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**INTERPRETING THE SCOPE OF FISCAL DEVOLUTION UNDER ZIMBABWE’S 2013 CONSTITUTION**

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1. **Introduction**

The Constitution of Zimbabwe Amendment (No.20) Act 2013 was enacted on the 22nd May 2013/ and makes provision for a unitary state,2 with devolution and decentralization of governmental powers and functions.3 This is one of the foundational principles underpinning the state of Zimbabwe as outlined in section 3 of the Constitution.4 The Constitution thus explicitly creates a three tier system of the state,5 comprising central government, provincial government, and metropolitan councils and local authorities.6

With regards to the local government sphere, the 2013 Constitution has imbued the local governments with a 'constitutional' as opposed to merely 'legislative' status as was the case under the previous constitutional regime.7 Local authorities now have the constitutional authority to govern the affairs of the people within their area of jurisdiction on their own initiative.8

Arising out of this constitutionally mandated devolved system of government is the issue of fiscal devolution which is an integral part of the concept of devolution.9 Section 276(2)(b) as read with section 276(2) of the Constitution specifically requires Parliament to enact a law that confers a power on local authorities to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities. There is no similar

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Section 3(1) of Part 2 of the Sixth Schedule of the Constitution.

2 Section 1 of the Constitution.

3 Section 3(2)(l) of the Constitution.

4 The section provides for founding values and principles underlying the state of Zimbabwe.

5 Section 5 of the Constitution.

6 (ibid).

7This was in terms of the Urban Councils Act and the Rural District Councils Act.

8 Section 276(1) of the Constitution of Zimbabwe.

9 P Drummond and A Mansoor, *Macro-Economic Management and the Devolution of Fiscal Powers,* IMF Working Paper, WP/02/76 *(*2002) 6, available at <https://www.imf.ora/external/oubs/ft/wo/2002/wo0276.odf>*.* (accessed on 10 May 2016).

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provision in respect of provincial and metropolitan councils yet they are a tier within the devolved framework. The question that arises then is how these entities are expected to fund themselves if there is no conferment of such a power. The constitution further provides for the equitable sharing of national resources within the three tier system.10

This paper assesses fiscal devolution outlined in the Constitution and examines its scope. However, in assessing fiscal devolution provisions in the Constitution, the paper first highlights the provision on fiscal devolution and then considers how the issue of supremacy of the constitution impacts the interpretation of the fiscal devolution provision.

1. **The Scope of Fiscal Devolution in the Zimbabwean Constitution**

Fiscal devolution refers to the transfer of revenue, spending and borrowing powers from central government to subnational tiers of government.11 In Zimbabwe, Section 276(1) of the Constitution confers powers of self-governance on local authorities. It provides as follows;

1. Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.

The Constitution in section 276(2)(a) further requires Parliament to enact a law that will confer powers on local government to levy rates and taxes and to raise sufficient revenue for them to carry out their objects and responsibilities

This provision appears to confer taxation powers to local authorities and thus fiscal devolution. To properly understand the above provision, it is necessary that one has to consider the issue of constitutional interpretation in Zimbabwe. The starting point in so doing is, in essence, the appreciation of the supremacy of the Constitution.

* 1. **Supremacy of the Constitution**

A constitution is the supreme law such that any law, conduct, practice or custom that is inconsistent with the constitution is invalid to the extent of the inconsistency.12 The constitution is the grundnorm that any legislation, conduct, practice or custom has to be

10 Section 3(2)(j) of the Constitution.

11 Drummond and Mansoor (n 9 above) 4.

12 Section 2(1) of the Constitution.

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measured against. Any law that is inconsistent with the constitution is invalid to the extent of the inconsistency13.

The constitution importantly imposes obligations on various persons and bodies within the state and such obligations are binding on every person, whether same is a natural or juristic person.14 These include the state and all executive, legislative and judicial institutions and agencies of government at every level.15 These persons are required and obliged to fulfill the obligations imposed by the constitution.16 The constitution uses imperative language, 'must, in the imposition of obligations on the persons indicated therein. In this regard, duties imposed by the chapter 14 provisions should be understood within the context of this particular part of the constitution.

