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Table of Contents

Constitution Making: The Role of External Actors

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In the past three decades new constitutions have been developed in many parts of the world, often in the aftermath of conflicts, but also in response to demands for more democratic political systems or for the resolution of institutional crises. In these processes, the international community often plays an important role. This article considers the role that external actors play in the elaboration and development of new constitutions in post-conflict societies. It identifies both the negative and the positive roles external intervention can play and suggests approaches that could be adopted by external actors to maximize their impact while avoiding the pitfalls of external intervention.

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1. Introduction

There is a general recognition, reinforced by the UN Millennium Development Goals, that governance is central to all issues relating to security and development. One of the greatest challenges in post-conflict states is establishing a constitutional order and democratic governance. Post-conflict constitution building is about re-building the political community as well as state structures destroyed by conflict. Because constitution making follows the conclusion of a peace agreement, or may even be among the settlement terms of a peace agreement, it is intimately linked to the dynamics of negotiations designed to convince parties to lay down their arms. Often the very process of resolving a conflict is tied to basic understandings of how the state will be restructured and governed. The basic components of a democratic constitutional order include: (a) the establishment of the constitution as the fundamental law regulating and limiting governmental authority; (b) the establishment of procedures for regular elections that are free and fair; (c) explicit legal safeguards for fundamental rights; (e) dispute resolution through constitutionally valid political processes and an independent judiciary; (f) general enforcement of the rule of law, including respect for contracts (Ndulo, 1998-99). An important legal instrument in the establishment of constitutional order and good governance is the national constitution. As Madhuku observed: "a constitution is a political animal; it embraces the key aspirations of people in the area of governance and mapping the relationship between the individual person and the state." Constitution making in any country, let alone a post-conflict one, is a major exercise. It presents a myriad of challenges in terms of expertise, resources and logistical support required for the

process. Invariably in the drafting of post-conflict constitutions external actors play an important role. They can illuminate the constitution making process with lessons from elsewhere, and empower local actors by providing independent and non-partisan support for internationally recognized constitutional principles, such as the separation of powers and the independence of the judiciary (Hatchard, Ndulo & Slinn, 2004). However, external actors can also play a negative role and be guilty of imposing their preferred constitutional models. This article looks at the role of external actors in this process.

2. Constitution Making and the International Community

Constitution making is a major bedrock in rule of law projects. There is widespread international support for democratization processes (UN, 1996; World Bank, 1992). At the level of the United Nations, the UN General Assembly has on several occasions, at the request of member states, requested the Secretary-General to submit reports on the ways in which the UN system could support democratization processes (IDEA, 2012). The United Nations has played a key role in constitution making processes in several post-conflict societies, such as East Timor, Sierra Leone (Ndulo, 2003), Afghanistan (Ndulo, 2003) and Namibia (NDI, 1990). The critical link between democratic governance and development was highlighted at the Millennium Summit, where the world leaders resolved to: "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms including the right to development" (Millennium Summit, 1995). This resolve includes developing ways and means to contribute to the shaping of a policy framework for democracy assistance at the inter-governmental level and support for the conduct of free and fair elections and constitution making processes (UN, 1992). The desire of governments to promote democratization and to discourage authoritarian rule is explicitly expressed at the regional level as well (AU Constitutive Act; Abrahamsen, 2002). Among regional organizations, the Organization of American States (OAS) officially proclaims that representative democracy is a purpose, a principle and a condition of membership (OAS, 1967). The African Union Constitutive Act firmly enshrines support for democratic governance in articles 3 and 4 (AU, 2000). The Constitutive Act in article 3 lists among its objectives the following: (a) the promotion of democratic principles and institutions, popular participation and good governance; (b) promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; (c) promotion of good governance through the institutionalization of transparency, accountability, and participatory democracy; (d) promotion of gender equality; (e) respect for democratic principles, human rights, the rule of law and good governance (AU, 2000).

In recent years, the level of involvement of external actors in constitution making has varied considerably, from significant external intervention to administrative support and advice (Miller, 2010). Although it is important that the constitution making process should essentially be a local product and should be driven by local stakeholders, in some situations there is no alternative to major international involvement. Where state institutions have collapsed, there may be no way to bring key actors together in a legislative or constituent assembly without the international community or third parties playing a major role in arranging the logistics and providing funding for

the constitutional process (Hatchard, Ndulo & Slinn, 2004). Through its participation, the international community can encourage the compliance of national constitutions with international human rights norms and standards (UN, 2009), ensure that the international standards are better articulated, provide requisite expertise and resources for a successful constitution making process, help build capacity, knowledge, networks and share best practices with the local people engaged in the constitution making process. As Rana observes with respect to Africa: "while the continent has long been a site for social, scientific, and institutional experimentation, among the most vibrant forms of current knowledge-sharing is the burgeoning domain of constitutional law. Especially since the 1996 adoption of South Africa's post–apartheid constitution, a new generation of African lawyers and judges have emerged, who have played a central role in spreading legal expertise and in advising new governmental arrangements throughout Africa" (Rana, 2010). Constitution making requires a wide range of expertise to deal with the diverse issues that a constitution addresses. Some substantive issues present special challenges for negotiators and without expert handling by experienced constitution designers these challenges can derail a constitution making process or limit the durability of the texts developed. Among the most frequent points of difficulty are: (a) distribution of power between the legislature and the executive; (b) federalism and decentralization; (c) derogations from rights; (d) gender equality; (e) property rights; (f) status of religion and customary law; (g) abortion; (h) gay rights.

The *United Nations Guidelines on Constitution Making* identify five principles which guide the United Nation's participation in constitution making processes. These include: (a) seizing the opportunity for peace building; (b) encouraging compliance with international norms and standards; (c) ensuring national ownership; (d) supporting inclusivity, participation and transparency; (e) mobilizing and coordinating a wide range of expertise; (f) promoting adequate follow-up (UN, 2009). The UN policy note also emphasizes that any United Nations assistance will need to stem from national and transitional authorities' requests (UN, 2009). Accordingly, international actors should engage national actors in a dialogue over substantive issues, explain the country's obligations under international law and the ways in which they could be met in the constitution. These obligations include the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, stateless and displaced persons. An example worth emphasizing is the principle of equality between men and women which should be embedded in every constitution.

It has to be acknowledged, however, that major foreign involvement can cause problems for legitimacy down the road. Iraq provides an example of a country where overbearing foreign direction of transitional arrangements and constitution making processes significantly hurt prospects for success and legitimacy. An example of positive external involvement is Namibia, which gave a relatively prominent role to foreign actors in its constitution making process. In Namibia the constituent assembly handed the working draft to a panel of three South African legal experts to prepare and refine the final version. However this use of foreign expertise was freely chosen, broadly accepted and in fact favored by most Namibians. Namibians shared a legal tradition with South Africa and therefore while the experts were technically outsiders, they were viewed with much less suspicion than experts from other continents. In other situations positive external involvement can come in the form of administrative and financial support of a domestically

controlled process. An example of this would be the Kenyan 2010 constitution which received support from a variety of organizations.

In addition to legitimacy concerns, several difficulties can arise in connection with the involvement of external actors, if the relationship is not structured correctly. Foreign experts can be very useful, but they might lack knowledge of local issues and conditions and they frequently appear as lobbyists for objectives and models promulgated by their home countries. Furthermore, foreign experts usually go in and out of a subject country quickly and have no sustained communication with local actors. Although the problem may lie partly with the experts themselves, it is too often the case that the organizations that engage experts to give assistance have not carefully thought about the role they want outsiders to play in the process. Often these organizations may represent donor countries, who want to fund their own experts and impact on the process. In some settings the advisers are highly politicized. Much money is wasted in this way, on trying to promote individual objectives. Further, the influx of free foreign experts and the need to brief them on the process at hand drains the time available for more important matters. Also, where there has been strong international community intervention key decisions, important in developing a new constitution, may have been taken outside the country rather than being shaped by the people the constitution is meant to govern. Similarly problematic, external assistance in the form of continued aid may depend on adhering to a pre-determined schedule, respecting terms during the negotiation process or incorporating foreign terms.

For better and more effective engagement, the international community should remain mindful that its role is to *support* the process and as such, it should refrain from being prescriptive. Such an approach avoids the danger of imposing a foreign model and institutions without regard to the local conditions. If there is to be genuine ownership of the constitution, the constitution making process must be geared to the social, political and economic conditions of the people the constitution is intended to serve. It must be remembered that the overriding goal of democracy is: "popular political self-government the people of the country deciding for themselves the contents of the laws that organize and regulate their political association" (Michelman, 1999).

It is important to guard against the uncritical adoption of foreign models. Constitutions must always be context driven. The warning by Nwabueze is apt when he notes that: "the spirit of the laws and institutions of the state, unlike the laws and institutions themselves, is not an exportable commodity; it cannot be packaged and transported" (Nwabueze, 2009). Human laws and institutions never function as well in the importing country as they do in their country of origin, unless the sprit conditioning or governing them there is also imbibed and assimilated. The process of constitution making should therefore be in the hands of those who know the local conditions, the history, the local dynamics and in the end will live with the product.

