Policing and Constitutional Reform in Zimbabwe
POLICING AND CONSTITUTIONAL REFORM IN ZIMBABWE

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Foreword

Democratic transitions involve a raft of reforms that, of necessity and in the short term, privilege the establishment of constitutional principles and guidelines for the holding of free and fair elections. Where there is scope for a longer-term agenda, a focus on broad restoration of national institutions allows a nation to re-vision itself both as a state and from the perspective of a set of constitutionally-enshrined principles upon which to build a more inclusive society.

On the strength of our role in the transformation of the police force during the South African transition and subsequent work on security and justice sector reform in the Democratic Republic of the Congo, Idasa decided to focus on policing and comparative constitutional provisions for the reform of the police in our analysis of Zimbabwe's constitutional process. The Zimbabwe Republic Police is a key national institution through which the return to normalcy can be facilitated with the support of political and civil society formations. It has to regain its non-partisanship and dedication to providing a national service as part of both the criminal justice system and the organs of state with a mandate to provide security and safety to citizens.

The Constitutional Guideline and accompanying research note were produced to enhance meaningful engagement by Zimbabweans in the process of transition in the country. They are intended to support the development and enactment of adequate, progressive and democratic police reform processes and policies. The analysis could be used by civics in structuring national debate, advocating for appropriate handling of policing or supporting the State in its roll-out of a new National Policing Policy. It could also be a resource document for political stakeholders to ensure that national dialogue on the question of policing is focused on key principles and allows scope for civic engagement on these issues.

Idasa's States in Transition Observatory thanks all those who contributed to the production of this Constitutional Guideline, particularly the researchers. It is our hope that the analysis will inform opportunities presented by current and future constitutional reform processes in the country.

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Introduction

Zimbabwe is in a process of drafting a new Constitution for the country and, at the time of writing, a second draft has been produced by the Constitution Parliamentary Committee (COPAC) for consideration by stakeholders.

Whilst taking note of the strengths of this draft, it would however appear that there are several areas where the proposed Zimbabwean Constitution may benefit from greater clarity and where additional provisions might be included to enhance the endeavour to democratise policing.

Policing that is guided by appropriate and democratic principles enables people to live with a sense of physical security and in the absence of fear. Such policing is:

- Subject to the rule of law and to principles of accountability and transparency.
- Non-partisan politically and supportive of democratic political processes and institutions.
- Focused above all on providing policing services to, and upholding the safety of, ordinary people.
- Carried out in terms of standards of integrity and respect for human rights.
- Integrates the recognition that police officers themselves are also citizens – though this is subject to limitations related to their status as an “essential service” and intended to ensure their political non-partisanship.

This Constitutional Guideline attempts to promote these principles. It is structured as follows:

- The first section (A) discusses the key features of the architecture of oversight and accountability of policing in Zimbabwe.
- The next section (B) focuses on questions to do with devolution of power in Zimbabwe and the policing powers of the provinces.
- The final section (C) focuses on questions to do with the Bill of Rights and how this might be strengthened with a view to ensuring better policing.
A. Democracy and the architecture of control and accountability of the police

(i) Policy-making authority

In terms of democratic norms, police should be protected from interference in operational decision making, but accountable to democratically elected governments for their actions and performance.\(^1\) In broad terms, this means that police should be “operationally independent” but ought to account for their actions to a democratically elected government.

The Draft Constitution partly reflects this notion in the provision that “The Police Service is under the command of a Commissioner-General of Police…”\(^2\)

However, it is reasonable that a democratically elected government should have some authority to provide direction to police as means of ensuring that the police are responsive to the needs of society. It is therefore widely accepted that democratically elected governments should be able to play a role in shaping police policy. The provision in the first draft that “The Commissioner-General of Police must exercise his or her command in accordance with general directions of policy given by the Minister responsible for the Police Service”\(^3\) is consistent with this principle.

**Recommendation:** These clauses should be retained.

However, the risk that the police minister will use his or her power for inappropriate purposes also needs to be recognised. It is thus recommended that provisions be included to inhibit this possibility.

**Recommendation:** The Constitution includes a clause such as the following:

The Minister responsible for police services may lawfully give a direction to the Commissioner-General in terms of an Act of Parliament with respect to any matter of policy for the Police Service, but may not give a direction to the Commissioner-General with respect to:

(a) the investigation of any particular offence or offences;
(b) the enforcement of the law against any particular person or persons; or
(c) the employment, assignment, promotion, suspension or dismissal of any member of the Police Service.\(^4\)

**Recommendation:** A clause should provide that the authority to give a direction as to the investigation of a particular offence shall lie with an independently appointed Prosecutor-General.
Since these recommendations transfer the possibility of partisan implementation of the criminal law from the responsible Minister to the Prosecutor-General, it is important that this appointment is made on a non-partisan basis and be seen to be so.

**Recommendation:** That the current provisions relating to the appointment of the Prosecutor-General be changed to render them transparent, accountable and democratic.

To further inhibit partisanship, the ability of the Minister (or other authorised persons) to issue directives, a salutary provision provided for in some Constitutions and statutes is that all such directives are to be made in writing and tabled before Parliament in an annual report on the Police Service.

**Recommendation:** A clause be included in the Constitution to provide that all directions given to the Commissioner-General of Police shall be in writing and form part of a report to be tabled before Parliament in accordance with the provisions of an Act of Parliament.

(ii) Rank, Promotions, Transfers and Deployment

The Draft Constitution also proposes that a Police Service Commission should be responsible for appointing “qualified and competent persons to hold posts or ranks in the Police Service”. This appears to imply that the Commissioner-General would not be administratively in charge of appointments and promotions.

It is unusual to remove this operational matter from the purview of a Commissioner-General of Police. However, in the Zimbabwean context, there is strong concern arising from past experience that the Commissioner-General may abuse such powers, together with the power to transfer members to undesirable postings, to enforce a partisan agenda.

**Recommendation:** That the Constitution be changed so that the function of the Police Service Commission in this regard is rather one of oversight to confirm or reverse any decision relating to the promotion, demotion, appointment and transfer of any member of the Police Service which it considers on reasonable grounds to be arbitrary and unfair. The decision of the PSC should be subject to review by a court in the usual way.

The current Police Act allows the Commissioner-General to appoint persons to the Police Service who are “fit and proper”. The provisions allow for considerable subjectivity and open the door to the possibility that propriety will be adjudged on political allegiance. The phrase “qualified and competent” used in the Draft Constitution does not put it beyond doubt that the appointee must be more than “fit and proper”.

**Recommendation:** That the Constitution provides that only persons holding such qualifications as may be determined by an Act of Parliament may be appointed as members of the Police Service.
(iii) Accountability, oversight and the investigation of police

Proper civilian oversight with a view to ensuring police accountability requires that different types of dedicated entities with appropriate capacity be established for this purpose. In terms of the Draft Constitution provision is made for the following types of entities, all of which may perform some oversight function in relation to the police.

- Section 11.5 makes provision for the creation of “an effective and independent” complaints mechanism “for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct” (emphasis added).

- In addition, Section 11.17 provides for a Police Service Commission (PSC). Though the functions of the Commission are to some extent concerned with the regulation of aspects of the administration of the service (appointments, conditions of service, discipline etc) the draft does provide that the functions will include:
  “To ensure the general well-being and administration of the Police Service and its maintenance in a high state of efficiency”;9
  “To ensure that members of the Police Service comply with Section 11.3” in terms of which members of the Police Service are required to conduct themselves in a politically non-partisan way and in compliance with the law including not obeying manifestly unlawful orders.10

- Chapter 12 also makes provision for various independent institutions supporting democracy, including an anti-corruption commission.