The constitution provides for a Declaration of Rights in Chapter 4. Part 1 thereof provides for the application and interpretation of the Chapter 4 provisions.17 Section 46 sets out the interpretation mechanism that has to be adopted in interpreting the bill of rights. Section 331 of the constitution states that s 46 shall apply to the interpretation of the rest of the constitution with necessary modifications.

In understanding the fiscal devolution provision above one will have to consider different approaches to constitutional interpretation in general. This is important so that one understands the Chapter 14 constitutional provisions. The provisions are key to devolution as they are bedrock of the same. In Zimbabwe the local courts have used the interpretation styles from other jurisdictions to ascribe meaning to provisions of either the constitution or ordinary legislation.18

* 1. **Approaches to Constitutional Interpretation in General**

Constitutional interpretation is a contested territory. There are so many varying approaches to constitutional interpretation. According to Randall Kelso there are basically four approaches to constitutional interpretation; natural law, formalism, Holmesian and

13 (n 12 above).

14 Section 2(2) of the Constitution.

15 (n 14 above).

16 (n 14 above).

17 Section 46 of the Constitution.

18 1989(2) ZLR 61 (SC).

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instrumentalism and these occurred during different eras of American legal history.19 At the present moment, there is a combination of these approaches.20 According to Grimm, some courts prefer a literal interpretation which can be termed legal positivism wherein the interpreter sees a 'legal norm as consisting of its text and nothing else'.21

Others prefer originalism. According to Grimm, originalism (a crude literal understanding), or the historical method, is the right way to ascertain the meaning of a legal provision in a constitution which is a way of ascertaining the intention of the framers only22. Others, according to Grimm, prefer the purposive approach which looks at the constitutional provision as an expression of the values and principles that the society wanted to establish at the highest order.23 These may change with changing social milieu.24 According to Currie & de Waal, constitutional interpretation is the process of determining the meaning of a constitutional provision25.

There are several approaches to constitutional interpretation which will be discussed below. This is important in seeking to understand the meaning of section 276(2)(b) of the constitution; the fiscal devolution provision.

* 1. **Different Approaches to Constitutional Interpretation**

One of the approaches to constitutional interpretation is the literal interpretation. This requires one to have regard to the words used as the starting point. Literal interpretation is where one has regard to the text used be it the Bill of Rights or any other part of the constitution26 and requires that one should use the language used in the constitutional

19 R Randall Kelso *(*1994), *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History 121,* available on *httD://scholar.valDo.edu/cai/viewcontent.cai?article=1924&context=vulr,* (accessed 10 May 2016), *see also* M Stokes *(*1994) *Meaning, Theory and the Interpretation of Constitutional Grants of Power 319, available on httD://*[www.austlii.edu.au/au/iournals/MonashULawRw/2013/12.Ddf](http://www.austlii.edu.au/au/iournals/MonashULawRw/2013/12.Ddf)*,* (accessed 10 May 2016).

20 (n 19 above) 123.

21 D Grimm (2011), *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics 16, available at httD://nuislawreview.ora/wD-content/uDloads/2015/02/dieter-arimm.Ddf.* (accessed on 11 May 2016).

22Grimm (n 21 above) 24.

23 Grimm (n 21 above) 26.

24 Grimm (n 21 above) 26.

251 Currie & J de Waal, *The Bill of Rights Handbook, Fifth Edition (2005) 145, Juta Co Ltd.*

26 J Kentridge and D Spitz, Interpretation, cited in M Chaskalson et al, Constitutional Law of South Africa , 11­15, Juta.

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p*r*ovisi*o*n.27 See *Mawarire v Mugabe NO & Ors,28 S vZuma,29* and *Minister of Home Affairs v Bickle & Ors.30*

The words, however, are not themselves definitive of the meaning of a constitutional provision.31 One thus cannot end with having regard to the literal meaning of the provision as some provisions of some constitutions are a result of political compromises and are thus left deliberately vague and open ended. This is particularly true of the devolution provisions, which was a contested area.32 Literal interpretation is not conclusive on its own but rather a starting point, it is acceptable if taken together with the purposive and generous approaches33 and has to be consistent with these approaches.

