' decision making yet in South Africa it is '*down to top*' decision making. The South African procedures are more devolution friendly than Zimbabwe in this regard.

In South Africa the law specifically provides that the public must be involved and informed at all stages²⁰⁹. In Zimbabwe the public is not involved at all in the procedures of suspension and removal of councillors from office. The South African model appears to promote devolution since the local community is afforded participation in decision making of issues affecting them.

In South Africa when the Speaker has reasonable suspicion that the Code of Conduct has been breached he must report the issue to council whereas in Zimbabwe the law does not provide that the Minister has to report to council. The MEC in South Africa is a creature of the devolution concept. He is a member of the Provincial executive council. He is not a member of National or central government. The law in South Africa ensures that administration of local affairs is left to the provincial and local spheres of government.

In Zimbabwe an 'independent tribunal' has to be appointed by the National government Minister to determine whether a councillor should be removed from office or not yet in South

²⁰⁹ Item 13 (2) Schedule 1 Municipal System Act.

Africa the hearing is conducted by council itself, the Speaker or the MEC. The role players in the South African context are members closely related in the running of the affairs of the local authority concerned yet in Zimbabwe the ‘independent tribunal’ which is appointed by the Minister need not have members drawn from the local community.

Both countries’ laws provide that the conduct of the proceedings in the suspension and removal of councillors should be in accordance with the rules of natural justice²¹⁰. However, a perusal of Zimbabwean court cases reveal that the courts have reiterated that the rules of natural justice have not been followed in the cases involving removal of councillors brought before it²¹¹. It is clear that the South African legal framework in the suspension and removal of councillors from office promotes devolution more than the Zimbabwean framework. The Zimbabwean framework appears to retain central government powers over local authorities and does not promote and fulfil the devolution agenda. The central government Minister in Zimbabwe plays a critical role in the procedures yet in South Africa the powers of suspension and removal of councillors have been devolved to provincial and local government.

In South Africa it is clear that local government autonomy is recognized and its constitutional status is now materially different to what it was when parliament was supreme. The institution of local government now has a place in the constitutional order, has been established by competent authority, and is entitled to certain powers, including power to make by-laws and define and control its own processes and procedures²¹². There is a realisation in the South African constitutional term ‘local sphere of government’ of the

²¹⁰ Item 4 (3) Schedule 1 Municipal Systems Act. Section 114A (13) (a) of the Urban Councils Act.

²¹¹ *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 188/15, *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 57/16, *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 274/16 and *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 385/16.

²¹² *Fedsure Life Assurance LTD v Greater Johannesburg Metropolitan Council* 1998 (12) BCLR 1458 (CC).

equality between national, provincial and local government structures, as opposed to the more hierarchical levels of power and importance²¹³. Whilst the 2013 Zimbabwean Constitution provides for devolution, it does not do so in unequivocal terms, it provides that powers may be devolved whenever appropriate, to metropolitan councils and local authorities which are competent to carry out the responsibilities efficiently and effectively²¹⁴. This leaves room for doubt on which councils and authorities are so entitled to have powers devolved to them.

4.5 Conclusion

This chapter set out to explore the procedures of removal and suspension of councillors in Zimbabwe and South Africa. It has outlined the general overview of the South African legal framework for suspension and removal of councillors. The overview of the South African legal framework encompassed an assessment of the current statutory framework for the suspension and removal of councillors in South Africa, the Code of Conduct for councillors was extensively discussed. Thereafter a discussion on the general background of Zimbabwe and the evolution of its legal system in the context of the removal of councillors from office followed. The discussion was followed by a comparative analysis of the procedures employed in the two countries which led to the conclusion of the chapter.

The role of central government in the processes of local government in the suspension and removal of councillors from office reflects the level of devolution within the respective country. It has been noted that the Minister in the National Government responsible for local government in Zimbabwe plays the major role in the procedures whilst in South Africa that role is played by council itself, the Speaker or the MEC. The public has no statutory role assigned to it in the Zimbabwean context but in South Africa the law specifically provides

²¹³ *Ukhutela District Municipality v President of the RSA* 2002 (5) BCLR 479 (N).

²¹⁴ Section 264 (1) of the Zimbabwe Constitution 2013.

that the public should be kept informed and should participate at all critical stages of the process. The South African model tends to promote the ideals of devolution, which encourage public participation in all matters of government which affect them.