Issues that require investigative attention that may arise may fall broadly into three categories:

- Serious abuses of human rights, often of a political nature, by members of the police or other security agencies. This may include deliberate acts of omission intended to allow acts of political intimidation and thuggery. They may also include the abuse of police powers (such as those of arrest), police brutality, deaths in custody, sexual offences, torture, the unlawful or unnecessary use of force and use of excessive force, particularly lethal force. Some of these may involve covert activities by actors in the security sector and it may be necessary to investigate these proactively rather than only doing so on the basis of “complaints”.

- Police corruption (involving abuse of police powers for personal gain) – police corruption takes a variety of different forms varying from random extortion and bribery from civilians (such as at roadblocks) to systematic corruption involving collaboration between police officers and members of organised crime groups.

- Service delivery complaints.

The investigative techniques and skills and modus operandi required to probe each category of complaint differ so widely that it is believed that to combine all in one body will detract from the efficacy of the operations of each.
**Recommendation:** That Service Commissions for each respective Service – the Police, the Defence Forces, and Intelligence Services – should have an oversight role in regard to appointments, transfers, conditions of service, discipline and general operational efficacy including matters of service delivery and conduct.

**Recommendation:** That the Constitution stipulates that Acts of Parliament provide these Commissions with the necessary institutional capacity to carry out the suggested role.

**Recommendation:** That the Constitution be changed to ensure that the appointments of the Commissioners is made on a non-partisan basis.

**Recommendation:** That Section 12.5 should be modified to provide for an “Independent Investigative Mechanism”. The body should have full investigative powers including powers to investigate matters proactively and on the basis of complaints. The Constitution should stipulate that national legislation must be introduced to authorise and set out the mandate of its operations.

Though this may not necessarily be provided for in the Constitution it should be emphasised that the impartiality of such a mechanism may only be ensured if investigators in the unit are supplemented by highly qualified investigators from criminal investigation agencies in other countries.

In addition to the independent investigative agency a further body to investigate high level corruption should be established with its mandate set out in an appropriate Act of Parliament.

**Recommendation:** That rather than the current anti-corruption commission, a separate non-partisan investigative body, mandated and capacitated to investigate high-level corruption nationally (including within the Police Service,) should be established by the Constitution.

**Recommendation:** That the Constitution provide that a large portion of this body comprises persons with policing and forensic skills and experience.

The police themselves must, however, remain charged with the duty to attend to complaints and have the will to do so.

**Recommendation:** The Constitution should provide that functions of the Police Service Commission should include “ensuring that complaints of misconduct by members of the Police Service are addressed effectively and efficiently by the Police Service” and the PSC should be able to require that the police provide reports to it on the functioning of the systems that they have established for receiving and addressing complaints. The Police Service should be required to co-operate with the investigative agency.
(iv) Appointment, Terms of Office and Dismissal of the Commissioner-General.

The effective implementation and operation of the above recommendations are to some extent contingent upon the appointment of an appropriately qualified and non-partisan Commissioner-General of Police. The current draft, allowing appointment by the President, does not meet this requirement.

**Recommendations:**

a) The Commissioner-General of Police should be appointed by the President with the agreement of an independent Police Service Commission, to which commissioners are appointed in a manner that ensures impartially.

b) The Constitution should provide that the person who is to be appointed must have specified qualifications provided for in an Act of Parliament.

c) The person who is appointed should be appointed for a single (of moderate length) term that may be renewed once by the Police Service Commission.

d) The Constitution should include provisions with respect to dismissal that protect the Commissioner-General against arbitrary dismissal.

B. A National Police Service or a Decentralised System

The issue of devolution was a major point of contention during negotiations over the Draft Constitution. The current draft provides that the security services of Zimbabwe will include “the Police Service”. This implies that Zimbabwe will have a national Police Service. However the draft does appear to envisage that other agencies that perform functions similar to (some or all of) those performed by the national police service may be created. Thus the draft provides that:

- “Security services” other than those provided for in Section 11.2 (1) may be established by an Act of Parliament.

- The Police Service must exercise its functions in co-operation with various bodies including “any body that may be established by law for the purpose of detecting, preventing or investigating particular classes of offences”.

In terms of the current draft, therefore, the Police Service is a national entity, though provincial police services could in theory be established if this was provided for by national legislation.
If the provinces are to have a meaningful say over policing, this would imply one of two options:

- Rather than a national police service, the police service in Zimbabwe is provincialised with distinct provincial police services falling under each provincial government. In addition to this, the national government may establish a national policing agency. However, this would not be responsible for the general policing functions but would have a more focused role perhaps similar to that of agencies such as the FBI, the Australian Federal Police or the British “Serious Organised Crime Agency”.

- Alternatively the provinces have greater control over the national police service (and the national police service is responsible for enforcing provincial laws).

If some regard is given to the principles of devolution in respect to policing the following is recommended:

Recommendations:

- If policing is not going to be fully provincialised, provincial governments should at least have some authority over the national police.

- In so far as provincial authority includes policy-making authority, it may be reasonable that this is subordinate to national policy.

- If provincial governments are to have a policy-making authority this should also be subject to the other constraints that are proposed for the national government, including limitations on its policy-making authority and requirements that policy prescripts be reduced to writing and be presented to the provincial legislature or other body for inspection.

- If provincial governments are going to play a meaningful role in oversight they will need to have a dedicated capacity to perform this function. Due to the difficulty of reproducing this capacity in each province, such oversight ought to be developed at a national level, as suggested above.

C. The Declaration of Rights and the Police

The manner in which crime is investigated and suspects brought to trial, usually embodied in a Criminal Procedure Act, is often an effective barometer of the extent to which due regard is paid to human rights. The human rights affected by the criminal justice process are thus appropriately specifically incorporated in State Constitutions. Many salutary provisions which appear in the present Constitution have been retained in the Draft and several rights have been strengthened through changes in wording. However, amendments to Zimbabwe’s Criminal Procedure and Evidence Act\(^{(15)}\) (CP&E Act) over the years have resulted in legislation which leans excessively towards a “crime control” rather than “due process” model of policing to the
detriment of human rights. Several provisions in the Draft Constitution could be improved and others introduced to correct this problem.

(i) The Right to Life

The Draft Constitution makes no specific mention of the right to life in relation to policing. It is believed that it should do so.

**Recommendation:** Lethal or potentially lethal force may only be used as necessary self-defence or in apprehending a suspect or to prevent the escape of a suspect from lawful custody if it is believed by the person using such force that the suspect will cause grave physical harm to any member of the public or police service.

**Recommendation:** The use of firearms by the police shall be governed by an Act of Parliament in accordance with international best practice and the police shall be equipped with non-lethal equipment for the purpose of carrying out their duties.

(ii) The Right to Liberty

While many salutary changes have been made in this regard, virtually all these provisions could be strengthened. Most improper behaviour by the police arises from the abuse of the power of arrest and the Draft Constitution could be improved to inhibit this abuse.

**Recommendation:** That the Constitution should provide that arrest without warrant may only be effected if it is reasonable to do so given the nature of the offence, the dangers of the delay in obtaining a warrant, that the arresting detail has reasonable grounds to believe that the failure to do so will affect the administration of justice and that there is no other secure means of bringing the suspect before a court.

**Recommendation:** That the Constitution should provide that warrants may only issued by judicial officers and any warrant of arrest issued, ought wherever possible to do so without prejudice to the administration of justice, to be accompanied by details of the recognizances which the arrestee may provide to secure liberty pending an appearance in court within the 48-hour period.

