The Legislature

The legislative branch of government is the branch which makes laws for the country. A legislature embodies the idea that people are the source of political power in the State and should control the law-making process. It is an institution of representative democracy under which the people elect representatives to act for them, as opposed to direct democracy under which the people enact legislation themselves through referendums or mass assemblies.

In this country the legislative branch is constituted by Parliament, which is divided into two separate chambers or houses, namely the Senate and the House of Assembly. Zimbabwe therefore has a "bicameral" or two-chamber legislature. This was not always the case. From 1923 until 1969 this country had a single-chamber (or "unicameral") legislature. Then in 1970 a Senate was established and legislative power was divided, as now, between the Senate and the House of Assembly. Zimbabwe continued to have a bicameral legislature until 1990, when the Senate was abolished and a single-chamber Parliament was created. In 2005 the Senate was re-established and our legislature has remained bicameral.

Issues to be Considered

Now that Zimbabwe stands poised to draft a new constitution, the structure and functions of the legislature, and its relationship with other branches of government, must be considered afresh. This paper looks at issues facing the constitution-makers under the following headings:

1. Should the legislature be unicameral or bicameral (i.e. should it consist of one chamber or two)?
2. If there are to be two chambers, what should their relationship be to each other?
3. As to the membership of the legislature:
   - Should all the members be elected?
   - Should members of Executive (i.e. Ministers) be allowed to sit and vote in the legislature?
   - If a member leaves the party to which he or she belonged at the time of his or her election, should that party have the right to have the member's seat declared vacant or can she or he "floor-cross", (i.e. join another party) or stay on as an independent. Or if a member who won a seat as an independent joins a party, can he or she remain an MP and represent that party, or should there be a by-election so that the constituency can decide.
   - What privileges should members have?
4. As to legislation:
   - Should legislation passed by the legislature require the assent of the Head of State?
   - Should the procedure for passing legislation be laid down in the Constitution or left to be worked out by the legislature in its standing orders?
5. What powers should the legislature have over national finance?
6. Should the Head of State have the power to dissolve or adjourn the legislature and to fix the dates of its sessions?

1. Should there be a Bicameral or Unicameral Legislature?

The answer to this question depends on the answers to two subsidiary questions:

- *Are there interest-groups who need to be represented in a separate chamber?*

In Britain there were historical reasons based on class stratification for having two houses and Zimbabwe "inherited" the system, but these reasons do not apply in Zimbabwe. But there may be interest groups such as women, the chiefs, disabled persons, etc, who may not get adequate representation in a directly-elected single-chamber Parliament. If they are to be given separate representation, then procedures must be laid down carefully in the constitution and the electoral law to ensure that the electoral or appointment processes are fair and not dominated by the party in power. Alternatively specific representation could be given to provinces in the Senate; for example the US Senate has equal representation for all member states and South Africa's upper chamber is the National Council of Provinces.

- *Would a second chamber, i.e. a Senate, significantly improve the quality of legislation?* The main justification for a Senate which has been advanced in Zimbabwe is that it would be composed of mature statesmen and women who would reconsider legislation passed by the lower house and, where necessary, curb the excesses of the people's elected representatives. If that was the hope of proponents of a Senate, they must have been disappointed. When one compares legislation passed in the years when we had a Senate with the legislation passed by a unicameral Parliament, one finds no noticeable difference in quality. Most of the amendments the Senate has made to legislation over the years have arisen from second thoughts on the part of the Government rather than from initiatives by senators. It has also been suggested that creating a Senate would prevent the fast-tracking of legislation which makes Parliament a rubber-stamp of the Executive, but the present Senate been has not been able to achieve this.

Set against the negligible advantages of having a Senate in Zimbabwe there is a serious disadvantage: cost. The expense of having a second chamber is considerable and the country can ill afford it. The only other reason for a Senate –usually unspoken – is that it has proved a convenient depository for political parties to reward their members. This reason does not benefit the nation as a whole and is no justification for a Senate.

On balance, therefore, it would be better for the country if the new constitution provided for a unicameral legislature.