Having compared and analysed the procedures used in the two countries in the suspension and removal of councillors from office, the next chapter concludes the previous discussions by offering some suggestions from the lessons learnt. It is trite that each country should employ means which are best suited to its needs, but it is prudent to compare with other similarly placed countries with a view to achieve international best standards. The next chapter will offer some practical recommendations from a comparative perspective.

CHAPTER 5

SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

The previous chapters introduced the global devolution discourse, and further explored comparatively, the devolutionary legal frameworks in Zimbabwe and South Africa. The comparative analysis is important because no system of devolution can be meaningfully assessed in the absence of available alternatives. This comparative study made it possible for the devolutionary systems in both countries to be usefully examined, with a view to further enhancing the prospects of an efficient and effective system in Zimbabwe. The procedure used in the suspension and removal of councillors was used as a case study to determine if the Zimbabwean procedures comply with best international standards.

South Africa was used as a comparator. Zimbabwe and South Africa provide a good comparative fulcrum because they both share a largely similar contextual background and are both coming from a history of centralisation of power in their national governments. The Constitutions of both countries specifically provide for decentralisation of power and local government is given prominence as a competent and autonomous sphere or tier of government.

Considering the foregoing discussions, this chapter concludes the dissertation in the following way. It begins by a summary of the main issues addressed in all the preceding chapters. The summary of critical issues that arose is followed by a discussion of recommendations which then lead to the dissertation's concluding remarks.

5.1 Summary

There is a general international consensus that devolution is a key for democratisation since it brings a locally responsible government more accountable to local people²¹⁵. It is also a fact that the Constitutions of most emerging democracies have embraced provisions for devolution of governmental powers and responsibilities²¹⁶. Considering the above, it is hardly surprising that devolution as a concept has taken centre stage in public discussions, nationally, regionally and internationally.

Due to the broadness of devolution as a concept, this study focused on one key element of it, that is, the role of central government in the suspension and removal from office of councillors, who are elected office bearers for local authorities. The election of local government office bearers by local residents is a component of devolution since it reflects the local people's powers of governance and their participation in the exercise of the powers of the State in making decisions that affect them²¹⁷. The procedures that are used in Zimbabwe in the suspension and removal of councillors from office reflect the seriousness with which central government takes to the issue of devolution.

There is no one form of devolution blueprint; therefore, this study compared and contrasted the devolutionary systems in Zimbabwe and South Africa in order to determine if the Zimbabwean scenario measures well against international best standards. The questions requiring answers were whether the procedure for the suspension and removal of councillors in terms of the Urban Councils Act undermines devolution of powers and responsibilities as envisaged in the Constitution? Whether there is procedural and substantive fairness in the suspension and removal of councillors in terms of the Urban Councils Act and how

²¹⁵ P Moyo & C Ncube (n 38 above) 290.

²¹⁶ South Africa, Malawi, Kenya, Uganda and Zimbabwe.

²¹⁷ Section 264 (2) (a) of the Constitution of Zimbabwe (2013).

procedural and substantive fairness can be guaranteed in the suspension and removal of councillors in terms of the Urban Councils Act.

Before addressing the questions, the study first explored the theoretical debates underpinning devolution generally. Chapter 2 addresses the concept of devolution in depth. Devolution and good governance go hand in hand. Countries which have chosen to implement devolution such as Kenya and Uganda are seen and acclaimed as more democratic²¹⁸. It was noted in chapter 2 that the presence of a devolved political system subscribes to the ideals of democratic local governance since it observes and respects pluralism in policy making, and policy choices, and emphasizes greater active citizen participation in decision making which is a sign for respect for their political rights and civil liberties.

In chapter 2 it was also noted that devolution ensures the presence of mechanisms for fair local political competition, transparency, and accountability, government processes that are open to the public, responsible to the public, and governed by the rule of law. Devolution is near in meaning with 'self-government'. It is justified on the grounds that it is an inherent normative ethical value for humankind. It transfers power to sub-governments so that they may have the capacity to autonomously or discretionarily make fundamental policy decisions without interference from central government²¹⁹. Devolution of powers and government responsibilities is a new governance model ushered in by the 2013 Constitution. Whilst the theoretical justifications of devolution differ, the critical nature of a devolved State still remains largely uncontested in modern day scholarship. Devolution is regarded as a tool for democracy, a means to achieve development and a tool to achieve good governance.

²¹⁸ See J Ribot (n 42 above) 209.

²¹⁹ R Leornardi, RY Nanetti *et al* (n 49 above) 95.