The rights of an accused upon arrest in the Draft are, in the main, appropriate save that the right to be informed “at the time of the arrest” of the reason for the arrest may be impractical, as the manner in which the arrest is effected may render this impossible.

**Recommendation:** That the Constitution provide that the rights of an accused upon arrest be afforded without delay.

**Recommendation:** That the Constitution provide that the failure to afford these rights without delay will render the arrest unlawful.
Most Zimbabweans do not have the means to institute legal proceedings for an order of *habeus corpus*. The Constitution thus ought to better address the habit of the police of attempting to conceal the arrest and whereabouts of detainees. The maintenance of a judicially held registry of all detainees would impede this abuse and lessen the possibility of “disappearances”.

**Recommendation:** That the Constitution provides that the name of any detainee must be entered forthwith in a judicially held registry open to inspection by the public at all times.

(iii) The Right to Privacy

Under Zimbabwe’s current laws senior police officers are authorised to issue search warrants. This is undemocratic and should be specifically prohibited by the Constitution.

**Recommendation:** That the Constitution provides that search warrants may only be issued by a judicial officer and that such warrants may not be executed by night unless there are compelling reasons to do so.

(iv) The Right to Silence

Section 18(8) of Zimbabwe’s current Constitution provides that “No person who is tried for a criminal offence shall be compelled to give evidence at the trial”. The courts have not interpreted this right as precluding the procedures provided for in subsections 198(9) and Section 199 of the CP&E Act which nonetheless allow the questioning of an accused who chooses to remain silent at trial and to draw adverse inferences from silence in the face of such questioning. This procedure eviscerates the right to silence at trial to the extent of rendering it nugatory. The phrasing of the right in the Draft Constitution does not address the problem. There an accused has the right “to remain silent and not to testify or be compelled to give self-incriminating evidence”. This clause needs to be strengthened so that it is clear that an accused may neither be questioned in court nor may an adverse inference be drawn from the failure of an accused to testify. A court could nonetheless make an appropriate finding on the evidence before it in the usual way if an accused fails to rebut a fact which *prima facie* has been established by the State.

Somewhat perversely, many criminal justice systems while providing an absolute right to silence at trial where many procedural and probatory safeguards are in place and implemented under the watchful eye of the judicial officer, in the pre-trial stages where such protections are limited and there is no independent or any oversight of their implementation the right to silence is no longer absolute. Although in most jurisdictions those arrested must be informed of their right to silence, they are simultaneously advised that the failure to mention any fact which they could reasonably be expected to mention at that juncture may result in an adverse inference being made by the court. The Draft Constitution, without explicitly providing as much, clearly adopts this approach. Thus section 4.7(4):
“Any person who is arrested or detained for allegedly committing, having committed or being about to commit an offence has the right—
(a) to remain silent;
(b) to be informed promptly—
   (i) of their right to remain silent; and
   (ii) of the consequences of remaining silent and of not remaining silent;”

**Recommendation:** That the Constitution provide that a person accused of a crime shall have the right to remain silent before and during trial, shall not be questioned about the offence if he or she has indicated an intention to exercise this right and no adverse inference against an accused may be drawn by a court arising from the exercise of this right: Provided that the section shall not prevent a court from making an appropriate finding of fact if the accused has failed to rebut a fact established *prima facie* by the state.

**(v) Obtaining Evidence Improperly**

At present the law allows for situations where physical evidence pointed out after coercive measures, including physical violence used to extract a consequently inadmissible statement, may be introduced as evidence in court.

The Draft Constitution provides that evidence will only be excluded if its introduction would “render the trial unfair or otherwise be detrimental to the administration of justice or the public interest”.

**Recommendation:** The Constitution should provide that no evidence which has been improperly obtained shall be adduced in evidence in a court.
The nature of policing in any society has a major impact on the quality of life of its citizens. Police are an armed agency with powers to use force against and arrest people, and are responsible for compiling criminal dockets against persons suspected of involvement in criminal activity. Where police powers are misused, people are subject to the arbitrary exercise of state authority – such as arbitrary detention and other abuse. Typically in these kinds of circumstances police are also involved inappropriately in the political sphere in repressing, intimidating and undermining political opponents of the ruling party.

The creation of a policing system of the kind proposed in the Constitutional Guide is not something that can be accomplished overnight and the adoption of a new Constitution cannot simply bring this type of policing system into existence. However, constitutional provisions that govern policing can play an important role in defining the principles and setting the framework both for the governance of police and the conduct of policing itself.

The first draft for a new Zimbabwean Constitution was used as a point of departure for the Constitutional Guideline. However, during the course of the research, a second draft was produced (referred to as the Draft Constitution) with substantial and relevant differences from the first. There may be further amendments to this draft. The Draft Constitution already has several strengths, including a requirement of adherence to the rule of law, the subordination of the police to civilian authority, a prohibition against obeying manifestly illegal orders and provisions for the political neutrality of the police.

The Constitutional Guideline is intended as a reflection on what a new Zimbabwean Constitution might add in relation to policing and as resource document for those suggesting improvements to the current draft.

The suggestions made here take cognisance of the fact that the Constitution of each country is informed by that country’s own history. These constitutions may seek to recognise the unique history of the country and include provisions specifically intended to avoid the pitfalls of the past. Thus remedial provisions may need to be explicitly articulated to prevent a repetition of past wrongs. So, for example, most state constitutions do not simply include a clause prohibiting unfair discrimination, but list the grounds upon which discrimination is prohibited and considered unfair (such as race or sex) because history has shown that these categories require specific mention.

These notes are intended to elucidate and elaborate the reasoning behind the suggestions made in the Constitutional Guideline.
A. Democracy and the architecture of control and accountability of police

(i) Policy-making authority

One of the key difficulties in determining the locus of policy-making authority is in defining a boundary between “policy” and “operational” matters and therefore in understanding the appropriate limits on the type of direction that can be given to a Commissioner-General by the responsible Minister or other government officials, such as the Attorney-General or Director of Prosecutions. For instance, the South Australia Police Act prohibits the Minister from issuing directions to the Commissioner “in relation to the appointment, transfer, remuneration, discipline or termination of employment of a particular person”. In a similar manner, a 2001 report in the Australian state of Victoria recommended that consideration be given to incorporating with the proposed Ministerial power to issue directives, a non-exhaustive list of matters on which the Minister cannot direct the Chief Commissioner. Thus, it may be possible to provide that no directive from the Minister to the Commissioner-General should seek to prescribe or influence decisions:

- to investigate, arrest or charge in a particular case;
- to appoint, deploy, promote or transfer individual police officers.

But not all of this is straightforward. It is debatable as to whether government officials should be forbidden to request investigations. If they have received information about a specific criminal offence, it may be reasonable for them to ask the police to investigate the matter. For example, a judgment emanating from Zimbabwe’s High Court that there is compelling evidence that Joseph Mwale, a state security agent, should be investigated for the murder of several opposition officials, infamously has not been acted upon by the Commissioner-General of Police.

The sword is thus double edged. While on one level it may seem inappropriate to prevent a request that a possible offence be investigated, the same power may also then be used to instigate politically motivated investigations against political opponents.

It is thus difficult to determine the division of responsibility between the Minister, Commissioner-General, the Police Service Commission (PSC) and Attorney-General or Prosecutor-General.