2. Relationship Between the Chambers of a Bicameral Legislature

If there is to be a bicameral legislature, the new constitution will have to regulate the relationship between the two chambers. The present constitution does this. Generally, both chambers have equal law-making power and all Bills must be passed by both chambers before they can be sent to the President for assent and promulgation as Acts of Parliament. <u>But:</u>

- The House of Assembly has primary responsibility for initiating and passing "money Bills", i.e. Bills relating to taxation and State revenues. The Senate cannot initiate such Bills and cannot amend them if they have been initiated in the House of Assembly.
- If there is disagreement between the Senate and the House of Assembly over

whether or not to pass a Bill or whether or not to amend it, the Senate can delay the Bill for 90 days only. After that time, the House of Assembly can resolve to overrule the Senate and send the Bill to the President for assent.

- The House of Assembly also has the ultimate say in whether Parliament will accept Parliamentary Legal Committee adverse reports on statutory instruments.

If there is to be a Senate in the new constitution, and if most of its members are to be elected by ordinary voters, its legislative powers should probably be equal to that of the lower House; in other words, it should have the same power as the lower House to initiate, amend and reject Bills, including money bills.

3. Membership of the Legislature

Should all the members be elected?

Ever since Independence some members of the legislature have been appointed by the President:

- In the original Lancaster House constitution, six senators were appointed by the President on the advice of the Prime Minister, but there were no appointed members of the House of Assembly.
- When the Senate was abolished in 1989 by Constitution Amendment No. 9, provision was made for the unicameral Parliament to have among its members eight Provincial Governors appointed by the President and an additional 12 presidential appointees.
- Now that the Senate has been reinstated, it contains 10 Provincial Governors appointed by the President and five other appointed members. In addition the GPA has added further appointed members in the form of Vice-Presidents, the Prime Minister, Deputy Prime Ministers and their proxies and these additional appointees are spread between the two Houses.

The appointment of members of the legislature by the President goes against the doctrine of separation of powers, under which none of the three branches of government should control or unduly influence the others. In the new constitution, therefore, neither the President nor the Prime Minister (if there is one) should have power to appoint members of the legislature. All the members should be elected.

How they should be elected will be dealt with in another paper which will consider electoral systems. One point should be made here, however: if there is to be a Senate, there should be some differentiation between the election of senators and the election of members of the other chamber, otherwise the Senate will be a clone of the lower chamber. This differentiation may be achieved in either of two ways:

- By making the electorate different for senators and members of the other chamber. For example, senators could be elected on a provincial basis while members of the other chamber are elected on a constituency basis. Alternatively, some senators could be elected by institutions such as universities (which is the case in Ireland), professional associations or other bodies representing important sectoral interests such as women, chiefs, disabled, etc.
- By providing different electoral systems for the two chambers. For example, senators might be elected on a proportional representation system and members of the other chamber on a first-past-the-post basis.

Should members of the Executive be allowed to sit and vote in the legislature?

If the doctrine of separation of powers were to be applied strictly, members of the Executive (i.e. Ministers) should not be members of the legislature and should not be allowed to take part in debates of the legislature. The doctrine cannot be applied so strictly, however, because the executive and legislative branches of government must co-operate to some extent; the executive must have some way of ensuring that its proposals for legislation are presented in the legislature. It is also important for the legislature to be able to question Ministers and hold them to account. Ways of achieving this vary from country to country:

- In France, Ministers are not members of the legislature but are entitled to address the Senate and the National Assembly.
- In the United States, Cabinet members are not members of Congress, but the Vice-President is a non-voting president of the Senate, and the President is entitled from time to time to address Congress on the state of the nation.
- In Britain, all Ministers including the Prime Minister must be members of one or other of the Houses of Parliament and the Executive effectively controls parliamentary business.

Zimbabwe largely follows the British model. No one can hold office as a Minister for longer than three months unless he or she is a member of the Senate or the House of Assembly and Ministers are entitled to take part in the debates of both chambers. It is debatable whether the new constitution should change this. It is noteworthy that none of the draft constitutions that have been put forward to replace the present constitution – the Constitutional Commission draft, the NCA draft, the Kariba draft or the Law Society model constitution – seeks to change this position very much.

On balance, therefore, the new constitution should probably preserve the current position more or less unchanged: Ministers should be drawn wholly or mainly from members of Parliament, and they should have the right to take part in the debates in either chamber.

If this position is unchanged under the new constitution, ways will have to be found of counterbalancing the influence of the executive by enhancing Parliament's independence (perhaps by making it easier for private members to introduce their own legislation and to alter legislation sponsored by the executive).