In this regard foreign experts should participate in the constitution making process as partners with local experts. The value of the expert's comparative experience is widely acknowledged (Chidyausiku, 1999). Access to comparative experience is particularly useful during a constitution making process as it provides a wide range of information on possible options and lessons on what to do and what not to do. However, the international community has to be mindful that in some situations foreign experts are brought in by a government bent on controlling the process in an effort to provide legitimacy to a flawed process. Where this is the intention, international experts should refrain from participating and should guard against being used for

legitimation purposes. External actors and the international community play an additional role in mobilizing resources for the constitution making process. They often provide money to fund the experts and also a significant part of the budget of the constitution making process. It must, however, be emphasized that local expertise is important for developing a sense of ownership, fostering a culture of service in local institutions and propagating knowledge in the community. Building capacity in a society is an important aspect of constitution building. The influence of external actors is less likely to be resented when it focuses on the *process* rather than on the results; in other words, ensuring that the process is inclusive rather than advocating a particular result.

3. Constitution Making Processes

Developing an effective procedure to prevent the manipulation of the constitution making process by those in power is a considerable challenge (Ndulo, 2010). It is one that would be helped by the articulation of principles and mechanisms that are to govern the process. The articulation of principles would enhance the quality of the process of constitution making and increase the possibility of success. An important way of guaranteeing responsiveness is to ensure that a legal framework is put in place, which insulates the process from manipulation from the government of the day and creates an appropriate institutional framework to facilitate the participation of people in the process. The 2010 Kenyan process succeeded precisely because there was a legal framework that insulated the process from government interference and ensured full participation of the people. The lack of such a legal framework has completely undermined the 2013 Zambian Constitution making process and threatens to derail it. The conditions under which a constitution making process is initiated are important. Before any society launches into a constitution making process, it is highly advisable that the society debates and comes to some sort of understanding as to what kind of society it wants to create. A constitution must be an exercise in building national consensus on the values and provisions to be included in the constitution. Clarity in the type of society to be created enables the process to look at the conditions in the country and the type of institutions and legislation required to transform the society in order to bring about the envisioned society.

A constitution making body must be fully representative of all stakeholders, must take into account the concerns of the widest possible segment of the population, be transparent in its work and make meaningful, effective and properly structured participation by all stakeholders in the country possible. These factors are important to maintain integrity in the process. In addition, participation of the people in the process provides good civic education for the population. Citizens begin not just to understand the process, but, in addition, they begin to appreciate its importance to their lives and communities and they begin to understand the values that the constitution seeks to protect and promote. Furthermore, the draft constitution to be developed by a constitution making body must not be subject to unilateral executive interference. It must be guided by reasonable timeframes. While time does not always guarantee quality, there is no doubt that a truly participatory and consultative process requires sufficient time to give it meaning and to bring alienated interests and communities into the process. A rushed process often leaves many issues

unresolved and leads to quick compromises that do not stand the test of time. Moreover, rushed processes often tend to compromise opportunities to engage in mass education as a way to build ownership around the final constitution.

After the elaboration and development of a draft constitution, the next important issue is how to adopt the constitution. The supreme law of the land should not be adopted using procedures that apply to ordinary legislation. Two common methods of adopting constitutions are: adoption through a two-thirds majority in a parliament and adoption through a national referendum (Hatchard, Ndulo & Slinn, 2004). With respect to parliament adopting the constitution, the important issue is not so much whether parliament has the power to adopt and enact a constitution. Rather, it is how to ensure that the sovereign will of the people, on which the edifice of democracy rests, is expressed in producing a legitimate, credible and enduring constitution. If anything, the process of consulting the people strengthens parliament, as it implies an unequivocal acceptance of the fact that parliament's powers are delegated to it by the people. The relationship between parliament and the people can endure only if this fact is recognized.

The adoption of a constitution through a referendum is one of the most transparent ways of furthering the culture of consultation. Popular democracy demands the institutionalization of a culture of consultation, reciprocal control in law making and the use of power and privilege. This should be entrenched in a constitution as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to amendments. The two-thirds majority requirement is often within reach of the largest party in parliament, making it little different in practice from the simple majority required for ordinary law making. To safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party in parliament. Approving a constitution through a national referendum encourages the full participation of the people who can give it their formal "seal of approval". The process can generate wide publicity, engender full public debate and education of the people on the substantive issues covered by the constitution. It increases the chances of the document receiving the sort of critical and objective consideration it deserves. Further, a referendum can counterbalance a presidential or government inspired document being approved by a compliant parliament. Referenda inevitably have their own drawbacks. In particular, the actual wording of the questions may greatly influence the result. Moreover, they are expensive and time-consuming and can be too formal and static. There is also the problem that if a constitution is rejected at a referendum there is often no option than to start the process all over again.

4. Conclusion

A stable political order can only be achieved by establishing a constitutional order that is legitimate, credible, enduring and which is structurally accessible to the people without compromising the integrity and effectiveness of the process of governance. The stark lessons learned from the various constitutional processes that have taken place in post-conflict states, is that the process of adopting the constitution is as important as its substance and that the process must be legitimate for it to be acceptable to all stakeholders. In order for the process to be legitimate, it must be inclusive. No party, including the government, should control it. A constitution should be the product of the

integration of ideas from all stakeholders in a country, including political parties both within and outside parliament, organized civil society and individuals in society. The international community can play an important role by ensuring that the process adopted by countries engaged in constitution making are inclusive processes. This would be an appropriate context to leverage their financial support to achieve this objective.

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Cost-Effectiveness of Food and Cash Transfers to Patients under Anti-Retroviral Treatment in Zambia *

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This study determines the relative cost-effectiveness of food and cash transfers when administered to Human Immuno-deficiency Virus (HIV) / Acquired Immune-Deficiency Syndrome (AIDS) patients on Anti-Retroviral Therapy (ART) in Zambia. The results show that cash transfers are not only cheaper but also unambiguously more cost-effective with respect to nutrition and health outcomes such as body-mass index (BMI) and Cluster of Differentiation 4 (CD4) count. This seems to suggest that, whenever market conditions and institutional capacities (banks, personnel, etc.) permit, cash should be given a higher rating by governments and other programming stakeholders than physical food aid as an instrument for influencing health and nutrition outcomes among HIV patients that are on ART.

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1. Introduction

Living standard surveys conducted throughout the 1990s and 2000s reveal that Zambia is among countries with a large proportion of people in poverty. The nation-wide surveys indicate overall poverty rates at around 70%, with rural poverty at 80% and urban poverty at 50% (CSO 2010).[1] These very high poverty figures suggest widespread livelihood stress among most households. Although poverty is the major cause of high vulnerability to food entitlement failures among poor households, high incidences of Human Immuno-deficiency

*This paper is based on earlier work done by the authors on behalf of and with support from CARE International Zambia and the United Kingdom (UK) Department for International Development (DfID). However, the views expressed herein do not necessarily represent the position of any of these organizations. All errors in interpretation are the authors' own.

[1]See also CSO (2000), CSO (2002), CSO (2004) and CSO (2006). Living Conditions Monitoring Surveys (LCMS) are conducted by the Central Statistical Office (CSO), the Ministry of Finance (MoF), and the World Bank. They are nationally representative surveys with the goal to monitor living standards and various Government and donor policies and programs.

Virus (HIV) / Acquired Immune-Deficiency Syndrome (AIDS) (estimated in 2005 at 14% of the adult population aged 15-49 years) have exacerbated the situation. Empirical studies show that Zambia has over the last two decades witnessed the highest levels of poverty since the emergence of HIV/AIDS (Drinkwater et al., 2006; Wietler, 2007). The increase in poverty due to HIV/AIDS is largely attributed to reduced productivity due to poor nutrition and health conditions among the affected households (WHO, 2003a; Ladzani, 2009).

The impact of HIV/AIDS has gone far beyond the household and community levels. All areas of the public sector and the economy have been affected. Because of high infection rates of about 25% among the economically active adult population, households that consist of vulnerable members with no or too few viable members are increasing (Wietler, 2007). According to the IMF, the epidemic is likely to affect economic growth (IMF, 2002). Agriculture, from which the vast majority of Zambians make their living, is particularly affected by the impact of HIV/AIDS (Shepekesa, 2011). HIV/AIDS is believed to have made a major contribution to the food shortages that hit Zambia in 2002, which were declared a national emergency (Jayne et al., 2007).

The negative socio-economic consequences resulting from HIV/AIDS have highlighted the need for broader, innovative and effective interventions, besides treatment. In recent years, the Government of the Republic of Zambia (GRZ), through the Ministry of Health (MoH) and the Ministry of Community Development Mother and Child Health (MCDMCH), and cooperating partners have developed and supported a multi-sectoral response system. This has involved, among other things, provision of Anti-Retroviral Therapy (ART) to suppress the HIV virus, and social protection to help improve the nutritional and health conditions of those affected (Temin, 2010). It is widely understood that adherence to and efficacy of ART are greatly improved when food or nutritional supplements are provided with the treatment. As a result, social protection, consisting mainly of food and/or cash transfers, has been provided along with ART.

Social protection has become increasingly popular as a means for helping HIV/AIDS patients and their families to cope with the disease and related vulnerabilities (Nyasha and Wim, 2009; Kawana et al., 2011). According to Kawana et al. (2011), social transfers are a critical enabler for successful HIV prevention and treatment outcomes, transforming the AIDS patients to being HIV-infected and reducing HIV-related vulnerabilities. United Nations AIDS (UNAIDS) has identified social protection as a strategic priority in the global HIV response because of its importance in addressing the drivers of the epidemic and in helping to mitigate the impact of the disease on communities, households and individuals (Kawana et al., 2011).