The purposive approach in interpretation, on the other hand, entails looking at the purpose of the constitutional provision. One has to consider the mischief that the law sought to deal with or address. In other words, one has to consider the legislative purpose of the particular constitutional provision. The interpreter thus has to determine and give effect to the values of the constitution as expressed in the actual wording of the drafters.34 This is aimed at giving expression to the core values of the constitution as espoused in sections 3 and 46 of the constitution.

The interpretation of the rest of the constitution is different from the interpretation of the Bill of Rights in degrees rather than in form.35 The Bill of Rights is worded in a language that allows for a more broad approach to be adopted in its interpretation than the rest of the constitution.36 In the former, one looks at the scheme of government sought to be created by the constitution.37 Words used in other parts of the constitution can be used to shed light

27 S v Zuma 1995 (2) SA 642 (CC).

28 2013 (l)ZLR 469 (CC).

29 (n 26 above).

30 1983 (2) ZLR 400 (S).

31 Kentridge and Spitz (n 26 above) 11-15.

32 E Masunungure and S Ndoma The Popular Quest for Devolution In Zimbabwe, Afrobarometer Briefing Paper no.114 available on

*httD://afrobarometer.ora/sites/default/files/Dublications/Briefina%20DaDer/afrobriefnoll4.pdf.* (available 30 May 2016), 4.

33 Kentridge and Spitz (n 26 above) 11-15

34 Kentridge and Spitz (n 26 above)ll-15.

35 Kentridge and Spitz (n 26 above) 11-15.

36 Kentridge and Spitz (n 26 above) 11-15.

37 Kentridge and Spitz (n 26 above) 11-14A.

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on the meaning of a particular provision.38 At the end one has to give effect to the constitutional values as expressed in the constitution.

Another approach is the contextual approach which considers the intrinsic and extrinsic context of a provision in a constitution. These are factors that are inside or outside the constitution as a document. Extrinsic provisions may refer to the political, financial or historical context of the particular provision in a constitution. Intrinsic context refers to the other provisions of the constitution. Contextual interpretation takes into account the general historical setting of the constitution, the idea being to acknowledge the key historical events and a desire to cut ties with the past. The constitution retains that which is defensible (values, customs etc) and rejects an unacceptable past, making a radical break from it.

Background material is however considered to find out the context of a constitutional provision. Such material is usually referred to as the travaux preparatoires (documents like reports used during the constitution making process).

The intrinsic context usually deals with competing or contrary constitutional provisions. The rule of interpretation in such a situation is to interpret these together (conjunctively) as opposed to individually (disjunctively). This is sometimes referred to as the harmonization process in which different provisions are read together e.g. linking the right to life to human dignity, environment, food, liberty.

The interpretation philosophy imposed by the Zimbabwean 2013 Constitution in this regard, one will say, is purposive. This is because, in interpreting the Bill of Rights, the central issue is the requirement that the body interpreting the constitution must give full effect to the rights and freedoms in the chapter39. Moreover, the interpreter must promote the values that underlie a democratic society40. The interpreter must pay regard to the provisions of Chapter 2 (National Objectives)41 and may consider relevant foreign law42 as well as

38 Kentridge and Spitz (n 26 above) 11-15

39 See s 46(l)(a), (b) and (d) of the Constitution

40(n 39 above)

41 See s 46(l)(d) of the Constitution.

42 See s 46(l)(e) of the Constitution.

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consider any other factors that are taken into account in interpreting a constitution43. That approach, with necessary modifications, must be adopted in interpreting the other constitutional provisions outside the Bill of Rights.44

A constitution therefore can only be interpreted in the manner provided for in s46. It needs to be said that the judiciary is bound by the provisions of s46. This is because section 45(1) provides that the whole of Chapter 4 provisions are binding on the State, and all executive, legislative and judicial institutions and agencies of government at every level. Consequently, the judiciary cannot escape the provisions of the Constitution in any way.