What should happen if a member of Parliament leaves his or her party?

Under the British constitution, members of Parliament are free to "cross the floor", that is to abandon their party and join another one without having to resign their parliamentary seats.

The same applied in Zimbabwe until 1989, when the Constitution was amended to provide that if a member of Parliament leaves the party to which he or she belonged when elected, the party can notify the Speaker or the President of the Senate, as appropriate, that the member no longer represents its interests, and the member then automatically loses his or her seat. There are arguments for and against the current Zimbabwean position:

- In Zimbabwe as in most modern democracies, members are elected on the basis that they belong to a particular political party. If one of them subsequently leaves his

or her party, therefore, it may be dishonourable for him or her to remain in Parliament without going back to the electorate and seeking re-election under his or her new political affiliation.

- If members know they will have to vacate their seats if they leave their party, they will be less likely to abandon the party whenever the political wind changes. Party discipline is therefore strengthened, making it easier for government and party leaders to predict whether or not legislation will be passed by Parliament. If by contrast there is a weak party system, members of the legislature are more easily bribed with money or political advancement to vote against their parties. Weak parties may therefore encourage corruption in the legislature.

The contrary argument is that members of the legislature are not elected to serve the interests of a particular political party, but to serve their country. They must be allowed to act according to their own good judgement and conscience and not according to the dictates of their party bosses.

None of these arguments can be regarded as conclusive, but it may be observed that the argument in favour of giving members freedom to vote according to their conscience assumes that politicians are all honest and upright and willing to follow their consciences.

What privileges or immunities should the legislature and its members have?

The privileges of a legislature are special rights that are conferred on the legislature as an institution and on its members individually, so that the legislature has the authority and independence to carry out its functions properly. Because these privileges are so important, some of them at least should be set out specifically in the constitution. The present Constitution merely allows an Act of Parliament to provide for the parliamentary privileges; in contrast, the South African constitution mentions of some of them.

The most important privilege of the legislature as an institution is the power to compel officials to appear and give evidence before it and its committees. This privilege should be mentioned in the new constitution. The legislature should also have power to punish its members and other people for contempt, but its power should be limited to ensure that the punishments are reasonably moderate and that the range of conduct that constitutes contempt is not so great as to stifle legitimate criticism of the legislature and its members.

At present, the main privileges and immunities enjoyed by members of the Zimbabwean Parliament are:

- *Freedom of speech and debate*. This is a vital privilege because members must be free to engage in debate and raise matters in Parliament without fear that they will be arrested, prosecuted or sued civilly for what they say in Parliament.
- *Exemption from attendance at court*. This exemption extends only so far as to prevent members from being kept away from their parliamentary business by having to attend court proceedings.
- *Immunity from arrest*: This immunity, inherited from the British Parliament, applies only to civil arrest while Parliament is sitting. It does not apply to arrest for criminal offences. It does not therefore protect members from being arrested and

detained on trumped-up charges. The French constitution, it may be noted, protects members of the legislature from being arrested for criminal offences without the authority of a committee of the legislature. Our new constitution should give the same protection.

These privileges are intended to facilitate the functioning of the legislature, not to benefit its members individually. The new constitution should mention them specifically.

4. Legislation

Assent by the Head of State

Under the present Constitution, a Bill passed by the House of Assembly and the Senate must be assented to by the President before it is promulgated as an Act of Parliament. The President therefore takes part in the legislative process; indeed, the Zimbabwean legislature is defined as consisting of the President and Parliament, and the preambles of all our Acts state that they are enacted by "the President and the Parliament of Zimbabwe".

The involvement of the Head of State in the law-making process is a survival from the days when laws were made by kings. It may seem anomalous to continue the practice in a modern State, where political power is supposed to be vested in the people, but most States do so. Even the constitution of the United States, which famously begins with the words "We, the people" and which vests "all legislative powers" in a Senate and a House of Representatives, requires the President to approve all Bills before they are enacted.

None of the draft constitutions mentioned earlier — the Constitutional Commission draft, the NCA draft, the "Kariba draft" or the Law Society's draft — alter the Head of State's involvement in the making of legislation, and it is too well-entrenched for the new constitution to alter it. Strict time-limits must be imposed, however, on the Head of State's consideration of a Bill before approving or disapproving it, and in the event of the Head of State's rejecting a Bill the legislature must have power to compel him or her to approve it. The President should not be allowed to "veto" legislation by delaying his assent.

