

The Zimbabwe Independent Complaints Commission Bill – A Critical Examination

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COMPLAINTS AGAINST MISCONDUCT BY
MEMBERS OF THE SECURITY SERVICES

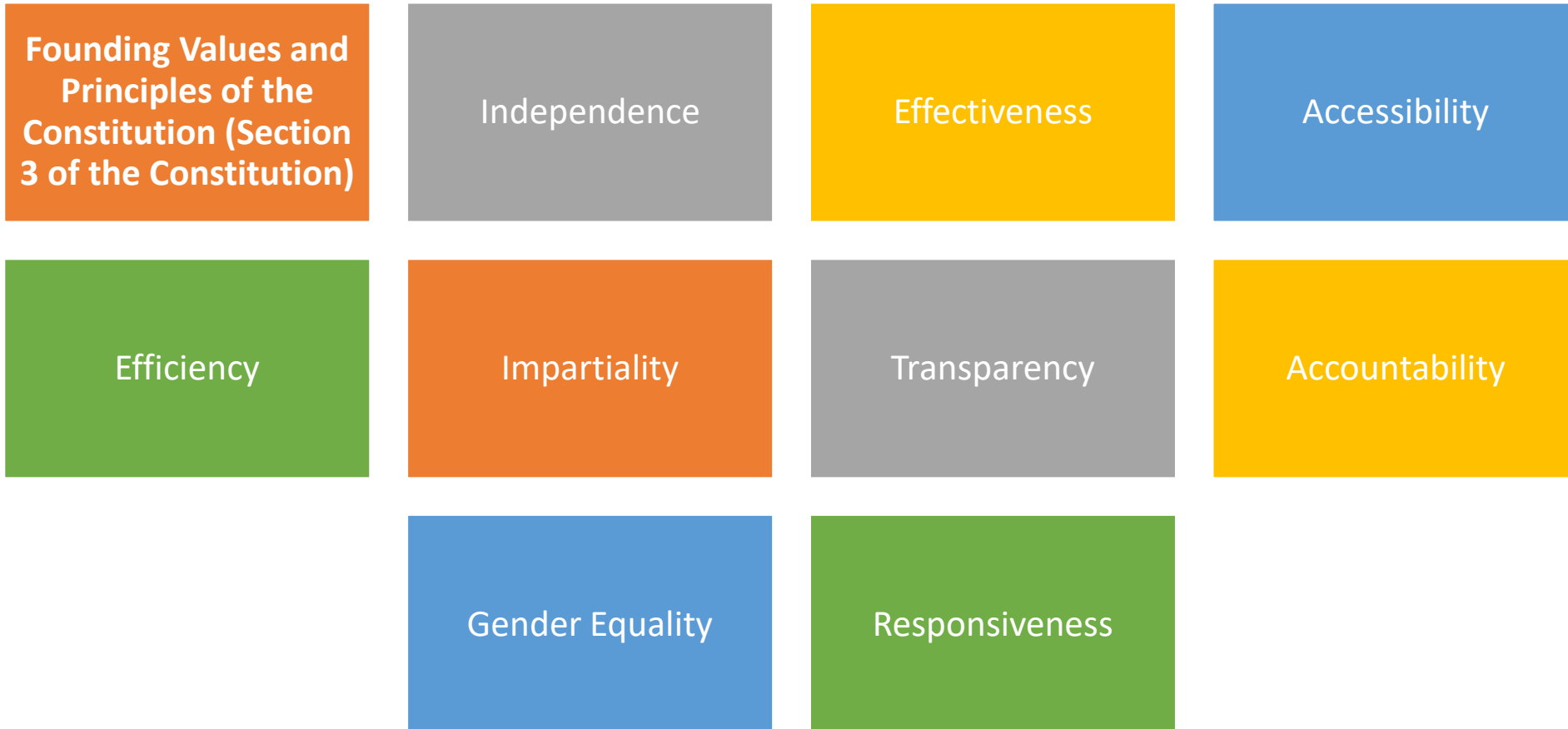
CONSTITUTIONAL CONTEXT

Section 210 of the Constitution:

“An Act of Parliament must provide for an effective and independent 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 conduct”

- **Receiving** complaints
- **Investigating** complaints
- **Remedying** any harm caused by misconduct

CONSTITUTIONAL CONTEXT



COMPOSITION OF THE ICC

Membership of the ICC

5 members

Chairperson is appointed by the President after consultation with the Judicial Service Commission.

The other 4 members are also appointed by the President but from a shortlist selected by Parliament's Committee on Standing Rules and Orders.

Positive: Like the current method of appointment to Chapter 12 independent commissions.