A constitution is a document sui generis45 as indicated in S v Zuma46 wherein the court held that:

"...But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected...I would say that a Constitution "embodying fundamental principles should as far as its language permits be given a broad construction"

As indicated above, the interpretation criteria imposed by the constitution is clearly spelt out in s46. This approach was adopted by the Garwe JA in Mawere v Registrar General & Ors,47 He stated that the principles of interpretation are those outlined in Minister of Home Affairs v Bickle & Ors 1984 (2) SA 439(ZS) at 447 where it was said that:

"The question, then, is one of construction, in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another...The true test must always, be the actual language used".

The preferred approach that will be used in interpreting the devolution provisions in the constitution is that which is outlined in the above cases, with necessary modifications as required by the language of section 331 of the Constitution.

43 Seethe paragraph immediately under s 46(l)(e) of the Constitution.

44 Section 331 of the Constitution.

45 See the case of *Government of the Republic of Namibia and Another v Culture 2000 and Another 1994 (1)* S4 *407 (Nm.S), 418 F-H.*

46 1995 (2) SA 642 (CC).

47 CCZ 4/15.

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* 1. **Interpretation of section 276(2)(b) of the Constitution**

Section 276(2)(b) provides as follows;

1. An Act of Parliament may confer functions on local authorities, including—
2. ...;
3. a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities....

A literal interpretation approach will show that the words of the provision are rather straight forward. It is to the effect that parliament will enact legislation that may confer on local authorities certain functions that include the power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities as provided for in section 264.

Literally, parliament has an option whether or not to confer such functions on local authorities and in fact, may rightly decide not to do so. In other words, parliament has discretion whether or not to confer such powers on local authorities. In not conferring such functions on local authorities, parliament will be acting lawfully, acting within its constitutional powers. That is the literal interpretation of the words used in the provision.

However, as already indicated above, the literal meaning is but the starting rather than the end in constitutional interpretation.48 It is of value when used together with the other approaches, especially the purposive or contextual approach. The role of constitutional interpretation is to give effect to the values of the constitution.49 Chapter 3 provides the Founding Provisions of the constitution of Zimbabwe. These are provisions on which the state is anchored. Among these is the principle of supremacy of the constitution, the founding values and principles. Among the founding values and principles are devolution and decentralisation of governmental power and functions. Chapter 14 then sets out the role of devolved government and its structures.

It is within this context that one has to interpret the provisions of section 276(2)(b) so as to understand its import. One of the underlying values in the constitution is the creation of a devolved and decentralized government where both its powers and functions are devolved and decentralized to lower tiers of the state or the subnational levels. Devolution and

48 Kentridge and Spitz (n 26 above) 11-15.

49 Kentridge and Spitz (n 26 above) 11-16.

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decentralization of central government powers and functions is one of the values of the constitution of Zimbabwe. Central government has a number of powers and functions including those of a fiscal nature; revenue collection, spending and borrowing.

It is apparent that one of the values underpinning the state of Zimbabwe as expressed by the constitution is the creation of a devolved state. The constitution has thus proceeded to set out the objects of a devolved state and in fact outlined the nature of devolved government in Chapter 14. It is apparent that in order to carry out their functions and responsibilities, local authorities should be able to levy rates and taxes and generally to raise sufficient revenue to enable them to carry out their functions and responsibilities.

Local authorities perform a mammoth number of functions as outlined in the Urban Councils Act (Chapter 29:15) and the Rural District Councils Act (Chapter 29:13). These functions are partly outlined in section 276(2) of the constitution, requiring an Act of Parliament to provide for these and already provided for in two Acts referred to already. In a nutshell, the rural district councils as well as the urban local authorities have various competencies which they have to undertake on behalf of their constituents.

Jonga says urban local authorities have a duty to provide goods and services to the urban communities in a democratic manner.50 Jonga further notes that the Zimbabwe Electoral Support Network (in its 2008 report) observed that in Zimbabwe there was breakdown of service delivery by local authorities resulting in the failure to collect refuse, burst sewers, erratic water supplies and roads filled with potholes thus nightmarish to the motoring public.51 Urban local authorities used to provide electricity to the urban communities.52 This

50 W Jonga, Local Government System in Zimbabwe and the Associated Challenges: Synthesis and Antithesis, Archives of Business Research, 2(1), 75-98 Society for Science and Education, United Kingdom available at <http://scholarpublishing.org/index.php/ABR/article/view/89/68>, (2014) 79, (accessed on the 31 August 2016).