The recommendation is that the decision whether or not a directive should be issued to the Commissioner-General to investigate a criminal offence should lie with the Prosecutor-General. It is thus imperative that the appointment to this office is made on a non-partisan basis and that the incumbent is impartial. The current procedures for the appointment of the Prosecutor-General vest too much discretion in the President. The appointment is made in the same manner as that of judges, through a judicial services commission, over which the President exercises inappropriate power and the appointing procedures lack transparency. It is an important component of democratic policing that this aspect of the criminal justice process
be insulated from political influence as far as possible. The first draft of Zimbabwe’s proposed Constitution sought to regulate most appointments under the Constitution through a Parliamentary Appointments Committee and a process of public interviews. These provisions, or similar such provisions, ought to form part of the current draft if Zimbabwe’s criminal justice system, and the policing which forms part of it, is to be adequately reformed. The Draft Constitution exacerbates an already unsatisfactory situation by providing that the current and manifestly partial Attorney-General shall assume the position of Prosecutor-General when the Draft Constitution comes into effect.  

A further way of attending to the difficulty of political interference in investigations is to provide for transparency around any directives that are given to the Commissioner-General. Thus the Constitution of Kenya provides that, “Any direction given to the Inspector-General by the Cabinet secretary responsible for police services..., or any direction given to the Inspector-General by the Director of Public Prosecutions..., shall be in writing”.  

Ideally, provision should also be made for these directives to be presented to Parliament for scrutiny. In the Australian state of Queensland, the responsible Minister is authorised to provide written directives to the Police Commissioner on certain specified matters. However, the Police Commissioner is required to keep a register which includes all of the directives received from the Minister. The Commissioner is further required, each year, to submit a certified true copy of the register to the State Crime Commission and the state legislature committee responsible for addressing policing matters. Along similar lines, in South Australia the Police Minister must cause a copy of any direction given to the Commissioner to be (i) published in the Gazette within eight days of the date of the direction; and (ii) laid before each House of Parliament within six sitting days of the date of the direction if Parliament is then in session, or, if not, within six sitting days after the commencement of the next session of Parliament. Similar provisions exist in Zimbabwe’s Police Act. The Commissioner-General must “forthwith take all necessary steps to ensure due compliance with any directions” given to him by the Minister of Home Affairs or President. The Commissioner-General is then obliged to submit an annual report to the Minister detailing the activities of the Police Force in the preceding year, the results of any policy directions given to him during the preceding year and results of any cases which the Attorney-General has, in the previous year, required him to investigate. The Commissioner-General may also submit special reports to the Minister on any matter deemed necessary. The annual report (and the special report if the Commissioner-General so requests) must be laid before Parliament by the Minister. The Police Service Commission must likewise submit to the Minister an annual report, and any special report it deems necessary, which are laid before Parliament in the same way. The extent of compliance with these salutary provisions is not presently known. However, it is recommended that these requirements are transferred from the Police Act and incorporated into the Constitution.

As with all written rules, these types of provisions can be subverted. The fact that there are provisions of this kind would not guarantee that the Minister or other officials would not try to interfere inappropriately in police decision making through informal pressure. However, by creating transparency around directives the ability of the Commissioner-General to resist interference is strengthened.
(ii) Rank, Promotion, Deployment and Transfers

Generally, the power to appoint officers and promote officers to ranks lies, in most jurisdictions, with a Commissioner-General or equivalent head of the service. In fact, in many jurisdictions precisely the opposite approach is taken to that suggested in the Draft Constitution, that is, measures are provided to ensure that the Commissioner-General is shielded from inference with his or her power in this regard, rather than removing this power from the Commissioner-General entirely.

The current provisions in the Police Act in Zimbabwe stipulate that the President has the exclusive power to appoint a member to a commissioned rank – that of inspector or above – or reduce the rank of a commissioned officer, though he exercises this power with “due regard to” the advice of the Minister, which the Minister tenders “after” consultation with the Commissioner-General. The President may also “create” and dispense medals and decorations to members of the police force.29 Under the Police Act, the Commissioner-General has the power to appoint the remaining members of the force.30 The only qualification for a member is that the Commissioner-General believes the person to be “fit and proper”.31

These provisions pay some regard to the fact that those within the Police Service itself are often best placed to advise on the issue of promotions and rank. However, presidential and ministerial involvement in appointment, promotions, conferring of honours and transfers of members invites political interference. The power to suddenly transfer members of the police services to undesirable postings, uprooting them and their families from their social environment, has been identified by members of civil society and human rights activists as a powerful mechanism to ensure the political compliance of members of the police service and the fostering of partisan policing.

It is these ills that the Draft Constitution presumably intends to cure by placing the power in the hands of the PSC. However, it omits the important issue of transfers. It also possibly oversteps the mark in relation to appointments. The suggestion is thus that the PSC is rather given an oversight role in this regard so that arbitrary demotions and transfers and other victimisation may be subjected to appeals to the commission.

Although Zimbabwe’s Police Act provides that only fit and proper persons be appointed to the Police Service, it is obvious that this broad phrase has allowed for considerable abuse and partisanship. Under and unqualified persons with a background in Zimbabwe’s war against white minority rule or products of the ZANU PF-directed National Youth Training Programme have been appointed to the Police Service while lacking suitable qualifications or inappropriately promoted, most frequently to positions as officers commanding police stations. This means of creating a partisan police service can be inhibited through requiring more closely specified qualification criteria for members of the Police Service.

(iii) Accountability and oversight

In terms of police accountability a key issue is that, to exercise oversight over police, governments need to have an agency capacitated to perform this function. This implies a dedicated
body comprising people who have, or develop, intimate knowledge of the police and policing. Related to the fact that their involvement in this role is generally “part-time” in nature, parliamentarians, Police Service Commissioners or others involved in oversight of police are frequently out of their depth. They often lack sufficient insight into policing to identify the most important issues around which they should be subjecting police to scrutiny and are unable to interrogate in a meaningful way the responses to their questions that are provided by police. Merely creating a body that has the responsibility for performing an oversight function in a dedicated manner is not sufficient. The body has to be resourced and managed in an appropriate way. Provisions mandating the creation of such a body therefore cannot guarantee that the capacity to perform these functions will exist.

(iv) Investigations

Several points are relevant to a discussion of this issue:

Human rights abuses by members of the security forces or others

In the current Zimbabwean context a key issue is the need for proper investigations of the police by an independent agency. This includes the need to investigate allegations relating to the abuse of police powers, police brutality, deaths in custody, sexual abuse, torture, the unlawful or unnecessary use of force and use of excessive force. There is great value in having an investigative agency for this purpose if the agency is well resourced, its mandate closely defined and dedicated to performing its role. However the need for an investigative agency to address these types of issues is not restricted to the investigation of police in the current political climate. There will be a need for special investigative agency to uncover covert security sector activities (not necessarily restricted to activities by members of the police service) that are intended to undermine the potential for democracy. Such an investigative agency cannot be established without outside assistance but may also include personnel from domestic security agencies subject to a process of screening. Section 11.5, which provides for the establishment of an “effective and independent” complaints mechanism, is intended to attend to complaints from members of the public concerning misconduct by any member of the security services. This would thus include not only the police, but the army, air force and intelligence organisation.

Investigation of complex corruption cases

Properly functioning investigative bodies, for combating corruption, can prevent the leakage of state resources to the extent that they significantly contribute to and justify the costs of their own operation. Police corruption (involving abuse of police powers for personal gain) takes a variety of different forms varying from random extortion and bribery from civilians, such as at roadblocks, to systematic corruption involving collaboration between police officers and members of organised crime groups. Investigation of the former type of corruption is typically very difficult as cases cannot be proved unless the offending police officer is caught red-handed. For this reason the former type of corruption may better be addressed through proactive “field integrity tests”. Investigation of the latter type of corruption requires sophis-
ticated investigative agencies using special technologies and tactics that are best located in a 
specialist anti-corruption investigative agency that is independent of the police.