However, while both cash and food transfers have been shown to have positive effects as mechanisms for combating extreme poverty and HIV/AIDS, few studies have measured the relative effectiveness and cost-effectiveness of the two interventions. In response, CARE International Zambia, with funding from the United Kingdom (UK) Department for International Development (DFID), between 2010 and 2012, implemented

an ART adherence study in Katete district, about 500 kilometers east of Lusaka. The two-year pilot project sought to determine the relative cost-effectiveness of food and cash transfers as measured by their effects on adherence to ART and key nutrition and health outcomes, such as Body-Mass Index (BMI) and Cluster of Differentiation 4 (CD4) count. For both food and cash, the transfer size was calculated based on the World Food Programme (WFP) Zambia standard food basket for a vulnerable and poor household per month, consisting of a 25 kg of maize meal, 4 kg of beans, 2 kg of sugar, 2.5 liters of vegetable oil and 1 kg of salt.

The ART adherence project included a coherent design for impact evaluation, involving collection of three-wave panel data, comprising one baseline and two follow up surveys. Initial descriptive statistical analysis of these data seems to suggest that both intervention types are achieving the desired effects on the outcomes of interest (Kawana et al., 2011). However, no attempt has been made to measure the relative cost-effectiveness of the two interventions. Literature suggests that although transferring cash is more cost-effective than distributing food whenever conditions are in place for cash delivery (Farrington, Harvey and Slater, 2005; Levine and Chastre, 2004), this may not necessarily be the case when the realities of implementation set in (Harvey and Marongwe 2006; Savage and Umar 2006). Gentilini (2006) admonishes most cash-food comparisons in the literature, arguing that cost comparisons should correctly include not just transport but also several other costs, many of which are peculiar to cash transfers.

The study reported in this paper seeks to determine the relative cost-effectiveness of food aid and social cash transfers as means for achieving health and nutritional outcomes for HIV patients receiving ART. We use data generated by the Katete ART adherence project, supplemented with social cash transfer (SCT) implementation data from 8 of the 11 SCT districts.[2] The goal is to generate empirical evidence for scaling up these interventions. To the best of our knowledge, this study represents the first comprehensive attempt at estimating the relative cost-effectiveness of cash and food transfers as instruments for influencing health and nutritional outcomes among HIV/AIDS patients that are under ART.

2. Conceptual Issues on Cash and Food Transfers

A number of conceptual issues arise in assessing the appropriateness and effectiveness of cash transfers and in-kind transfers, such as food (Akter et al., 2007). Several reasons are

[2]Social cash transfers (SCTs) in Zambia are currently being provided in 11 rural districts: Chipata, Kalabo, Kalomo, Kaputa, Katete, Kazungula, Luwingu, Monze, Serenje, Shang'ombo and Zambezi. These districts have been chosen on the basis of having high levels of vulnerability and exclusion, existence of functioning community and district welfare assistance committees.

commonly advanced for preferring cash over food and other in-kind transfers. Tabor (2002) contends that cash is preferable to in-kind transfers because it is economically more efficient to distribute, while Subbarao et al. (1997) assert that cash transfers are superior to food transfers because they do not distort individual consumption or production choices at the margin. It is also argued that cash provides the recipients with freedom of choice and a higher level of satisfaction at any given level of income than food (Ahmed, 1993; Akhteret al., 2007), in addition to cash's relatively higher potential to stimulate agricultural production and other productive activities (Akter et al., 2007).

Arguments in favor of in-kind and food transfers include their perceived relative effectiveness at controlling, modifying and influencing the behavior of the recipients (Tabor 2002; Gentilini, 2007). According to this strand of literature, a food-based program is superior to cash when the target households cannot afford the food and/or are unlikely to purchase adequate quantities of the food or services even if they had the cash. The argument is that, if not restricted, recipients are more likely to divert cash from the intended basic or normal goods to other commodities that they fail to afford on their own. As a result, Akter et al. (2007) assert that for food-based programs, an effective tool for targeting the poor is to select an inferior food for distribution.

In addition, other empirical works have disputed the ability of transfers to provide choice in consumption to recipient households. Gentilini (2007) and Migotto et al. (2006) assert that in addition to cash, choice also hinges on the availability and accessibility of information. As a result, Sen (1981) argues that there is real freedom only when people are aware and rightly informed about their choices. For example, in examining the role of nutrition education programs in Malawi, the World Bank (2006) noted that while very cost-effective in improving child health, such programs are rarely demanded by communities, as they may not be aware that their young children are deficient in micronutrients and suffer from anemia.

3. Methods and Procedures

3.1 Data and Data Sources

This study aims to determine the relative cost-effectiveness of cash and food transfers to individuals starting ART treatment. This study uses data from a three-wave longitudinal survey (baseline, midline and endline) on the Katete ART adherence pilot project to estimate the BMI and CD4 count – the two outcome variables of interest. A total of 351 clients were enrolled in the pilot project that lasted for 2 years (2010-11), of which 175 were on cash and 176 on food transfers at baseline. However, during data analysis, 13 (3.7%, 8 on cash and 5 on food) were disqualified on account of being above the required

age of 55 years for the study. Therefore at baseline only 338 study clients (167 on cash and 171 on food) were included in the analysis. At post assessment, a total of 293 from 338 clients completed the whole period of 8 months of intervention, indicating an attrition rate of 45 (13.3%). Although clients were enrolled as individuals, they received transfers sufficient for the entire household, consistent with the WFP standard food basket. The three surveys collected data on both individual and household level variables.

The pilot project aimed at examining whether providing cash relative to food transfers to patients initiating ART improves their: (a) nutritional status as measured by the body mass index (BMI); (b) Household Diet Dietary Score (HDDS); (c) adherence to ART; (d) CD4 count; (e) asset base; (f) household income; (g) whether cash transfers are more cost-effective than in-kind transfers. However, the pilot study report identifies BMI and CD4 count as the only quantitative indicators that depict significant differences between the two interventions in all the three survey waves (baseline, midline and endline). According to Levin (1995), and Levin and McEwan (2000), cost-effectiveness analysis (CEA) is used to address only those types of intervention alternatives with outcomes that cannot be expressed in monetary values but are quantitative in nature. We, therefore, perform CEA using only BMI and CD4 count as the outcome variables.

Better nutrition and adherence to ART regimes are expected to raise both the BMI and CD4 count for the HIV/AIDS patients, regardless of their base levels. We, however, recognize that for BMI this may not be beneficial if the base BMI is in the overweight or obesity region. However, because these are very poor people and households, we expect their base BMI to more likely depict underweight than overweight status. Thus, we assume in this study that higher BMI is beneficial to these clients.

To arrive at a comparable size of the transfer for the two treatment arms, we use the World Food Program (WFP) standard food basket. Due to lack of recent data on the cost of transferring this unit of food from Lusaka to the representative final consumer nationally, we use estimates made by WFP (2006) and reported by Harvey and Marongwe (2006) and Wietler (2007), to estimate the total cost (sum of commodity cost; loading, transportation, storage and handling costs; direct and indirect costs) that would have been incurred had the food provided to the HIV clients between 2010 and 2011 through an e-voucher system in only one district (Katete) been delivered through a national food distribution program.

For the cost of transferring cash, we use estimates provided by DFID and MCDMCH (2013) based on actual data compiled during the period 2010 through 2012. These per-Dollar estimates of cash transfer costs were then combined with the estimated cost of WFP's standard food basket, net delivery costs, to arrive at the cost of a cash equivalent of the WFP standard food basket.

One of the key assumptions of the pilot project is that there is enough empirical evidence elsewhere suggesting that HIV patients on ART respond well and quickly when they are provided with either cash or food transfers (Beith and Johnson 2006; ODI – Briefing Paper, 2008). On this basis, the Katete pilot study that provided the two health

outcome variables (BMI and CD4 count) to this study, did not include a control group to help infer that the changes seen in the key outcome indicators were due to the effect of study interventions. This omission prohibits us from measuring the impact of the two transfer types, but enables a comparison of the relative efficacy of the two intervention types.

3.2 Data Analysis

While cost data were estimated in 2006, the corresponding health outcomes for the two transfer types were measured through a 2011 study of the Katete ART project. To combine the two types of data in a CEA, we compounded the cost data to 2011 values. Literature contends that program transfer costs be estimated to their comparable values at the time the outcomes are measured (WHO, 2003b). For studies that seek to evaluate alternative interventions implemented over a period of time and for whose costs data are available over the entire period of implementation, discounting is the appropriate mechanism for bringing future streams of costs to their comparable present values (Gold et al., 1996; Drummond et al., 1997). Conversely, if a study makes use of historical cost data to compare present alternative program interventions, compounding becomes the right procedure for bringing past streams of costs to their equivalent present values (Pearce, 1986). Given that this study uses 2006 cost data to compare two transfer mechanisms (food and cash) implemented between 2010 and 2011, we use the latter to bring the historical cost data to their corresponding present values.

According to Gold et al. (1996), there is generally no single preferred discount or compound rate and, as such, several rates are used in the literature to discount or compound costs. However, for comparability across studies, it is recommended that analysis be performed using a common discount rate (Levin and McEwan, 2000). The World Health Organization (WHO) recommends as social discount or compound rates 3 percent for developed countries with very low interest rates and country-specific rates of long-term government bonds for country-specific studies (WHO, 2003). We use the long-term government bond compounding rate of 10% obtained from the Zambia Revenue Authority (ZRA, 2013). The policy-laden government security rate is preferred to market rates of interest in this case because the cash, food and ART interventions are all government social programs. Market interest rates would unfairly over-penalize future outlays compared to the present.