Weakness: it gives a disproportionate amount of power to the President and makes the ICC vulnerable to capture

Recommendation

an appointment procedure like the method used for the appointment of High Court judges

QUALIFICATIONS OF COMMISSIONERS



SECURITY GUESTS AND OBSERVERS

Security Guests

- Chairperson may invite the head of each security service to **“appoint a serving or retired member of that service of sufficient seniority to sit together with the membership of the Commission whenever the Commission is investigating or conducting an inquiry into any act of misconduct on the part of any member or former member of that security service.” (Section 6(5))**
- No clarity regarding the role of this guest

Security Observers

- The head of a security service has the power to appoint an observer at the ICC for a term of at least 12 months. The observer has the right to be present at any meeting of the ICC during which a member of that security service is being investigated . The Chairperson can even invite the observer **“to participate in the deliberations of the Commission during any investigation, hearing or inquiry”** although they will not have the right to vote on any question that may arise. The observer can also **“put questions to any complainant or other person who is a party to any investigation, hearing or inquiry being conducted by the ICC.**
- Gatekeepers of the security establishment and impact on independence of the ICC

SECURITY GUESTS AND OBSERVERS

- Vague and undefined roles
- Violation of natural justice principles
- Intimidatory atmosphere for complainants and witnesses
- Serious effect on independence of the ICC – real or perceived

Recommendation

- The CLC recommends the removal of these provisions regarding additional members and observers. They severely undermine the independence of the ICC and might lead to its redundancy. These defensive mechanisms only serve to create barriers of entry to the ICC.

CONDITIONS OF SERVICE

- Section 6(3) of the Bill proposes that Section 320 of the Constitution shall apply to the conditions of office of members of the ICC.
- The term of office for members of the ICC is five years and renewable for one additional term only .
- Commissioners serve at the pleasure of the President. This makes the ICC very different from other independent commissions. ICC commissioners are vulnerable to the whims of the President. The President can remove them at any time, and he does not have to give reasons.
- The CLC recommends a change to this provision so that members of the ICC do not serve at the pleasure of the President. A new clause in the Bill can replicate the provisions governing the removal of members of independent commissions and judges.

EFFECTIVENESS: FUNCTIONS

- Section 4 of the Bill which lists the functions of the ICC only states the **investigative function** but e complaints. It does not deal adequately with the functions of **receiving complaints** and **providing remedies**.

“Recommendations or Orders”

- Section 4(2)“**The Commission shall make such recommendations or orders as it considers appropriate to the security service concerned or any other relevant authority, including recommendations or orders for prosecution, compensation or any other appropriate relief or internal disciplinary action.**”
- Remedies must be effective. Orders must be binding. Recommendations can be ignored (Consider the recommendations of the Motlanthe Commission, 2018)

RECOMMENDATIONS OR ORDERS

- To appreciate the distinction between the two remedies consider the language of Section 16(3) of the Bill:
“(3) The Commission may, where it considers it necessary—
 - (a) recommend the immediate release of any person from unlawful detention by a security service;**
 - (b) recommend the payment of compensation to the complainant;**
 - (c) recommend that the complainant seek redress through the courts;**
 - (d) refer the matter to the National Prosecuting Authority for the prosecution of the member complained against; or**
 - (e) order the appropriate security service concerned to institute appropriate internal disciplinary processes against the member complained against”**

GENDER EQUALITY

- Bill has a progressive provision that requires the top two positions at the ICC to be shared equally between men and women
- However, there is no specific provision requiring equal representation both among the commissioners and members of the executive staff.
- It would also be progressive to have a provision which requires that if the Chairperson is a man, then the Executive Secretary of the ICC, another key leadership position should be a woman. This type of deliberate measure to promote women is justified under the equality and non-discrimination provision of the Constitution.

JURISDICTION OF THE ICC

- Section 13(2)(a) limits the prescription period for complaints to just 3 years. This is too restricted. In cases of violence, torture or sexual assault, there may be good reasons why complainants take longer than 3 years to gather the confidence to make a report.
- 13(2)(b) ousts the jurisdiction of the ICC on the grounds that the matter is before the courts or before another independent commission. The fact that a court is conducting criminal proceedings should not preclude the ICC from carrying on an investigation where the complainant is seeking compensation. The current provision is an attempt to unduly limit the avenues available to victims such that one must choose whether to go to court or to go to the ICC..

CONCLUSION

The Bill is an important step in the implementation of the Constitution. The establishment of the Independent Complaints Mechanism is long overdue

However, as examined, the Bill does not comply with the requirements of the enabling provision: section 210 of the Constitution

It also fails to meet the founding values and principles of the Constitution

Finally, it falls short of the standards set out in the Declaration of Rights.

The Constitutional Law Centre has made several recommendations to improve the Bill



A HISTORY OF BRUTALITY
AND IMPUNITY