Procedure for the passing of legislation

The present Constitution deals with the procedure which Parliament must follow in regard to the passing of legislation, but its main focus is the relationship between the Senate and the House of Assembly. The internal procedures of each House are left to standing orders made in terms of the Constitution. This pattern is followed in the draft constitution of the Constitutional Commission of 1999 and in the "Kariba draft". In the NCA draft and the Law Society drafts which have limited Senate powers, most matters of parliamentary procedure are left to be prescribed in standing orders.

If the new constitution creates a Senate, and if the Senate is given the same or nearly the same powers as the lower chamber to enact legislation, then the relationship between the two chambers should be spelled out as it is in the present Constitution. The internal procedures of each chamber should for the most part be left for the chambers concerned to work out in their standing orders. The constitution should, however, lay down some minimal ground rules:

- Legislative procedures must allow adequate debate on all legislation. Members must be give adequate time to consider the legislation; "fast-tracking" Bills should be prohibited or at least minimised.
- There must be adequate consultation before legislation is presented in Parliament. Current parliamentary procedures do require Bills to be considered by portfolio committees and allow the committees to hold public hearings, but the constitution itself should lay down the need for full consultation.

In addition, though this need not be specified in the constitution, the procedural rules should be made as simple as possible so that members understand them easily and do not have to be subjected to lengthy induction before they are able to take part effectively in debates.

5. Powers of the Legislature over National Finance

In Britain since the 17th century the Executive has had to rely on Parliament to provide it with the necessary finance to maintain the government, and Parliament has used its financial power to keep the Executive in check. This is reflected in the present Zimbabwean constitution, which gives Parliament (primarily the House of Assembly) power to raise finance through taxation, requires all government revenues to be paid into a single Consolidated Revenue Fund, and prohibits the Executive from withdrawing money from the Fund unless authorised to do so by Act of Parliament.

The new constitution should certainly continue this position, and if possible should strengthen it, perhaps in the following ways:

- The constitution should state that no taxes can be raised except under the specific authority of an Act of Parliament. The present Constitution does not state this expressly, and the President has raised some taxes temporarily through regulations made under the Presidential Powers (Temporary Measures) Act.
- Parliament should be required to set statutory limits on the level of national debt and borrowings by the State.
- All public accounts without exception should be audited by the Comptroller and Auditor-General and scrutinised by Parliament. At present some accounts relating to the President's office are not scrutinised.
- The power to fix and raise the salaries and allowances of State officials, including the President, Ministers and members of the legislature, should be made subject to approval by an independent Salaries Commission set up by the constitution.

6. Dissolution, Adjournment and Sessions of the Legislature

At present, the President has power, in his personal discretion, to summon Parliament to its annual sessions, to prorogue (i.e. adjourn) Parliament and to dissolve it. He cannot abolish Parliament completely, because Parliament must meet at least once every six months but he can keep its sittings to a minimum. The maximum life of Parliament (i.e. the period between general elections) is five years but the President can shorten that period by dissolving Parliament before the five-year term has elapsed.

If Parliament cannot even determine the dates of its own sessions it cannot be regarded as a truly independent legislature. Clearly the new constitution must reduce the President's powers in this regard.

One way of doing this, suggested in the NCA draft constitution and the Law Society's model constitution, would be to allow Parliament to determine when and how often it should sit. The President would be required to summon Parliament within 21 days after a general election, and after that it would be up to Parliament to work out its own sittings. In the interests of efficiency, Parliament would probably have to prepare some sort of time-table for its sittings, but this could be done through its standing orders rather than through Presidential order.

Even the power to dissolve Parliament could be conferred on Parliament itself rather than on the President. This would have to be done by an increased majority, say a two-thirds majority, of all the members of Parliament (or of the lower chamber of Parliament, if there is to be a bicameral legislature).

Conclusion

One important point should be made before ending. Whatever the form of the legislature in the new constitution, and however much power it is given, it will only be effective if effective members are elected to it. Its effectiveness, in other words, will depend on the quality of its members. That in turn will depend, at least partly, on the form of the electoral system. And that will be the subject of another paper.