Following Gold et al. (1996), we use the discrete-time compounding formula to estimate the value in 2011 of WFP's 2006 cost estimates:

$$Cost_{futurevalue} = Cost(1+r)^{t}, \qquad (1)$$

where r refers to the compound rate and t = 1, 2, ..., T is the time period in which the cost occurs.

The information collected on intervention costs and effects was thereafter combined to perform a cost-effectiveness analysis for the two interventions. This was done by computing a ratio of the total cost of the intervention, after compounding, to each outcome of interest, BMI and CD4 count (WHO, 2003b; Levin and McEwan, 2000). Following WHO (2003b), and Levin and McEwan (2000), the cost-effectiveness ratio (CER) for each intervention was obtained by dividing the total cost of delivery of each alternative (C) by its effectiveness or outcomes (E):

$$CER = \frac{C}{E}, \qquad (2)$$

After the ratios were calculated for each alternative, they were then rank-ordered from smallest to largest. The alternative with a smaller ratio was considered to be more cost-effective (Weinstein et al., 1996).

4. Results

4.1 Cost of Cash and Food Transfers

In the Katete ART adherence project, the food and cash interventions were given to the target individual but intended for the entire household hosting them. The outcome variables, on the other hand, were measured only for the target individual (i.e. the HIV positive client on ART). The intra-household dynamics related to differences in sharing ability between the two treatment arms and its effect on the outcomes are some of the sources of the differences that this study has sought to determine.

Table 1 presents cost estimates for procuring and delivering a standard WFP food basket to a representative recipient client/household, based on figures obtained from WFP (2006). The results indicate that, as at 2006, the average total cost of delivering a standard WFP food basket to a representative poor individual in Zambia was United States Dollars (USD) 40.61 per month. When compounded, this figure increases to USD 65.41 per month in 2011 Dollar equivalent. The results also show that delivery costs accounted for as much as 134 percent (USD 37.48 in 2011) of the purchase price of the food basket (USD 27.93 in 2011). These findings are consistent with those of Chiwele (2010) and White (2006) who also found the cost of transferring food significantly higher than the purchase price.

Table 1. Cost Estimates of Food Transfers in Zambia (2006) and Compounded Totals (2011 USD)

Commodity	Commodity cost (USD)	LTSH Costs (USD)	Direct Costs (USD)	Indirect Costs (USD)	Total Commodity Cost

					(USD)
25kg Maize meal	11.22	6.95	2.91	1.81	22.89
4kg Beans	1.81	0.82	1.91	0.21	4.75
2kg Sugar	1.81	0.82	1.91	0.18	4.72
2.5L Vegetable Oil	2.32	1.09	1.91	0.21	5.53
1kg Salt	0.18	0.45	1.91	0.18	2.72
Total					
2006 values (uncompounded)	17.34	10.13	10.55	2.59	40.61
2011 values (compounded)	27.93	16.32	16.99	4.17	65.41

Notes: 2006Exchange rate: USD1= ZMK4,000 (BoZ). LTSH refers to loading, transport, storage and handling costs

Source: Cost estimates based on data provided by WFP (2006); Oxfam Zambia (2006)

Table 2 presents comparable estimates of transferring a Dollar of cash transfers (Column 1). With the exception of the last row, these estimates were gathered from prior studies. We use the actual cash transfer cost estimates (last row of Table 2) in the rest of the cost-effectiveness analysis. This is because this, unlike all other estimates presented in Table 2, is not only based on actual cost data gathered by the MCDMCH but it is also from the same period as the health and nutrition outcomes (2010-12).

Using the actual cash unit transfer costs of $0.90 per USD, we estimate that it would cost $25.31, in 2011, to transfer $28.12 (the compounded value of the WFP standard food basket) to the intended beneficiaries. That is, if the recipient were given cash, the total cost of the transfer per month would be equal to the cash needed to purchase the food basket (USD28.12) plus the cost of transferring that cash (28.12 * 0.90 = USD25.31). Thus, cash is at least 32 percent cheaper to transfer than food and other in-kind transfers. The finding that cash is cheaper than food aid is consistent with several other studies. White (2006) and White and McCord (2006) found the cost-transfer ratios of cash to have been less than unity and those of food to have been more than one in both Malawi and Zambia SCT schemes.

Table 2. Cost of Transferring Cash in Zambia

Scenario	Cost to transfer USD1.00
	(1)
Estimates based on the Kalomo Scheme	
Pilot Phase (2004-06)[a]	$1.09
Scaled-Up Phase (2005-07)[b]	$1.48

Hypothetical Scale-Up to all Districts (2009)[c]	$1.20
Actual costs (2010-12)[d]	$0.90

[a] Estimates by Harvey and Marongwe (2006) and White (2006)
[b] Estimates by White (2006) and White and McCord (2006)
[c] Estimates by Chiwele (2010). These figures include the cost of M&E
[d] Based on actual data compiled from ministry records of all social cash transfer schemes during the period 2010 through 2012 (DFID and MCDMCH (2013)). These figures do not include the cost of M&E, which is supported separately through the American Institutes for Research (AIR)

4.2 Cost-Effectiveness Analysis of Food and Cash Transfers

Tables 3 and 4 present point estimates and 95 percent confidence intervals (CIs) for the cost-effectiveness ratios (CER) for food and cash transfers as means for influencing the patients' BMI (Table 3) and CD4 Count (Table 4). The results in Table 3 show that the cost-effectiveness ratio (CER) of a cash transfer on BMI is not only lower but also lies within a narrower 95 percent CI of 19.58-20.44, compared to that of an equivalent food transfer of 21.28-27.12. This suggests that cash transfers are not only cheaper but also more cost-effective than food aid in improving nutrition and health of recipient individuals. According to Weinstein et al. (1996), an alternative with a smaller CER is more cost-effective than that with a relatively higher CER; that is, it provides a given effectiveness at a lower cost and therefore it is the best candidate for new investments. There are several other reasons that cash has come to be preferred to in-kind transfers, including its ability to provide the recipients with the freedom of choice in consumption and its ability to enable them to diversify their diets according to their preferences and nutritional requirements (Akhteret al., 2007; Ahmed, 1993).

Table 3. Cost-effectiveness of Food and Cash Transfers on Nutrition (BMI)

	Program Type	
Statistic	Food	Cash
Mean BMI	21.94	21.37
Std Error (SE)	2.65	0.46
BMI CI: 95% (Low-Upper)	19.29 – 24.59	20.91 – 21.83
Total Cost of Transfer (8 months) in US$	523.20	427.44
Cost Effectiveness Ratio (CER) Interval	21.28 – 27.12	19.58 – 20.44

Notes: SE is standard Error and CI is confidence Interval
Source: Our estimates are based on data obtained from Kawana et al. (2012); MCDMCH (2012); DFID (2013)

Similarly, the cost-effectiveness results in Table 4 demonstrate that cash transfers are more cost-effective at sustaining the general health conditions of HIV positive people. The 95 percent CI for the cash CER with respect to CD4 Count is not only narrower but also falls unambiguously below that of food aid.

Table 4. Cost-effectiveness of Food and Cash Transfers on CD4 Count

Statistic	Program Type	
	Food	Cash
Mean CD4 Count	351.95	361.95
Std Error (SE)	26.71	27.32
CD4 Count CI: 95% (Low-Upper)	325.24 – 378.66	334.63 – 389.27
Total Cost of Transfer (8 months) in US$	523.20	427.44
Cost Effectiveness Ratio (CER) Interval	1.38 – 1.61	1.10 – 1.28

Notes: SE is standard Error and CI is confidence Interval

Source: Our estimates are based on data obtained from Kawana et al. (2012); MCDMCH (2012); DFID (2013)

5. Conclusion

This study presents one of the first attempts at understanding the relative cost-effectiveness of cash versus food aid as instruments for influencing health and nutrition outcomes for HIV-positive people that are on anti-retroviral therapy (ART). The results confirm that cash transfers are not only cheaper but also unambiguously more cost-effective. This seems to suggest that, whenever market conditions and institutional capacities permit, governments, civil society groups, development practitioners and other organizations involved in social welfare schemes should give cash transfers a higher rating than food aid when designing interventions targeted at improving nutrition and health outcomes for HIV patients that are on ART.

However, the fact that the study uses estimates of nutrition and health outcomes (BMI and CD4 count) from a small pilot district and national cost estimates identifies the need to interpret the results cautiously and the need for bigger and context-specific studies. Additional qualitative studies are also required to examine in detail the causal mechanisms underlying the observed results.

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Explaining and Fixing the 'Weak Governance Curse' in Resource-Rich Least Developed Countries

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There is a resource boom in the least developed countries, including those in Southern Africa. In order to translate their resource wealth into positive development outcomes in the long run, these countries need to have strong domestic governance systems. Yet, governance indicators in resource-rich LDCs have stagnated or deteriorated in the last decades. We use a new institutional analysis with a focus on path dependence theory to argue that these countries are caught in a "weak governance curse". Besides having inherited dysfunctional governance paths from past critical junctures, rent-seeking behavior associated with resource rents constitutes a major contemporary political economy obstacle to successful governance reform in these countries. Although these dysfunctional governance systems have become extremely resilient to change, we build a theoretical case as to why global regulatory mechanisms can serve as potential tools to provoke gradual feedback effects to disrupt this negative equilibrium.