Chapter 3 outlines the procedure for suspension and removal of councillors from office in Zimbabwe. The evolutionary development of the procedures from independence up to the current constitutional era was undertaken. The current procedures of suspension and removal of councillors are effectively provided for in the 2016 amendment to the Urban Councils Act. Chapter 3 notes that the amendment which was made to the Urban Councils Act to align it with the Constitution appears to be a rushed job which does not address all the dictates of the Constitution. The amendment appears narrow in its scope as it leaves out other key issues pertaining to local government legislation²²⁰.

It was noted in chapter 3 that the amendment still leaves the effective powers to decide the affairs of local authorities to the central government. The minister is still empowered to have a decisive say on how local authorities should be run. If he does not agree with the decisions made by elected local authorities he is empowered to suspend them. The Amendment has been described as piecemeal, unconstitutional and designed to ensure the central government Minister retains the powers to rid city councils of their mayors and councillors who do not agree with the Minister²²¹.

In order to make a proper and definitive determination of whether the local procedures measure up to best international practices, chapter 4 provides a detailed comparative analysis of the procedures of suspension and removal of councillors in Zimbabwe and South Africa. The chapter outlines the procedure of suspension and removal of councillors in South Africa. The South African procedures were compared and contrasted against the Zimbabwean procedures to note the similarities and differences.

²²⁰ Whilst the amendment of the Act provided for compliance with section 278 of the Constitution, it does not address the dictates of section 264 which provides for devolution. It just addressed the procedural aspects of the law in removal of councillors without addressing the substantive devolutionary agenda.

²²¹ Position Paper on the Local Government Amendment Bill by the Harare Residents Trust. www.hrt.org.zw [Accesses: 8 August 2018].

Chapter 4 notes that in South Africa local government autonomy is recognized and its constitutional status is materially different to what it was when parliament was supreme. The institution of local government now has a place in the constitutional order, has been established by competent authority, and is entitled to certain powers, including power to make by-laws and define and control its own processes and procedures²²². There is a realisation in the South African constitutional term ‘local sphere of government’ of the equality between national, provincial and local government structures, as opposed to the more hierarchical levels of power and importance²²³.

It is also noted in chapter 4 that whilst the 2013 Zimbabwean Constitution provides for devolution, it does not do so in unequivocal terms, it provides that powers may be devolved whenever appropriate, to metropolitan councils and local authorities which are competent to carry out the responsibilities efficiently and effectively²²⁴. This leaves room for doubt on which councils and authorities are so entitled to have powers devolved to them. The Zimbabwean legal framework does not comply with best international practices for the promotion of devolution.

Given the above summary, it is necessary at this stage to address specific recommendations pertaining to the identified gaps and shortcomings in the procedures for suspension and removal of councillors in Zimbabwe, with a view to make the procedures more compliant with international best standards to promote and enhance devolution.

²²² *Fedsure Life Assurance LTD v Greater Johannesburg Metropolitan Council* 1998 (12) BCLR 1458 (CC).

²²³ *Ukhutela District Municipality v President of the RSA* 2002 (5) BCLR 479 (N).

²²⁴ Section 264 (1) of the Zimbabwe Constitution 2013.

5.2 Recommendations

The preceding summary has detailed the critical issues pertaining to devolution in Zimbabwe. An analysis was made of the procedures employed in the suspension and removal of councillors from office. A comparison of the procedures used in Zimbabwe against those used in South Africa was made. The objective of the analysis was to determine if the procedures in Zimbabwe promote devolution. Given this background, it is important at this stage to give recommendations which address the identified shortcomings in the procedures used in Zimbabwe. The recommendations are important in guiding policy makers on how devolution in Zimbabwe can be enhanced, especially regarding local government authorities' autonomy from central government. The recommendations are also meant to ensure that Zimbabwe keeps abreast with international best practices regarding the issue of devolution.

The South African Code of Conduct²²⁵ spells out in detail what conduct, either by commission or omission, amounts to grounds for disciplinary action against a councillor whereas the Section 114 of the Urban Councils Act²²⁶ of Zimbabwe provides a list of grounds, among them some indeterminate and undefined terms such as '*gross*' incompetence and misconduct. This leaves room for abuse in Zimbabwe by the central government through the Minister, who is empowered to suspend, because the circumstances under which the conduct can be said to be "*gross*" to justify suspension is not specifically defined by the law. There is need for further amendment of the Urban Councils Act so that it spells out in very clear terms the acts that constitute misconduct.