51 Jonga (n 50 above) 82, it must be pointed out that the function of providing water in the bulk of the towns was taken away from the purview of local authorities through a ministerial directive in 2005, and given to the Zimbabwe National Water Authority (ZINWA). The consequence is that this revenue source was lost to such authorities. In 2008 central government through the Minister of local government again issued another directive handing back the said function to some councils but maintained such control in other authorities like Gwanda, Beitbridge etc. see a detailed discussion of the issue in Jonga, note 119 pages 82-84 which also discusses the issue of removal of electricity management from urban local authorities by central government. See a full discussion of the issue of revenue of service provision by B Coutinho, Sources of Local Government Financing, cited De Visser et al eds, Local Government Reform, A Policy Dialogue available at <http://repositorv.uwc.ac.za/xmlui/bitstream/handle/10566/208/DeVisserLocalGovtZimbabwe2010.pdf7seaue> nce=, 4. 74.

52 See section 216 of the Urban Councils Act.

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power was however taken away in 1989 and given to the Zimbabwe Electricity Supply Authority (ZESA) and thus starved urban authorities of a revenue generation stream.53

It is not a secret that local authorities face a number of challenges; demand for health services due to the HIV-Aids pandemic that is exacerbated by poor services in the surrounding farms and rural areas which are poorly resourced.54 Indeed, it has been stated that every local authority is required to 'take lawful and necessary procedures for the prevention of occurrence or for dealing with the outbreak or prevalence of any infectious, communicable or contagious disease'.55 A duty is imposed on the local authorities that covers water provision, sanitation, prevention of pollution of water, land, air, control of communicable diseases and food hygiene or environment health services.56

Evidently, duties of local authorities are multifold. It is self evident, therefore, that in order to perform their functions and responsibilities, the local authorities need revenue. The local authorities in seeking to raise revenue have to levy rates and taxes and have other means generally, to raise further revenue to carry out their functions and responsibilities. In other words, the local authority's very lifeblood is premised on the ability to possess a power to levy rates and taxes and a power to raise further revenue outside levying rates and taxes. A local authority without such a power will not be able to provide services required by residents and other consumers within a local authority. It is therefore within this context that the term "may" used in section 276(2)(b) has to be understood. One thus has to understand the context and purpose of the fiscal devolution provision espoused in section 276(2)(b).

In as much as the term that is used in section 276(2) of the constitution in relation to conferment of functions on local authorities is the word “may", it is clear that within the context of the values and constitutional scheme of arrangement of government, such

53 Jonga (n 50 above) 82. This power for councils to own and operate a public electricity supply undertaking and carry on any activity incidental or connected thereto is in terms of section 216 of the Urban Councils Act. This entitlement is, however, subject to the Electricity Act (Chapter 13:05).

54 Urban Local Government Financing and Health, Report of A Workshop, Mutare, Zimbabwe 5-6 February 2001, 3, available at <http://www.tarsc.org/publications/documents/URBAN%20FINHEALTH%20MTG%20REP%202001.pdf>,

(accessed on 31 August 2016).

55 (n 54 above) 3.

56 (n 54 above) 3.

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conferment is a must or mandatory.57 This accords with a purposive interpretation of the provision as its purpose was to ensure that power cascades to the lower tiers of the state created under another value established by the constitution in section 5. This provision should be read together with sections 3(2)(l), 264 and 276(2)(b) of the constitution and understood within the context of the whole scheme of devolved government set out in Chapter 14 of the constitution.

It is apparent that in seeking to understand the meaning of section 276(2)(b) of the constitution of Zimbabwe, from a purposive perspective of fulfilling the constitutional requirements on devolution of power and functions, the section actually requires parliament to enact legislation that will confer a power on local authorities to levy rates and taxes and generally a power to raise sufficient revenue to carry out their functions and responsibilities as outlined in the constitution.