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1. Introduction

There is a resource boom happening in the poorest countries in the world. In 2012, twenty-two out of the forty-nine countries which the United Nations classifies among the least developed countries (LDCs) were already exploiting or were expecting to shortly exploit significant amounts of natural resources (UNCTAD, 2012). Nineteen of these resource-rich LDCs are African countries, including five members of the Southern African Development Community (Angola, Democratic Republic of Congo, Mozambique, Tanzania and Zambia).[1] Academic research shows that resource wealth can only be translated into improved human development outcomes in the presence of good domestic

[1]We use a broad definition of resource-rich to include LDCs that exploit or are about to exploit significant resources such as Angola, Mali, CAR, Chad, DRC, Equatorial Guinea, Guinea, Liberia, Mozambique, Niger, Sao Tome and Principe, Senegal, Sierra Leone, South Sudan, Sudan, Uganda, Tanzania, Zambia, Afghanistan, Cambodia, Timor-Leste and Yemen.

governance systems (North, 1995; Brousseau & Glachant, 1995). Yet, all these LDCs have weak domestic governance systems.[2] The resource-curse literature alerts that if resource-rich LDCs cannot bridge their domestic governance deficits, they will end up with worse development indicators in the long run, and will more likely be ruled by authoritarian regimes and fall victim to political instability and civil conflicts than their resource-deprived peers (Auty, 1993; Sachs & Warner, 1995; Karl, 2005; Humphrey, Sachs & Stiglitz, 2007; Ross, 2012). A most pressing question in developing circles is therefore how to positively influence the governance paths of resource-rich LDCs. This question remains, however, wide open.

Despite massive efforts and resources invested in multilateral and bilateral development assistance to promote domestic governance reform in the last decade, many developing countries, and resource-rich LDCs in particular, have seen no significant improvements in their domestic governance systems (Kaufmann, Kraay & Mastruzzi, 2010). Why is this the case? How can this be fixed? Using a new institutional analysis with a focus on path dependence theory, we argue that improving domestic governance systems in resource-rich LDCs is an Augean endeavor because these countries are caught in a double trap (Collier, 2010). First, historical factors account for the development of dysfunctional governance paths in resource-rich LDCs. Such paths became resistant to change over time (Section 3). Second, rent-seeking behavior associated with resource rents constitutes a major contemporary political economy obstacle to successful governance reform in these countries (Section 3). As a consequence, improving governance systems in resource-rich LDCs is an intractable problem, and the strategy of promoting governance reform through development assistance has proven insufficient to break what we call "the weak governance curse".

New global regulatory mechanisms (GRMs), such as the Extractive Industries Transparency Initiative and securities disclosures for extractive corporations in home countries, have recently been created to provoke feedback effects in the domestic governance systems of these countries, alongside governance reform attempts through bilateral and multilateral agreements. Although there is so far no empirical research determining the potential impact of these mechanisms in addressing what we call the "weak governance curse", we use path dependence insights (Section 5) to build a theoretical case as to why it is possible to conceive of GRMs as tools to provoke gradual breakthroughs in extremely dysfunctional governance systems. We start by providing a brief presentation of the analytical framework (Section 2).

2. Brief Analytical Framework

An extensive body of literature investigates why significant amounts of capital and time dedicated to promote governance reforms through bilateral and multilateral assistance have apparently failed to generate noteworthy results. Michael Trebilcock (2012), for example, identifies four obstacles that impede effective rule of law reforms in developing countries: (1) resource constraints (including lack of financial, technical and human capacity); (2) socio-cultural-historical constraints

[2]We use a broad definition of governance that includes Fukuyama´s circumscribed conception involving state capacity ("government's ability to make and enforce rules, and to deliver services", Fukuyama, 2003) and national mechanisms of democratic accountability (Kaufmann &Kraay, 2007).

(related to values, norms and attitudes adverse to the rule of law that prevent formal reforms from becoming effective); (3) political economy constraints (including lack of domestic demand for reforms and supply-side vested interests that derail or obstruct reform attempts); (4) legal origins that determine the subsequent performance of legal institutions (path dependence).

This extremely useful classification can be extended beyond rule of law reforms, to governance reforms in general. For the sake of simplicity, and to highlight the main points of this article, however, we concentrate on a single approach, that of the new institutionalism. In the last three decades, new institutionalist scholars have investigated the mechanisms of institutional formation and institutional change. Economics and political science scholars have concluded that institutions are resilient to change due to path dependence (Kay, 2003; Pierson, 2004; North, 2005; David, 2007; Zamagni, 2010; Signé, 2011; Acemoglu & Robinson, 2012). The concept of path dependence illuminates how past choices and events have both determined how current governance systems were originally shaped and have possibly created significant obstacles to institutional reform. To Allan M. Williams and Vladimir Balaz (2007, p. 37): "path dependence exists when the outcome of a process depends on its past history, on a sequence of decisions made by agents and resulting outcomes, and not only on contemporary conditions."

The path dependence literature compellingly explains why and how governance systems change. The concept of a critical juncture is key to understanding this process. An initial extraordinary event destabilizes an existing governance system by provoking dramatic shifts in domestic payoffs, thus opening the way to significant institutional change. This critical juncture enables the inauguration of a new governance path, which gets reinforced and stabilizes over time, becoming resilient to change. The same critical juncture can create a path that is functional in one system and dysfunctional in another, depending on the circumstances (Acemoglu & Robinson, 2012).

We use an expanded concept of path dependence – encompassing legal (institutional) origins and demand-side political economy constraints, as defined by Trebilcock (2012) – to argue that: 1) most resource-rich LDCs have inherited dysfunctional governance systems, which were reinforced over time, and are now "locked in"; 2) supply-side vested interests and rent-seeking behavior (see Section 4 for a comprehensive presentation of the concept) further complicate the picture. In other words, promoting effective governance reform has become intractable, and these countries are currently "trapped" in a weak governance curse. We assume that lack of resources is not the biggest challenge due to the massive amounts of external resources invested in governance reforms, and also the potential domestic financial resources available for resource-rich countries. We also assume that socio-cultural constraints, if confirmed, would not represent a defining factor.

In Section 5 of this paper we use path dependence concepts to envision three potential ways in which GRMs could interact with extremely dysfunctional domestic governance systems. First, these mechanisms can be used to provoke an external shock in a stable governance system. This may destabilize the system and create a critical juncture that will set up a new governance path. Paul Pierson (2004) argues that in cases where the institutional path seems so locked-in that all internal strategies have proven insufficient to break the bad equilibrium, only external shocks will be effective in promoting change. This would be the case, for example, with external military interventions.

A second possibility is to use GRMs to help foster gradual internal changes. This idea is based on two assumptions. The first assumption – as suggested by Kathleen Thelen (2003) – is that institutional changes do not depend on external shocks. Internal dynamics, even in bounded paths, are still fluid, and change is always occurring, however small. For Thelen it is always possible to find endogenous avenues to provoke feedback effects in stable dynamics. Collin Crouch and Henry Farrel (2004) expand Thelen's theory, arguing that often there are potential but dormant endogenous alternative mechanisms that can open new paths or that may provoke feedback effects to disrupt the dynamics of a dependent path. We argue, differently from these authors, that exogenous GRMs can operate in the same fashion that potential endogenous mechanisms operate, offering an innovative avenue that domestic actors may or may not use to set a new path in the domestic sphere. Thus, our second assumption is that external mechanisms can help foster internal changes. The idea proposed here, that exogenous institutional mechanisms can serve as key options to provoke feedback effects in extraordinarily resilient dysfunctional governance paths is grounded in a combination of Pierson's and Thelen's theories. Our research is then interpretative with a comparative historical method (Mahoney, 2004), systematically identifying the processes of continuity and change over time with the corresponding paths.[3]

3. The Paths of Resource-Rich LDCs

Twenty-two LDCs have been either experiencing a marked growth in resource exploitation or are expected to do so in the near future. According to the World Governance Indicators (Kaufmann, Kraay & Mastruzzi, 2010), these countries have weak governance systems, some well below the world and regional averages. Virtually all of these countries fell under direct or indirect colonial control by European states between the sixteenth to the late nineteenth century (Table 1).

Country	Colonial Power	Country	Colonial Power
DRC	King Leopold/Belgium	Sudan	France
Niger	France	South Sudan	France
Mozambique	Portugal	Zambia	UK
Chad	France	Yemen	UK
Sierra Leone	UK	Tanzania	UK
Central Afr. Republic	France	Cameroon	France
Guinea	France	Angola	Portugal
Mali	France	Timor Leste	Portugal/Indonesia
Afghanistan	UK	Sao Tome Prince	Portugal
Equatorial Guinea	Spain	Liberia	-
Senegal	France	Uganda	UK

Colonization by foreign powers has been widely recognized as a critical juncture for the formation of institutional paths. Acemoglu & Robinson (2012), for example, argue that there is a strong

[3]For a detailed description of the comparative historical method used in this article, please read the full article of Mahoney (2004).

correlation between extractive institutions established by European powers in colonies with low settlement rates and the weakness of current governance systems in these former colonies. Others argue that additional factors, such as harmonization of institutional transplants with local institutions or values (Berkowitz, Pistor & Richard, 2003), integration of indigenous constituencies in colonial institutions (Daniels et al, 2010), capture of extractive institutions by authoritarian local elites after independence (Engerman & Sokoloff, 2012) have all played a role to either mitigate or reinforce the dysfunctional governance paths in former extractive colonies. Once dysfunctional governance systems initiate at a certain critical juncture and are reinforced over time they likely become "locked in", making governance reform an intractable enterprise in these countries.