An alternative way would be to promulgate a national Code of Conduct for councillors such as is the South African way. This would leave no room for abuse of the generalised grounds

²²⁵ Schedule 1 Municipal Systems Act.

²²⁶ Chapter 29:15.

for suspension by the Minister as is the current position. A national Code of Conduct for councillors would ensure all councillors are aware of what is expected of them on assumption of office. It would also clearly provide for the grounds of removal from office and the procedures to be followed. There is need for laws that promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as provided in the Constitution²²⁷. A national Code of Conduct would fulfil this constitutional requirement.

In South Africa the council itself, the Speaker or the MEC are empowered to initiate disciplinary proceedings against a councillor for breach of the Code of Conduct. Central or National government has no direct role in the initiation of the proceedings against a councillor. In Zimbabwe on the other hand it is the Minister of local Government who is empowered to initiate proceedings against a councillor. The council has no such powers afforded to initiate proceedings against a fellow councillor. The powers to initiate such proceedings are devolved to local authorities as opposed to the position in Zimbabwe where the National or central government wields such power. There is need for the Zimbabwean laws to be amended to reflect that government policy promotes and enhances the devolution and decentralisation of its powers and functions to local authorities.

Local authorities and residents should be more involved in the initiation of the procedures for suspending and removing errant councillors from office. The National Government should leave such tasks to the local authorities and residents to perform. The involvement of the Minister runs contrary to one of the objectives of devolution which provides that devolution is meant 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 decisions that affect them²²⁸.

²²⁷ Section 264 (2) (b) of the Constitution of Zimbabwe (2013)

²²⁸ Section 264 (2) (a) of the Constitution of Zimbabwe (2013)

The procedures in South Africa are mainly initiated by council itself, the Speaker and the MEC may only be informed of an investigation which would have been already commenced. The process starts from the grassroots going up. In Zimbabwe it is the Minister of the central government who initiates proceedings and the council is only informed when a decision has been made. In Zimbabwe it is '*top to down*' decision making yet in South Africa it is '*down to top*' decision making. The South African procedures are more devolution friendly than Zimbabwe in this regard.

In South Africa the law specifically provides that the public must be involved and informed at all stages²²⁹. In Zimbabwe the public is not involved at all in the procedures of suspension and removal of councillors from office. The South African model appears to promote devolution since the local community is afforded participation in decision making of issues affecting them. This is contrary to the dictates of the Constitution. The Urban Councils Act in Zimbabwe must provide for public participation and the right of communities to manage their own affairs as provided for in the Constitution²³⁰.

In South Africa when the Speaker has reasonable suspicion that the Code of Conduct has been contravened, he must report the issue to council whereas in Zimbabwe the law does not provide that the Minister has to report to council. The MEC in South Africa is a creature of the devolution concept. He is a member of the Provincial executive council. He is not a member of National or central government. The law in South Africa ensures that administration of local affairs is left to the provincial and local spheres of government. In Zimbabwe an 'independent tribunal' must be appointed by the National Government Minister to determine whether a councillor should be removed from office or not yet in South Africa the hearing is conducted by council itself, the Speaker or the MEC. The role players in the

²²⁹ Item 13 (2) Schedule 1 Municipal System Act.

²³⁰ Section 264 (2) (d) of the Constitution of Zimbabwe (2013)

South African context are members closely related in the running of the affairs of the local authority concerned yet in Zimbabwe the ‘independent tribunal’ which is appointed by the Minister need not have members drawn from the local community.

The involvement of the central government at all stages in the procedures for the suspension and removal of councillors from office in Zimbabwe is inimical to devolution. There is need for an overhaul of the statutory framework in Zimbabwe to ensure that it complies with the Constitution and international best practices. The current statutory provisions and practice do not promote the objectives of devolution identified in section 264 (2) of the Constitution.

Both countries’ laws provide that the conduct of the proceedings in the suspension and removal of councillors should be in accordance with the rules of natural justice²³¹. However, a perusal of Zimbabwean court cases reveal that the courts have reiterated that the rules of natural justice have not been followed in the cases involving removal of councillors brought before it²³². It is clear that the South African legal framework in the suspension and removal of councillors from office promotes devolution more than the Zimbabwean framework.

The Zimbabwean framework appears to retain central government powers over local authorities and does not promote and fulfil the devolution agenda. The central government Minister in Zimbabwe plays a critical role in the procedures yet in South Africa the powers of suspension and removal of councillors have been devolved to provincial and local government. In South Africa local government autonomy is recognized and its constitutional status is now materially different to what it was when parliament was supreme. The

²³¹ Item 4 (3) Schedule 1 Municipal Systems Act. Section 114A (13) (a) of the Urban Councils Act.