**Investigation of (service delivery) complaints against police**

In the international world of civilian oversight it is virtually unheard of to have an oversight 
body that carries responsibility for investigating all complaints against the police. One excep-
tion to this rule is the Police Ombudsman for Northern Ireland. However, in less affluent 
countries there are greater obstacles to creating a body with sufficient resources to play this 
role. Whether the complaints are dealt with effectively or not depends on the effectiveness of 
the investigative agency. Frequently, in jurisdictions where such bodies have been established, 
 members of the public are disappointed as the agency itself tends to deal with complaints in 
an unsatisfactory manner. Instead of complaints being resolved, the problem of having a police 
 service that is generating complaints is exacerbated by also having a complaints body that is 
unable to deal with these in a satisfactory way.

Another issue that needs to be taken into consideration is that, in the early stages of transition 
in societies that may be emerging from an authoritarian form of government, the existing 
mechanisms of internal discipline in the police, and mechanisms for receiving complaints are 
very weak. In addition, as a result of the role played by police in enforcing repressive poli-
cies, there is a high level of mistrust and fear of the police. At the same time that the police's 
internal mechanisms are likely to be weak in the period immediately after the introduction of 
a new Constitution, newly established complaints bodies are also likely to be fairly weak and 
suffer from problems such as the absence of proper systems and shortages of experienced sta-
ft.

If there is to be proper accountability of the police, the current provisions in the Draft Consti-
tution need to be strengthened, revised and restructured. The recommendation is that the over-
sight role over the police is divided among the PSC, a special investigative agency mandated to 
probe serious abuses of power by security services and an anti-corruption body with policing 
powers tasked with investigating corruption within the police force and high level corruption 
generally. In making this recommendation cognisance is taken of the fact that the multiplicity 
of oversight bodies is resource-intensive and that experience from other jurisdictions shows 
that the operation of these bodies in practice, as indicated above, is far from ideal. As noted 
in the Constitutional Guideline, the types of complaint requiring investigation demand dif-
ferent skills in regard to the nature of the complaint, for example whether it relates to service 
delivery, corruption or human rights abuses. In Zimbabwe, the frequent directions from the 
courts that the police themselves investigate complaints of the abuse while in police custody, 
is obviously unworkable. While the functioning of independent investigative directorates in 
other jurisdictions has sometimes been not been entirely satisfactory, it seems better to create 
a body which has the potential to function adequately and to attempt to attend to the diffi-
culties that have manifested themselves, rather than remain with an inherently flawed system. 
Having said this, the police should not be wholly removed from the process of investigating 
complaints against their conduct, especially those relating to service delivery, and internal 
mechanisms should exist within the police service to consider these complaints.

The mandate of the PSC as an oversight body should include oversight of administrative mat-
ters, grave service delivery failures, and investigation of victimisation of members of the service 
by superiors within the service. However the PSC cannot be relied on to carry out investiga-
tions of serious human rights violations, or complex matters of corruption, and specialised
investigative agencies should preferably be created for this purpose.

In the current period the priority is to establish an investigative agency with a mandate to
investigate (whether on the basis of complaints or proactively) conduct by members of security
agencies that is in violation of the Section 11.3 of the Draft Constitution. This would include
the abuse of police powers (such as those of arrest), police brutality, deaths in custody, sexual
offences, torture, the unlawful or unnecessary use of force and use of excessive force, particu-
larly lethal force. Its mandate should therefore concern serious human rights violations by
the police. With a successful democratic transition, this body might become less concerned
with politically motivated human right abuses and more focused on violations by police of
the rights of accused persons.

The function of investigating corruption by members of the police service needs to be under-
stood as separate, particularly where this relates to complex cases involving high-level corrup-
tion. Preferably there should be a specialised anti-corruption investigative agency. This body
should have appropriate autonomy and be sufficiently insulated from the hierarchy of the
national police force to enable it to carry out investigation into corruption within the police
service without undue influence, while remaining accountable. Proper investigation of high-
level corruption requires resources, both quantitative and qualitative, which are generally only
available to the police service. It would not be salutary to duplicate these resources within the
proposed Zimbabwe Anti-Corruption Commission. There is some recognition of this in the
ability of the Zimbabwe Anti-Corruption Commission to direct the Commissioner-General
to investigate corruption, but this will prove inadequate where the corruption is with the
police force itself – often a significant problem in post-authoritarian states. Salient examples
are South Africa and Brazil. The Draft Constitution should thus require national legislation
to establish this body.

Even with these oversight agencies it must be emphasised that none of these problems of
service delivery, human rights abuses or corruption can be addressed adequately if the Police
Service, and specifically the Commissioner-General, is not committed to addressing them.
The Police Service, whose actions have given rise to the complaints, should not be able to
“pass the buck” for dealing with them. Thus, for instance, Section 244 of the Constitution of
Kenya provides that:

244. The National Police Service shall—
(a) strive for the highest standards of professionalism and discipline among its members;
(b) prevent corruption and promote and practice transparency and accountability;
(c) comply with constitutional standards of human rights and fundamental freedoms;
(d) train staff to the highest possible standards of competence and integrity and to respect
human rights and fundamental freedoms and dignity; and
(e) foster and promote relationships with the broader society.
iv) Appointment, Terms of Office and Dismissal of the Commissioner-General

The proposals made to this point will not function efficiently without a suitable person to lead the Police Service. Appropriate provisions regarding the appointment, term of office and dismissal of the Commissioner-General will help to ensure that a suitable person occupies this office, and also that the incumbent is not vulnerable to pressure or manipulation from members of the executive or others in government.

It is a vexed question as to how appointments are made to key positions in a democratic government in such a way so as to ensure that the incumbent is non-partisan and not subject to political influence. Some have gone so far as to suggest that this is impossible and the question is rather how to deal with the inevitability that the head of police will be a political appointee wielding political influence.

Even if the power to make the appointment is removed from single political actor (such as the President) and passed to an appointing body, this displaces the problem rather than resolves it, as it then becomes necessary to ensure that the appointing body itself is not politically partial. One way of attempting to address this difficult issue is to limit the discretion of the person making the appointments, to make the process transparent and to put some distance between the locus of political power and the appointing authority. The earlier draft constitution attempted to do this with an elaborate and transparent procedure for constitutional appointments, including appointments to the PSC. The more independent PSC was to be responsible for the appointment of the Commissioner-General. For this reason, and because the impartiality of the PSC is required for other recommendations made in the Constitutional Guideline, it is suggested that the earlier procedure suggested for the appointment of the PSC, or provisions with a similar effect, be restored. As it stands, the Draft Constitution effectively gives unfettered discretion to the President to appoint the Commissioner-General of the Police Service.

Furthermore, though the Draft Constitution provides some type of specification in relation to the persons appointed to the Police Service Commission it does not do so for the Commissioner-General. This gap makes it possible that the person appointed will be selected for political reasons rather than because he or she is necessarily an appropriate person to serve in this role. The Constitution needs only to stipulate that the Commissioner-General has such qualifications as may be provided for in an Act of Parliament.