It is beyond the scope of this article to propose a complete analysis of the colonial strategy and subsequent institutional evolution of each of these 22 countries. The following anecdotal evidence is intended to paint a general picture of how, likely because of high levels of settler mortality, most of the resource-rich LDCs were mainly extractive colonies, with institutions controlled by small elites, which created structures to more effectively exploit natural resources and cash crops. These dysfunctional extractive institutions were generally reinforced by different factors over time.

DRC (former Belgian Congo), Chad (former Ubangui-Shari) and the Central African Republic, for example, were subjected to the system of European concessionary companies. The companies were offered concessions to exploit natural resources over large parts of the territories. Sierra Leone also experienced decades of rule by corporate concession. The Sierra Leone Company was incorporated in London and received authority from the British Crown to explore large portions of land and to "make laws until the settlers were capable of making their own" (Redden & Schlueter, 2005, p. 6). Portuguese colonies in Africa were also extractive. Gerald Bender (1978) argues that few free Portuguese were interested in settling in the African colonies, which were associated with hardship and death. The number and type of Portuguese settlers in Angola (and Mozambique and Sao Tome) were never in any way similar to those in the "new Europe" colonies, such as Canada or the USA, or even to those in the Latin American colonies (Bender, 1978). Many other current resource-rich LDCs had high levels of settler mortality and became "extractive states" dominated by their European colonizers (Acemoglu, Johnson & Robinson, 2012).

However, this initial critical juncture is not the only factor explaining the resilience of dysfunctional governance systems in this group of countries. Richard Sandbrook has extensively researched the political roots of economic stagnation in African countries. He argues that when European institutions were transplanted from metropolises to many African colonies, they were not socially embedded. With continued colonial exploitation they remained strongly dissociated from society. Gradually, these uprooted institutions adapted to their function in the new environment. The result, argues Sandbrook, was the consolidation of patrimonial states, with political and social regimes based on "personal rule" (Sandbrook, 1986, p. 319). Most of the African resource-rich LDCs fell into this category of patrimonial states.

The integration of European institutional models into pre-existing or traditional systems of maintaining social order was not a common feature in most of the 22 resource-rich LDCs. In French Equatorial Africa, for example, two very different legal codes were in use. French citizens were subject to the French legal code, regardless of color. Indigenous peoples were subject to customary law, but this law was administered not by local authorities but by French representatives (Kritzer,

2002). Similarly, in Angola there were two types of colonial courts, ordinary and special. The special courts heard cases involving Portuguese settlers. The ordinary courts, presided over by a colonial administrative official, heard cases involving "*indigenas*", meaning those Angolans considered "unassimilated and uncivilized". Until 1961 the Portuguese government officially classified 99% of all native Angolans as "unassimilated and uncivilized" (Redden & Schlueter, 2005). Indigenous constituencies were rarely represented in colonial legislative institutions in LDCs.

Therefore, many resource-rich LDCs that are currently experiencing a resource boom – or are about to do so – have inherited governance frameworks that lack legitimacy among most of the population, that are patrimonial and non-conducive to local development, governmental accountability or political participation. After independence, the capture of institutions by autocratic leaders in most of these countries, compounded by the rivalries of the Cold War, contributed to the emergence of dysfunctional governance frameworks. As a result, the challenge of reforming these institutions is daunting. Therefore, it is true that path dependence can help us understand where these dysfunctional systems originated. The question is whether path dependence insights can also help us determine how to improve these systems, as we will discuss in Section 4.

Yet, besides the historical factors that generated and reinforced dysfunctional governance systems in resource-rich LDCs, there is another element that makes governance reform even more intractable. Because of the availability of significant resource rents, rent-seeking behavior (Calhoun, 2002) functions as a major contemporary factor that continues to "lock in" already dysfunctional governance systems in these countries. Although not much discussed in the path dependence literature, the idea that significant natural resource rents may cause perverse distortions in a country's institutions is not new. This idea is addressed in the rentier state literature that has developed since the 1970s, which we will discuss next.

4. Rent-Seeking Behavior: The Contemporary Trapping Mechanism

There is a long line of studies affirming that rent-seeking behavior, a phenomenon associated with significant resource rents, has a deleterious impact on political institutions. This literature precedes the broader literature on the resource curse.

Hossein Mahdavy (1970) introduced the theory of the rentier state in the 1970s. Rentier states are countries that receive substantial amounts of economic rents from abroad, on a regular basis. These can be rents from exports of minerals, oil and other natural resources, or even aid. In these states significant income and wealth derive from chance or situation, instead of resulting from labor and constant capital investments (Yates, 1996). This certainty of unearned rewards would cause a rentier mentality in leading political and economic actors, reducing their incentives to advance or to accept important institutional reforms favouring productive activities and collective prosperity.

The rentier state literature claims that ruling elites in oil states become divorced from and unaccountable to the country's citizens. Some factors facilitate rent-seeking behavior in rentier economies. First, according to Fadil (as cited in Yates, 1996): "the rentier state becomes the main intermediary between the oil [or mineral] sector and the rest of the economy". Second, access to substantial rents allows state actors to buy off opposition and to repress any contestation of

authority. Third, unlike other countries rentier states do not need to build tax systems in order to capture resources. A tax bureaucracy has been historically associated with facilitating the flow of information, strengthening social and political pressure and providing incentives to institution building (Karl, 2004, p. 665). Auty (2006) affirms that high rents create incentives to state capture "because it confers immediate personal and political benefits". In contrast, wealth creation (via manufactures, for example) is a long-term process, whose revenues may benefit others down the line and not current actors. The captured rents are diverted from the competitive economy and invested in inefficient state bureaucracy and national industries, or are stolen by elites (Khan and Jomo, 2000).

In *The Third Wave [of Democratization],* Samuel Huntington (1991) also called attention to the correlation between oil rents, weak tax systems and weak demand for democratic accountability. More recently, while undertaking comparative studies of contemporary oil states, Terry L. Karl (2004, p. 106) argued that oil revenues led states to become "over-extended, over-centralized and captured by special interests". In 2006, while editing essays on many promising 1990s transitions to democracy which ended up slowing down, reversing or collapsing, Michael Dauderstadt and Arne Schildberg (2006, p. 7) affirmed: "Authoritarian rentier economies are often the root cause of [the] lack of transition [to democracy] and of subsequent underdevelopment, conflict and terrorism". In 2006 Pius Fisher analyzed the difficulty of implementing institutional reforms in Tanzania, concluding that: "rent-seeking is probably the main impediment to economic development in general and to reforming economic policy in particular".

In a 2006 study Richard Auty (Dauderstadt & Schildberg, 2006) argues that the perverse incentives of high rents were the main explanation for diverging development paths among developing countries, mediated by institutions. Kurt Weyland (2010) also argues that the rentier state theory can explain why resource-rich Venezuela, Bolivia and Ecuador are adopting radical leftist and increasingly authoritarian policies, diverging from the trend of more moderate changes (towards leftist policies or towards rightist policies) negotiated within democratic institutions in the rest of Latin America. For Weyland (2010, p. 145): "Bolivia's move from leftist moderation to radicalism, which occurred soon after the discovery of huge natural gas reserves, provides striking evidence for this novel twist on rentier state arguments". Sebastian L. Mazzuca (2013) similarly argues that the Chinese and Indian massive demand for natural resources goes a long way in explaining the rise of what he calls "rentier populist" governments in Venezuela, Bolivia, Ecuador and, to a lesser extent, Argentina (Mazzuca, 2013, p. 108). Larry Diamond (2010) has also pointed to the "oil curse" as one of the main explanations as to why oil-rich Arab countries have remained so anomalously immune to the various worldwide waves of democratization.[4]

Resource-rich LDCs are therefore facing two distinct trapping mechanisms: their dysfunctional governance systems originated in the past and became dependent over time; and now rent-seeking makes these governance systems even more resilient by creating an important incentive for contemporary political and economic actors to prevent attempts to steer the

[4] To be sure Diamond also points to religion and culture, to the perfection of authoritarian statecraft by Arab countries over time and to international geopolitics as other factors that help to explain the lack of liberal democracies in the Middle East. Yet for him the real game changer for the region would be a "prolonged, steep decline in world oil prices" because oil rents are enabling those countries to constantly control and suppress the political and social pressures for democratization.

governance systems towards a more functional path.

The existence of this double trapping mechanism does not mean that it is impossible to shift paths in the future. One possibility is a new critical juncture, like the external intervention imposed on Afghanistan, or the ones inaugurated by social revolutions in the Middle East. However, the long-term outcomes of the American intervention in Afghanistan and of the 2011 Arab Spring are by no means clear. The July 2013 popularly-backed military coup against the Morsi regime in Egypt, and its quick turn to a repressive and violent military regime are sober illustrations of how difficult it is to harness a critical juncture to inaugurate and maintain a functional institutional path. Are critical junctures the only possible, if uncertain, way out of these trapping mechanisms? We address this question next.