That interpretation will be in conformity with the values of the constitution as well as the compromise and consensus of including devolution in the constitution by the political players in the constitutional making process and taking into account the fact that seven (7) out of ten (10) provinces in Zimbabwe supported the inclusion of devolution in the constitution.58 The inclusion of devolution was to ensure that power is devolved to the lower tiers of the state so that these lower tiers carry out such powers and functions.

It is thus apparent that the constitution indeed provides for fiscal devolution of power to the local authorities and none to the provinces. This is because the constitution provides in section 265(l)(b) that a lower tier in the government can only assume a power that has been allocated to it. The fiscal power is accordingly allocated to a local authority and not any provincial tiers of the state. Local authorities have the power to levy rates and taxes and raise sufficient revenue for the purpose of being able to carry out their functions and

57 This should be contrasted with the whole of section 167(2) of the Constitution gives the impression, by the use of the word "may", that the Constitutional Court has a discretional jurisdiction to entertain certain matters when it is apparent that it is the only court with such jurisdiction, to the exclusion of all others. For example in respect of a petition to challenge results of a presidential election, section 93 of the Constitution, it is clear that it is the Constitutional Court which determines such dispute.

58 See the (Copac) National Statistical Report, Version 2, presented at the Second All Stakeholders Conference in October 2012 in Harare; pages 268-276 of the report. See also E Masunungure and S Ndoma The Popular Quest for Devolution In Zimbabwe, Afrobarometer Briefing Paper no.114 available on httD://afrobarometer.ora/sites/default/files/Dublications/Briefina%20DaDer/afrobriefnoll4.pdf. (available 30 May 2016), 4

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responsibilities. Parliament is obliged to enact such a law and its failure to do so is in fact a contravention of the constitution which rightly triggers a determination by the Constitutional Court if Parliament has failed to fulfill a constitutional obligation in terms of section 167(2)(d) of the constitution.

1. **The Nature, Content and Extent of Fiscal Devolution in the Constitution**

As argued above, the constitution of Zimbabwe provides for fiscal devolution in section 276(2)(b). Only local authorities are conferred fiscal devolution. The nature of fiscal devolution as expressed in the said section is unclear. It is the extent of such fiscal devolution that appears to be capable of determination only. It confers power on local authorities to levy rates and taxes and also allows them to raise (further) revenue that is sufficient to enable them to carry out their objects and responsibilities. In this regard, local authorities can levy rates and impose taxes. The extent of such rates and taxes as well as further revenue should be such as to be sufficient for the local authorities to carry out their objects and responsibilities. As such, it appears that it is up to the local authorities to determine such objects and responsibilities that they have to meet and as a corollary, the rates and taxes and further revenue heads to be imposed.

The nature of fiscal devolution remains clearly and fully not outlined in the constitution. This is because the rates and taxes to be levied are not outlined in the Constitution. The constitution defers the issue of determining the nature and content of the rates and taxes and other revenue heads to be imposed/levied to legislation. (There is presently no legislation to provide for fiscal devolution). It will be appropriate, therefore, to conclude that it is Parliament that is vested with power to decide the content and nature of the rates to be imposed or levied by the local authorities to meet their needs.

However, it seems most appropriate to conclude also that besides taking into account the fact that same have to be sufficient for the local authorities to carry out their objects and responsibilities, they will have to take into account the allocations local authorities will receive from central government. These are allocations made by central government in terms of section 301(l)(a) and (b) as read together with section 301(3) which requires that such allocations should not be less than 5% of national revenues raised in any financial year.

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1. **Conclusion**

The constitution has provided for fiscal devolution in Zimbabwe in respect of local sphere only and not provincial sphere (provincial authorities can only qualify for allocations in terms of section 301(l)(a)and(b)). The constitution has provided that fiscal devolution has to be given effect to by enactment of the legislation to that effect. The scope of fiscal devolution as provided for in the Zimbabwe constitution is however unclear hence unknown. It is however apparent that having regard to constitutional interpretation, the conferment of fiscal powers on local authorities is peremptory and not optional per se on the part of parliament. The constitution on the other hand has set out the framework for the extent of the fiscal devolution as spelt out in section 276(2)(b).

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