The South African Constitutional Court has indicated that, “A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures”. However, the concern in South Africa is with a police commissioner who is a direct political appointment by the President. If there is greater independence from political authority on the part of the body making the appointments it may be reasonable to allow for a term (of, say, four years) which may be renewed not more than once. However, if the Commissioner-General is appointed directly by the President the incumbent may seek to ingratiate himself or herself with the ruling party through a display of political partisanship to ensure a renewal of the term of office.
Allied to these considerations is the need for provisions protecting the incumbent from arbitrary dismissal. The short-term advantage accruing to an incoming government of replacing a Commissioner-General (and other members of the security services) perceived to be partisan to the previous ruling party, must be balanced against the fact that where the heads of security services are led to believe that each time there is a change of government they will be replaced, these heads may be tempted to deploy their considerable power to ensure that such change of government does not occur.

B. A National Police Service or a Decentralised System?

Decentralised policing may be considered beneficial in the hope that greater regard is paid to the needs of communities. It is widely believed that decentralised policing systems are able to act with increased responsiveness. In so far as the provinces are assumed to be heterogeneous, it is considered that decentralised policing would allow for area-specific reactive and proactive policing policies to be put into place.

This research note does not attempt to prescribe a single solution to the problem of how to structure policing in Zimbabwe. It suggests that it may be possible to substantially provincialise policing or at least to provide provinces with greater authority over the national police service, with the police service remaining essentially a single national entity.

A further issue that should probably be considered in addition to territorial devolution, is the devolution or specialisation of function. Whilst it may not benefit Zimbabwe to devolve policing, there are considerable risks involved in concentrating policing functions, and especially investigative capacities, in a single police agency. The reason for this has to do with being able to ensure that the principle of equality before the law is a living principle. This means that anyone in Zimbabwe who breaks the law should be subject to investigation and potential prosecution for doing so.

Where investigative powers are concentrated in a single agency, the effect is that those who control this agency, and anyone they wish to protect, may in effect be protected from the operation of the law. Whilst it is not a guarantee of equality before the law, there is greater potential for this to be a living principle if there is more than one agency with high level crime investigatory powers. As indicated, the current Draft Constitution makes provision not only for “other ... armed organisations or services” to be established by an Act of Parliament but also appears to envisage that a body may be established “for the purpose of detecting, preventing or investigating particular classes of offences”. This allows for the devolution of investigation into high-level corruption as suggested above.
Options considered:

(i) **The Law Society of Zimbabwe Model Constitution**

A variation of the approach in the Draft Constitution is contained in a “model” constitution put forward by the Law Society of Zimbabwe in 2010. Whilst containing a provision essentially the same as that in Section 12.2(1)(b) of the earlier proposed constitution, the Law Society Model Constitution also proposes that each of its proposed eight provinces should have its own police service. According to this model constitution, the main function of a provincial police department would be to “assist the provincial government enforce provincial laws” though “an Act of Parliament or a provincial law may confer or impose additional functions on the Department”. The Model Constitution further provides that, “An Act of Parliament or a provincial law may give members of a provincial Police Department power to arrest alleged offenders, but anyone so arrested must be handed over immediately to a member of the Police Service to be dealt with according to law”.

(ii) **International approaches**

In many democratic countries policing is not a national function and resides (in federal states) at state level or under the jurisdiction of local or county governments or at both of these levels. Thus, in England and Wales, policing is primarily carried out by 43 constabularies or police departments that each have responsibility for policing in a specific geographical area of jurisdiction. However, not all democratic societies have decentralised policing systems. Countries such as Nigeria, France, South Korea and El Salvador, amongst others, all have a national policing system.

In countries where policing largely falls under the authority of levels of government below that of the central national level, there also tends to be some type of hybrid system. In England and Wales, in addition to the 43 constabularies, there is a Serious Organised Crime Agency with responsibility for addressing organised crime at a national level. Likewise in the United States policing is largely carried out by local (municipal or county) departments and there are also police departments under the authority of each state. In addition to this, there is the Federal Bureau of Investigation and several other “Federal law enforcement agencies”. In Australia each state has its own police service but in addition there is the Australian Federal Police.

In all of these countries, the general pattern is that provincial and/or state or local government police services have primary responsibility for policing functions within their physical area of jurisdiction. The national and/or federal level agencies have a much more specialised role. For instance, in Australia, the Australian Federal Police has responsibility for policing services in the Australian Capital Territory where the Federal Government offices are located but also is engaged with organised crime and other types of crime where it is understood that there
is a need for engagement by an agency whose jurisdiction extends beyond state boundaries. Nevertheless, the main policing functions are carried out by the state policing departments.

(iii) Comparing the international approaches with the options being considered in Zimbabwe

The examples provided by these countries therefore differ from that provided by the Law Society Model Constitution. This seems to envisage that the national police would have primary jurisdiction for law enforcement in all areas whilst the provincial police services would have principal responsibility for enforcing provincial laws. The provincial police services envisaged by the Law Society Model Constitution appear to partly resemble municipal police services in South Africa. Currently there are six of these in South Africa, most of them located in the large metropolitan areas. In these areas:

- Both the South African Police Service (SAPS) and Municipal Police Services (MPS) have responsibility for “crime prevention”. However the SAPS is far better resourced and has far more personnel than the MPS so that, even in areas where the MPS have jurisdiction, most police “crime prevention” is carried out by the SAPS.

- In addition to crime prevention, the mandate of the MPS covers traffic and municipal by-law enforcement. Similar to the responsibility of the provincial police envisaged by the Law Society Model Constitution for enforcing provincial laws, only the MPS have responsibility for enforcing municipal laws.

- As with the provincial police services envisaged by the Law Society Model Constitution, the MPS are required to hand over people who are arrested to the national police service (the SAPS).

For further discussion of this issue it may be helpful to refer to this matrix:

<table>
<thead>
<tr>
<th>Physical jurisdiction (where they enforce laws)</th>
<th>Same</th>
<th>Different</th>
</tr>
</thead>
<tbody>
<tr>
<td>SAPS and MPS have the same legal mandate and physical area of jurisdiction – one example is the MPS and SAPS in South Africa. In the physical areas in which the MPS have jurisdiction the SAPS and the MPS have responsibility for “crime prevention”.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SAPS and MPS have the same physical area of jurisdiction but different legal or operational mandates - the system proposed by the Law Society Model Constitution fits in here. Both the national police and provincial police will have jurisdiction within the territory of the province. However, the national police will enforce national laws and the provincial</td>
<td></td>
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policing and constitutional reform in zimbabwe

police will enforce provincial laws. in south africa themps also partly fit in here. though the saps has jurisdiction within the same physical areas it polices, only themps are responsible for municipal by-law enforcement.

block 3: both police agencies have the same legal or operational mandate but they perform their functions in different territories – this would be the most appropriate way of characterising the bulk of policing in countries such as australia, the united kingdom and the united states where specific local government, county or state police departments have jurisdiction over specific territories.

block 4: both agencies have different legal mandates and operate in different territories – in general this distinction may perhaps only apply in comparing police services in different countries or states.

in some respects the policing models in countries such as the united kingdom, australia and the united states may also be seen as falling into block 2. however, the crucial distinction here is that the “general” policing role is performed by the police agencies based at the lower levels of government (state, county or local) whilst the national and/or federal level agencies have a more specific role focused on distinct categories of offences that are seen to require national and/or federal level investigation.

(iv) strengthening provincial oversight and control over policing

the key issue is perhaps then that, even if the law society model for provincial police services were to be adopted, the provinces would have limited control over policing. due to the fact that the provincial police are not responsible for general policing but only for enforcing provincial laws, the provincial governments would have no authority over the activities of the main policing agency operating in their provinces.

south africa has approached the issue by seeking to give the provinces some control over national policing rather than creating provincial police services. each province has certain powers of oversight over the national police service. a problem with this system has been that provinces are not able to make their own police policies but may only seek to influence national policy. the national minister also may disregard provincial contributions. in so far as the national minister is engaged with his or her policy-making role and actively consults the provinces this is not necessarily a problem. however, the system has various disadvantages:

• the provinces have to follow a somewhat circuitous route in ensuring that national policing policy is sufficiently responsive to the needs of their province.