5. Global Regulatory Mechanisms as Escape Routes

Both the explanatory and retrospective path dependence literature (David, 2007; Zamagni, 2010; Kay, 2003; Williams & Balaz, 2007; North, 2005; Arthur, 1989; Pierson, 2004) and the emerging prospective path dependence literature (Levin, 2009; Prado & Trebilcock, 2011) that seeks to illuminate how countries break free from, or may be able to break free from, a dysfunctional governance path, have so far disregarded the possibility that global regulatory mechanisms may in fact interact with internal dynamics, gradually provoking feedback effects in a dysfunctional equilibrium. Pierson's (2004) theory that in some cases external interventions have proven key to forcefully disrupting the dysfunctional governance trap seems as compelling as Thelen's (2003) theory that internal dynamics are never totally locked in, and that endogenous avenues have often been responsible for breaking a dysfunctional path. One theory does not exclude the other. We argue that external factors such as global regulatory mechanisms should be more thoroughly investigated as factors that can explain how to break extremely resilient dysfunctional governance paths, even in the absence of a critical juncture. These external mechanisms should be taken into consideration by reformers searching for ways to address the complex trapping mechanisms that keep dysfunctional domestic governance paths locked in.

In this article we draw from Julia Black's (2002) broad definition of regulation, meaning: "the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes [...]." By global regulatory mechanisms (GRMs) we mean the institutionalized policy instruments that are created by social, business or political actors to set standards and to facilitate information-gathering and information-sharing in order to influence the behavior of other social, business or political actors that are located in foreign states (Black, 2002; Levi-Faur, 2011). To be clear, it is not necessary for the mechanism to be created at a global institutional setting, such as international or transnational organizations. If a state unilaterally creates a regulatory mechanism that, although domestic, has as the main objective to influence the behavior of social, business or policy actors located beyond its national borders, it falls into our definition of GRM.

GRMs are extremely diversified in terms of the subjects they intend to regulate and their objectives (Kingsbury, Krisch and Stewart, 2005). We shall therefore clarify which GRMs we are referring to in this article. First, in terms of subjects, our focus is on GRMs created to influence state

behavior, not the behavior of social or business actors. Second, in terms of objectives, we do not deal with the more traditional GRMs, designed to influence the behavior of states towards each other (e.g. international security treaties), or to foster inter-state cooperation in managing global goods or addressing global problems (e.g. multilateral trade or environmental agreements). We specifically focus on modern GRMs, designed to influence how other states behave within their own territories (Slaugther & Burke-White, 2007). Yet, our focus is even more specific, since we do not deal with those GRMs that seek to influence how states behave towards their own individuals or particular groups (e.g. human rights treaties).

Thus, we refer to a very specific group of GRMs, created by social, business or political actors to influence how other states shape their own domestic governance systems to affect their own development outcomes, or to address domestic problems that cause international concern. Examples are World Bank aid or loan agreements to promote good governance and rule of law in developing countries, or bilateral development assistance agreements between countries. We also refer to newer GRMs such as transnational multistakeholder initiatives created with the objective to improve domestic governance systems in developing countries, e.g. the Extractive Industries Transparency Initiative. Finally, we include new forms of extraterritorial regulations that have been created in developed countries to, albeit indirectly, cause positive feedback effects in domestic governance systems in foreign developing countries, such as USA and EU extraterritorial securities disclosure regulations in the extractive sector, whose ultimate purpose is to increase the transparency in the management of natural resources in resource-rich but governance-poor developing countries.

To be sure, the idea proposed in this article is not completely new. Indeed, the fact that global mechanisms interact with – and may have significant implications for – the internal dynamics of domestic governance paths has apparently guided the analysis of Pistor and Milhaupt (2008) in their book "Law and Capitalism". Pistor and Milhaupt (2008, p. 192) argue that domestic governance structures, including legal systems that are the focus of their study, experience a highly interactive process of action and strategic reaction with global institutions and actors. In four out of six cases that the authors investigate in the book, the exposure of a domestic governance regime to international markets and practices has proved to be a prominent catalyst for change, even in the absence of a major external shock.

For Pistor and Milhaupt, external investors demanding better governance in capital-importing countries explain the spread of laws protecting individual property rights in countries that apparently lacked sufficient internal demand for property rights reform (p. 7). They argue that in a globalized world, key constituencies of domestic governance systems are no longer predominantly insiders. The question is why and how the participation of outsiders has enhanced the protective function of property law in some of the cases they analyze. The authors argue that outsiders demand better governance in foreign capital importing countries because they do not have easy access to internal networks of relations and the informal property protections on which privileged insiders rely. For Pistor and Milhaupt (p. 194) there is a second reason why outsiders, rather than insiders, promote mechanisms to influence foreign domestic systems: sometimes outsiders have the political leverage to promote institutional mechanisms that domestic actors lack.

Pistor and Milhaupt also explain why external constituencies rely on the interaction with domestic constituencies to obtain better results. Despite their greater leverage to propose

institutional mechanisms, external constituencies often lack the legitimacy to use these mechanisms to advance their own interests. The combination of the leverage of outside constituencies and the legitimacy provided by internal constituencies is key for the external mechanisms to ignite internal change. In the authors' words (p. 194): "[...] the uncoordinated but cumulative efforts of foreign and domestic actors appear to make a powerful combination for inducing institutional change in an increasingly globalized world". Pistor and Milhaupt's insights are extremely useful for investigating whether external mechanisms could serve as tools to enable this combination of leverage of external constituencies and legitimacy of internal constituencies to break the resilient dysfunctional path in resource-rich but governance-poor countries.

One difference between Pistor and Milhaupt's study and the inquiry proposed in this article relates to the academic discussion over descriptive versus prospective and normative value of path dependence scholarship. Pistor and Milhaupt are very clear that their study on the influence of global economic interactions in domestic legal systems is descriptive, not normative (p. 10). Their work is not intended to serve as a guide to policy-making, but rather to understand why some countries made certain institutional choices in the past and to predict what choices may be made in the future. However, siding with those that think that path dependence insights can also be used in a prescriptive manner, we argue that GRMs should also be seen strategically as institutional choices beyond existing endogenous avenues that reformers could use to provoke feedback effects in governance systems that are caught in complex trapping mechanisms, such as is the case in most resource-rich LDCs. Our theory is that in some cases GRMs may be intentionally harnessed as tools to ignite or to strengthen internal processes of change, by enabling the interaction of external and internal pro-reform constituencies.

Although GRMs should also be seen as viable alternatives to fix the "weak governance curse" in resource-rich LDCs, we should be cautious not to assume that they necessarily have a positive impact on reforms. In fact, the type of GRM as well as the domestic political environment and its institutional configuration are key factors that will determine whether a GRM may succeed or fail, or even have a negative unintended impact. As demonstrated by Signé (2011), an external mechanism is less likely to succeed in case of institutional intrusion and absence of a strong basis of domestic supports. Institutional intrusion is defined as "a semi-strategic and semi-structural process through which national actors are partly forced to adopt new institutions or policies, and agree to do so only because of asymmetry in power, structural constraints (structure), or potential benefits (strategies) of the international actors. In this context, relevant and non-constraining alternatives are quasi inexistent, but national actors still have (limited) room for negotiations" (Signé, 2011, p. 181). Relevant illustrations of institutional intrusions are first generations of structural adjustment policies in Africa. Leaders, who had extremely limited room for manoeuver, were not really participating in policy formulation, and were almost constrained to accept coercive conditionalities to receive vital funding. Additionally, most of these leaders were not willing or able to effectively implement such policies, which had led to mitigated results.

GRMs are more likely to succeed and have strong positive impacts in case of strong domestic support through an institutional inclusion process. Institutional inclusion is then defined as "a semi-strategic and semi-ideational process through which national or regional actors intentionally include current international strategies (or solutions) to shape a new institution or policy with the aim of increasing the probability of [domestic] acceptance (via recognition, social

suitability, real or perceived common values) […] Inclusion does not necessarily imply success or failure […] Once institutions or policies are adopted, dynamics can vary greatly" (Signé, 2011, p. 181). Institutional inclusion is more likely to lead to both rapid (immediate) and slow moving changes, as domestic actors play a more active role than in the semi-structural intrusion process. Relevant illustrations of institutional inclusions are the Poverty Reduction Strategy Papers (PRSPs) at the national level, and the New Partnership for Africa's Development at the regional level. In order to facilitate the acceptance and success of their strategies, but also because they promote shared (real or apparent) international values, leaders are proposing global strategies that integrate several internationally proposed solutions.

These concepts were successfully tested to explain the dynamics of policy innovation and continuity as well as the paradigm shifts in the political responses to the twenty-first century versus twentieth century economic and financial crises in Africa (Signé, 2011).

6. Conclusion

This article argues that two trapping mechanisms – path dependence and rent-seeking behavior – explain why most resource-rich LDCs are locked into a "weak governance curse". We suggest that path dependence insights should be used in a forward looking manner to provide guidance for those actors that are seeking to devise mechanisms to help reformers in these countries to escape this double trap. We side with those in the path dependence literature that believe that a dysfunctional path, however resilient, is still dynamic, open to internal mechanisms that enable gradual change, and therefore, is often not completely dependent on external shocks to escape the trap. However, we propose that in intractable cases such as those faced by resource-rich but governance-poor countries, external institutional mechanisms that enable a combination of the leverage of external pro-reform constituencies and the legitimacy of internal pro-reform constituencies may offer crucial missing choices for pro-reform actors to break dysfunctional paths.