²³² *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 188/15, *Hamutendi Kombayi and 10 others v Minister of Local Government, Public Works and National Housing and Others* HB 57/16, *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 274/16 and *Bernard Gabriel Manyenyeni v Minister of Local Government, Public Works and National Housing and Attorney General of Zimbabwe* HH 385/16.

institution of local government now has a place in the constitutional order, has been established by competent authority, and is entitled to certain powers, including power to make by-laws and define and control its own processes and procedures²³³.

There is a realisation in the South African constitutional term ‘local sphere of government’ of the equality between national, provincial and local government structures, as opposed to the more hierarchical levels of power and importance²³⁴. Whilst the 2013 Zimbabwean Constitution provides for devolution, it does not do so in unequivocal terms, it provides that powers may be devolved whenever appropriate, to metropolitan councils and local authorities which are competent to carry out the responsibilities efficiently and effectively, thereby leaving²³⁵ room for doubt on which councils may benefit from devolution. There is need for devolution to be applied across the board without leaving the central government with some residual discretionary powers on which councils to devolve powers to and which ones not to.

Whilst it is acknowledged that each country has its own specific societal needs, the fact the world has become a global village cannot be ignored. Countries now have to learn and adopt positive practices from other similarly placed nations. It is with the above realisation that this dissertation has identified South Africa as a good comparator since its laws and practices seem to promote and fulfil devolution better than the Zimbabwean laws and practices. Zimbabwe must as a starting point, consider the steps of its neighbour in order to enhance and fulfil the constitutional requirements for devolution of power, especially pertaining to its conduct in the suspension and removal of councillors from officers. In light of the specific recommendations made above, it is necessary at this stage to end the dissertation with the final concluding remarks.

²³³ *Fedsure Life Assurance LTD v Greater Johannesburg Metropolitan Council* 1998 (12) BCLR 1458 (CC).

²³⁴ *Ukhutela District Municipality v President of the RSA* 2002 (5) BCLR 479 (N).

²³⁵ Section 264 (1) of the Zimbabwe Constitution 2013.

5.3 Final Conclusions

The comparative study has provided useful insights in the devolutionary systems in Zimbabwe and South Africa. The comparison of the procedures used by the two countries in the suspension and removal of councillors has been used to determine how Zimbabwe complies with international best practices. South Africa has been used a comparator since its Constitution and procedures reflect best international practices. The insights are important for policy makers, legislators, lawyers, academics and members of the public alike. The comparative analysis undertaken enables these important stakeholders to draw useful lessons with a view to enhancing the prospects for efficient and effective devolved local government in Zimbabwe. This dissertation should encourage the progressive reforms and alignment of laws and practice in Zimbabwe in a positive direction which further strengthens the devolutionary systems as an element of constitutionalism.

The suggested recommendations were largely drawn from the comparison of how the Zimbabwean procedures and legal framework matches with the South African procedures and legal frameworks, which comply better with international best standards. While the study focussed primarily on Zimbabwe and South Africa, its observations and recommendations have a general tenor which applies in other jurisdictions as well. The Kenyan procedures and legal framework were also briefly referred to. The government which was ushered into office after the Zimbabwean 2018 elections has indicated that it is committed to implementing the concept of devolution as provided in section 264 of the Constitution²³⁶. The study's findings are therefore very useful especially in Zimbabwe at this critical stage and other emerging democracies which are also experimenting with the concept of devolution in their jurisdictions. The ZANU (PF) government which has parliamentary majority can shake off

²³⁶ 'ED speaks on devolution and second republic' The Herald 23 June, 2018. See also 'Devolution key to economic development' Chronicle 20 August, 2018.

the perception that it has been unduly interfering in the independence of local authorities by spearheading the urgent amendments to the Urban Councils Act so that it fully complies with the Constitution and measures up to international best practices as identified in this dissertation.

The MDC opposition political party which has a significant presence in the Zimbabwean legislative body can also use the recommendations in this dissertation to lobby for legislation that can positively contribute to the independence of local authorities and thereby enhancing devolution in Zimbabwe. Students, legal practitioners, local authorities and the general public can use this dissertation as a reference point in discussions pertaining to the devolution and independence of Local authorities. It is clear that the country needs vibrant debate on these issues at this stage and this dissertation is a timely contribution in this regard.

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