• the policy process provided dramatically complicates the burden imposed on the national policy-making process, making the latter process cumbersome and undermining the potential for responsive policing policy.

• in so far as any policy developed at national level does not engage with specific issues where there is a need for provincial policy, or the national policy-making function is
dormant, the provinces are effectively neutralised in developing policy to address these issues.

In Zimbabwe, the question arises as to whether the policing requirements in the provinces differ to the extent that provincial police services are desirable. It seems more likely that only the metropolitan areas of Harare (including Chitungwiza) and Bulawayo may have singular policing requirements different to the non-metropolitan provinces, which justify a separate force. There may, however, also be advantages in taking into account the Shona-Ndebele divide in the Mashonaland and Matabeleland provinces.

If Zimbabwe is to provide provinces with greater influence over the national police, or if policing is fully provincialised, it would be appropriate that, in addition to oversight powers, the provinces should also have the power to make policing policy. If there is a concern about the potential for provinces to misuse policing, it may be provided that national policy may overrule provincial policy and that the provincial policy-making power is subordinate to the national one. The South African formula in terms of which provinces are involved in making policy through the national Minister is a recipe for neutralising the policy-making role of the provinces.

(v) Devolving policing – concluding remarks

A survey of international policing and international policing trends does not support any simple formula as an ideal system for governance of the police. Although it is often assumed that greater devolution supports greater responsiveness, provincial and, even more so, local governments may be prone to corruption and problems of capacity. These problems may be more accentuated in developing countries such as Zimbabwe. It is not valid to assume that a decentralised system of control over police will magically ensure that responsive, effective and professional policing is provided. It would be a mistake to adopt a simplistic dichotomy that stigmatises centralised democratic control over police and applauds the devolution of such control. As a paper by Veritas points out, to a large degree the range of functions that can be devolved is limited not only “by the willingness of central government to shed them” but also “by the capacity of provincial and local authorities to exercise them”.

In Zimbabwe there appears to be substantial concern that provinces should have a certain level of autonomy. If this logic is to be applied to policing, this research note suggests that rather than having two police services (national and provincial) the question should rather be one of the level of control exercised by the provincial government over policing. If the national police service is to be responsible for general policing throughout the country and the provinces have no authority over it, then provinces will have a marginal influence over policing. If policing is not fully provincialised then the issue should be one of ensuring that each province has a certain level of influence and control over the policing by the national police service within its boundaries.

This research note has also argued that for a democratic government to exercise effective oversight over police it needs to have specific agencies that are capacitated to perform this function. It may be unrealistic to expect that provincial governments will be able to develop such agencies. While the term “civilian oversight” is widely used, effective scrutiny of the police depends
on civilians being able to rely on the support of an agency staffed by people who are engaged in policing oversight on a full-time basis and are therefore able to develop indepth insight into the police. This means that it is necessary to create an agency dedicated to performing this oversight role. This agency can then enable “civilians” to hold police accountable in a more meaningful way. The relevance of these issues for the debate on a centralised or federal system is that it is not a simple matter to create multiple agencies of this nature. It is more likely that it will be possible to carry out oversight in a meaningful way if there is a centralised oversight agency. However, this does not exclude the possibility that provincial governments can have some authority over policing. For instance, in England and Wales, the Home Office has carried out indepth scrutiny of policing whilst county police authorities retain a significant level of authority over police.

C. The Declaration of Rights and the Police

(i) The Right to Life

The current Constitution allows for a suspect to be killed in the course of an arrest or to prevent the escape of a person lawfully detained if such force is “reasonably justifiable in the circumstances of the case”. This provision left it open to the courts to interpret what was to be deemed reasonably justifiable and, in keeping with the previous jurisprudence of the court, a crime control model was adopted. Deadly force should only be used where no other means of apprehending a suspect is possible and the suspect is reasonably considered to present a danger to other persons. In this regard, legislation should provide for the use of firearms generally in accordance with the best practice recommended by the United Nations. The Draft Constitution is silent on this issue, presumably intending jurisprudence to develop around this issue and arising from the Right to Life in section 4.5.

(ii) The Right to Liberty.

The due regard that should be paid to this extremely important right has been largely lost through amendments to the CP&E Act, which currently places more emphasis on the control of crime than individual liberty and rights.

The Draft Constitution strengthens the right to liberty in several ways. All detained suspects must now be brought before a court within 48 hours, regardless of when the 48-hour period expires (section 4.7(2)(b)). Section 32(3) of the CP&E Act, which allows for detention of up to 96 hours where the general period of 48 hours expires on a “day which was not a court day”, will rightly be rendered unconstitutional by this provision, as will section 33 which allows senior police officers to cause the indefinite incarceration of accused through “warrants for further detention”. The detainees would also, under the draft, have the right of access to
a medical practitioner of their choice in addition to the current provision which allows for the briefing of a legal practitioner. This change pays due regard to the frequently recorded instances of physical abuse of detainees whilst in police custody. Furthermore, the courts may be immediately approached to secure the rights of any person whenever it is believed that such person has been unlawfully detained.

Significant changes have also been made to the provisions relating to bail, and jurisprudence from the courts which has held that bail is not a right are now gainsaid by section 4.7(1)(d) which provides that suspects “must be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying his or her continued detention”. This makes it clear where the onus in an application for bail lies, an issue of some contention in the past.

Rights pertaining to habeas corpus, which exist under common law, have also been introduced into the Constitution through section 4.7(7). It is unclear why the English form of the right has been preferred to the equivalent Roman-Dutch interdictum de homine libero exhibendo, which is already part of Zimbabwean law with an established jurisprudence. No doubt the drafters found it necessary to introduce this right into the Constitution on account of the frequent occasions where the police have concealed those in custody to prevent them from having access to legal practitioners and relatives. Fortunately, Zimbabwe has not often had to deal with situations where those arrested have “disappeared” permanently, as was the case, for example, during the dictatorships in South American countries. Nonetheless, the post-dictatorship Constitutions of some South American countries have sought to lessen the possibility of a recurrence of these “disappearances” by providing that the name of any arrestee must immediately be entered into a judicially-held registry that must be open to inspection by the public at all times.

The current Constitution sets out the various grounds upon which a person might be deprived of his or her liberty, one of these being “upon reasonable suspicion of his having committed, or being about to commit, a criminal offence”. A substantial body of jurisprudence has considered the meaning to be accorded to the phrase “reasonable suspicion”. The draft substitutes the delineation of the grounds upon which a person may be detained with a provision that seeks to limit the grounds of detention by providing, generically, that no person may be “deprived of their liberty arbitrarily or without just cause”. This would thus leave it to the courts to determine what does and does not constitute just cause and no doubt reasonable suspicion of having committed or being about to commit a criminal offence would be included in this.

Of the powers accorded to the police, the power of arrest is probably the most frequently abused. The threat of arrest is used to extract bribes from motorists, to extract confessions and statements from accused persons, to harass political opponents, suppress political activity and to impose pre-trial punishment. All these abuses are evident in present-day Zimbabwe, and it would be appropriate if the Constitution introduced provisions to curb the abuse. Zimbabwe’s CP&E Act contains several clauses which facilitate this kind of abuse and should be rendered constitutional.

Under Zimbabwe’s CP&E Act there are four basic methods by which an accused may be brought before a court to face trial - written notice to appear, a summons, arrest with a warrant, and arrest without a warrant. Whilst the last of these obviously intrudes most upon the right to liberty, it is the most frequently used. It would thus be appropriate for the Constitu-
tion specifically to adopt and further the jurisprudence of the courts. The CP&E Act already provides, in the case of “search and seizure”, that this can only take place without a warrant if “the delay in obtaining a warrant would prevent the seizure or defeat the object of the search”. It is anomalous that the rights pertaining to property are afforded greater protection than the right to liberty. Analogous requirements should thus exist in the case of arrest.

Zimbabwe’s CP&E Act also allows for the issuance of warrants of arrest by senior police officers, thus side-stepping the generally accepted democratic criterion that an independent judicial officer considers the need for arrest before a warrant is issued. Even then, the issuance of the warrant may result in a suspect who is eligible for bail remaining in custody for 48 hours or more before successfully obtaining bail. Due regard would be given to the right to liberty if procedures were put into place that allowed an accused to regain his or her freedom immediately, if this could be done without prejudice to the administration of justice. Although this possibility exists to a limited extent through the posting of “police bail”, this is only available in limited circumstances and is contingent on the discretion of the police, which is rarely exercised in favour of the detainee.

iii) The Right to Privacy

The power of police officers to issue search warrants should be rendered unconstitutional and the power placed solely where it belongs in democratic societies – with the judiciary. To further protect the right to privacy, it should be provided that such warrants may not be executed by night unless there are compelling reasons for doing so.

(iv) The Right to Silence

The right to silence arises at two stages during the criminal process: at the pre-trial stage and during trial. There is little dispute that where an adversarial system of criminal justice is in place, an accused should be afforded an absolute right to silence at trial. It arises as a natural concomitant of the presumption of innocence and the duty of the State to prove its case without the assistance of the accused. The right to silence at the pre-trial stage is a highly controversial issue, with some believing that it “protects the guilty while being of no benefit to the innocent”. It has been the subject of numerous books, academic papers and government-appointed commissions. It is impossible to canvass the pros and cons fully here. However, it should be noted that the derogation from the right to silence has given rise to numerous abuses of accused persons whilst in the custody of the police. Although so-called “judges’ rules” covering the questioning of suspects have been approved by Zimbabwe’s courts, few of these rules are adhered to and none have the force of law in Zimbabwe. The procedure in the CP&E Act admitting into court statements that are given “freely and voluntarily” by a suspect to the police and the adverse inference which may be drawn if an accused “fails to mention any fact relevant to his or her defence in those proceedings, being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned when so questioned” have led to what is known as “warned and cautioned statements” being drawn by the police. The police have become extremely dependent on these warned and cautioned
statements to build cases against suspects, to the detriment of more thorough investigation of the crime and the gathering of other evidence almost invariably available elsewhere. While the “warning and cautioning” of the suspect should take place at the outset of any questioning, this generally only happens after the police have used coercion, trickery, threats, the threat of extended detention and other methods (which in a court would vitiate the probative value of the statement) and once the suspect is prepared to sign a written statement. The statement is typed by the police, often using their own wording, including legally loaded words, such as “possession”, to which a lay accused would attach a lay meaning. It is fictitious to suggest, as the present law does, that statements made by suspects held in the hostile environment of a police station with the threat of an extended period in custody if uncooperative, are made “freely and voluntarily”.

In jurisdictions where the right to silence has been derogated from in this manner, the limitation of the right is usually attenuated by other safeguards, such as access to free or subsidised legal advice, the recording of interviews with suspects, the use of custody officers to reduce unwarranted detentions, and independent complaints commissions to which abuses might be reported. Zimbabwe is unlikely any time in the foreseeable future to have the resources to provide legal advice at police stations to all suspects or to have recording equipment available to capture interviews with suspects.

In the absence of these safeguards, an absolute right to silence is the most effective way of limiting police abuse at this stage in the criminal justice process.

(v) Obtaining Evidence Improperly

Any trial where evidence has been improperly obtained should be regarded as inherently unfair. However, the courts in Zimbabwe have often shown a willingness to accept evidence, regardless of the fact that it has been obtained improperly, provided that such impropriety does not destroy its probative value. The suggestion is that the suspect’s remedy is limited to a claim for damages arising, say, from the improper entry upon premises, etc. This approach encourages rather than deters abuse. The proposals in the Draft Constitution do nothing to rectify the present position. It is thus recommended that all improperly obtained evidence may not be adduced in court.
Endnotes


2 Section 11.16(1).

3 Section 11.16(4).


5 Section 13.6(3).

6 Section 11.18(1)(a).

7 Chapter 11.10 Section 8(1)(b).

8 Section 11.18(1)(a).

9 Section 11.18(1)(c).

10 Section 11.18(1)(d).

11 Section 11.2 (1)(b).

12 Section 11.2 (e).

13 Section 11.14(2)(b).

14 Whilst no concrete proposal to this effect has yet suggested, these two provisions would appear to be compatible, for instance, with the creation of the specialised anti-corruption police body suggested above.

15 Chapter 9:07.

16 Section 4.27(3).

17 The draft is that dated 30 April 2012.

18 Section 7 of the 1998 Act.


20 ibid.

21 Paragraph 19(2) of Part 4 of the 6th Schedule to the Draft Constitution.

22 S 245(5).

23 Section 4.6 of the Queensland Police Service Administration Act 1990.

24 Section 4.7 of the Act.

25 Section 8 of the 1998 South Australia Police Act.

26 Section 11(3) of the Police Act.

27 Section 13(1) of the Police Act.
28 Section 13(3) of the Police Act.
29 Section 69(2) of the Police Act.
30 In the case of ancillary members, ministerial approval is required.
31 See Sections 8, 26 and 27 of the Police Act.
32 http://www.policeombudsman.org/index.cfm
33 Section 11.17.
34 Glenister, 2011, par 223.
35 Section 12.2(4)
36 Section 12.12(2).
37 See Law Society Model Constitution, Section 138.
38 LS 197(2).
39 LS 197(3). Presumably this should refer to Section 138 rather than 148.
40 The observation applies in comparing MPS and SAPS. Private security also plays a major role in many areas.
41 Provided for in Section 206(3) of the South African Constitution.
42 See Section 206(1) and (2) of the Constitution.
43 See the argument in the Veritas paper on ‘what legislative (rather than policing making) powers should provincial and local governments have?’ which argues that: ‘The answer to this depends on the functions that have been devolved to them. The greater the range of devolved functions, the greater should be the legislative powers of provincial and local governments.’ It continues: A more difficult question is how far should provincial and local legislation be subordinate to national legislation passed by the central parliament. If national legislation can simply override provincial or local legislation, then the provincial and local governments will have no real autonomy. On the other hand, there must be some circumstances in which the central government, acting in the national interest, can overrule provincial or local governments. In the NCA draft constitution there is a provision which would allow the national parliament, by a two-thirds majority, to nullify provincial legislation which is prejudicial to the interests of the country or another province. The South African constitution is more detailed and nuanced, dealing with the resolution of conflicts between national and provincial legislation and setting out limited circumstances in which national laws prevail over provincial laws.
44 p 5.
45 Section 13(2)(e).
46 Section 51 of the CP&E Act.
47 Section 132 of the CP&E Act.
48 Section 257 of the CP&E Act.
Idasa is an independent public interest organisation committed to building sustainable democratic societies in collaboration with African and global partners.