As noted above, we are not proposing that a GRM will always be successful in provoking internal change in dysfunctional dynamics in resource-rich developing countries. In fact development assistance agreements, which are one form of GRM, have proven insufficient in most cases. We are proposing that different types of global regulatory mechanisms may expand the limited choices internal reformers currently face. Our argument is that in some cases exogenous mechanisms may interact with existing endogenous mechanisms. Reformers could use global regulatory mechanisms in their attempts to destabilize the dysfunctional equilibrium from the inside. External mechanisms would therefore reinforce a trend or force already present in internal dynamics. External mechanisms can also be used to bring new actors into the internal dynamics, creating a new path for change. In other cases, however, exogenous mechanisms may prove ineffective, provoking no change at all in internal dynamics. Whether an external mechanism will be effective or not is largely unpredictable. Much depends on the characteristics of the governance path and current situation in each country: the political economy obstacles to reform, the different endogenous levels of demand for reform, the various political and technical capacities of internal actors, etc. There is also a need to be cautious about the potential unintended negative effects of GRMs in the domestic governance system.

Finally, we argue that it is not possible to predict which global regulatory mechanism may prove the most efficient tool to allow the combination of the leverage of external constituencies and the legitimacy of internal constituencies to increase the chances of breaking a dysfunctional governance path. A mechanism that facilitates institutional inclusion by offering more options to domestic actors would more likely lead to successful reform.

One global mechanism may function well in country A, while not functioning well in country B, and not functioning at all in country C. Much would depend on the particular internal circumstances of each country. In this case, it is better to have as many external options as possible, so that reformers can explore which mechanism may work best for the country in question. Although some of the proposed concepts (institutional intrusion and institutional inclusion) have been systematically tested with success (Signé, 2011), this article proposes the theoretical articulations of our research agenda on path dependence, GRM and other institutional processes likely to better explain institutional or policy persistence, innovation, success and failure in developing countries. In upcoming papers, we will further test and develop our theory with conceptual refinement and empirical investigations of comparative interests.

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The Dormant Clause: How the Failure of the Repugnancy Clause Has Allowed for Discrimination against Women in Zambia

Pamela Amaechi and Erica Mildner

Zambia's legal system combines unwritten customary law with post-colonial statutory law. However, select traditions clash with statutes promoting gender equality. Though the repugnancy clause promotes the supremacy of written law in discrimination cases, it has not been utilized effectively. This paper raises the sources behind the clause's rare application and explores the possibility of utilizing the equal protection legal strategy employed by Botswana to prevent sex discrimination under customary law. This paper is based on a study of existing literature on the repugnancy clause in Southern Africa. Interviews were held with Boma and Chelstone Local Court Magistrates, as well as senior Local Court officials, women's legal advocacy NGOs, and individual researchers. This research was conducted in Lusaka, Zambia during June and July 2013.

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1. Introduction

On 3 September 2013, the Botswana High Court struck down a customary practice that denies women equal inheritance rights with men. Other Southern African countries have begun to "grapple with the conflict between the rights of women in customary law and the rights granted to women in common law and post-independence constitutions" (Botswana Court Decision a Victory for Women's Rights, 2012). Such conflict is exhibited currently in Zambia, where domestic and international legislation ensuring equal treatment among the sexes has failed to garner equality for women. This problem can be traced back to the failed implementation of the repugnancy clause, the provision of the Zambian constitution that dictates the boundary between customary and statutory law. The repugnancy clause, located in the Local Courts Act (1991) outlaws any customary law that is "repugnant to natural justice or morality or incompatible with the provisions of any written law" (Local Courts Act, §12, cl.1.a). While Zambia's Supreme Court has yet to rule definitively on when the repugnancy standard applies in cases of sex discrimination, the Botswana High Court's ruling on 3 September 2013 definitively pronounces that customary practices denying women equal access to property cannot stand. As Chief Justice Ian Kirby proclaimed: "Any

customary law or rule which discriminates in any case against a woman unfairly, solely on the basis of her gender would not be in accordance with humanity, morality or natural justice" (Mmusi v. Ramantele, 2012). Such a sentiment is the preoccupation of the Zambian courts as well. This paper examines how the structure of the Zambian constitution and judiciary allows for the continued discrimination against women in customary law and explores why the repugnancy clause is rarely used. We then highlight the legal strategy employed by Botswana to prevent women's continued subjugation as a possible way forward for Zambia. Ultimately, we argue that any substantive improvement in the treatment of Zambian women under customary law must involve both a clear decree from government and the education of Local Court Magistrates (LCMs).

2. Constitution and International Protocols

Since 1991, Zambia has incorporated anti-gender discrimination provisions into its Constitution. Article 23, Clause 1 of the Constitution (1991) pertains to anti-discrimination, stating that: "a law shall not make any provision that is discriminatory either of itself or in its effect" (Constitution of Zambia, art. XXIII, cl.1). Discrimination is defined in the article as "affording different treatment to different persons attributable, wholly, or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed" (Constitution of Zambia, art. XXIII, cl.1). However, this anti-discrimination clause is limited in its application by Section 4(d) of the same article, which states that Clause 1 does not apply to the practice of customary law. As a result, Article 23(4)(d) greatly hinders the judiciary's ability to mould customary law to accommodate prevailing gender equality movements.

Internationally, Zambia has signed a variety of treaties that promote women's rights, including the Beijing Platform for Action and African Charter on Human and People's Rights (Ratification of International Human Rights Treaties - Zambia, 2009). Nevertheless, there is a significant problem in enforcing international legislation due to Zambia's following of a dualist common law doctrine. Under this system: "ratified international treaties do not form part of domestic law" (United Nations Entity, 1995). Zambia considers itself unobligated to follow international provisions unless those provisions have been first incorporated into domestic law. Accordingly, individuals cannot bring suit pertaining to a breach of international treaties if that policy is not reflected in domestic law. Because current domestic law, primarily Article 23(4)(d), allows certain forms of discrimination, international protocols are ineffective in tackling issues of discrimination against women. As of 2013, none of these treaties have been entered into law (Ratification of International Human Rights Treaties - Zambia, 2009).

2.1 Repugnancy Clause

The repugnancy clause acts to define the boundary between two legal systems, ensuring that statutory law supersedes customary law where the two conflict. In theory, the repugnancy clause allows customary law to adapt to prevailing values in Zambian society. In the event that written law does not conflict with a section of customary law, customary law is allowed to exist as long as a judge does not find it repugnant to natural justice or morality. A particular custom must first be formally challenged in court to be declared repugnant (Munalula, July 2013). Although the repugnancy clause exists to reconcile customary and statutory law, it is rarely, if ever invoked. It is therefore unsuccessful in promoting justice and reducing gender discrimination. Reasons for the clause's lack of success include its inherent vagueness, the lack of training in clause implementation among LCMs, personal subjectivity from society's perception of women and history's designation of repugnancy as a colonial instrument.

2.1.2 Vagueness in wording of the clause

Zambia's judiciary is composed of five sections: the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts and the Local Courts. The lowest level of courts is the Local Courts, whose jurisdiction lies exclusively in customary law. Section 12(1)(a) of the Local Courts Act (1966) contains the repugnancy clause, stating that: "Local Courts shall administer the African customary law applicable to any matter before it insofar as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law". Both provisions of the repugnancy clause are considerably vague and ambiguous. The first provision does not define the terms natural justice or morality, while the second provision fails to clarify the degree to which written law must be contradicted to be repugnant. The dilemma is aggravated by unclear guidelines over which system of morality, African or English, to use in the application of the clause. The Local Courts Handbook, a guide given to LCMs, defines natural justice as a streamlined and fair means to determine guilt and retribution. The Handbook defines morality as a "sense of rightness or decency", and defines repugnancy to morality as "anything which offends [this] or is contrary to fundamental human rights" (Masupelo, 1996). There are no examples clarifying when the "natural justice or morality" provision of the repugnancy clause should be used. Further contributing to this confusion is the Supreme Court's failure to establish a legal standard for repugnancy. Several LCMs interviewed expressed that they award child custody based on customary law, though Zambia's High Court has awarded custody based on the child's "best interests" in the case *Nkomo vs. Tshili* (1973) (Amaechi & Mildner, 2013). The vagueness in the clause is such that it can be applied either narrowly to only the most egregious violations, or broadly to prevent any perceived injustice or immorality.

2.1.2 Lack of Training among LCMs

The lack of training provided to LCMs additionally contributes to the ineffective application of the repugnancy clause. Before appointment to the bench, LCMs are not required to have prior legal experience and are not interviewed as to their understanding of customary or statutory law (Muma, July 2013). Rather than focusing on judicial knowledge, LCMs are hired for their diverse life experiences, respect within their local communities and their ability to be impartial. According to the Director of Local Courts, LCMs base their decisions in practical experience and conscience, referring to an assessor when necessary (Muma, July 2013). LCMs undergo two weeks of training, during which they are given a copy of the Local Courts Act as well as the Local Courts Handbook. They are additionally encouraged to attend post-training workshops, many of which are sponsored by NGOs. However, lack of funding often prevents the dissemination of training materials, as well as opportunities to attend the workshops. In the small sample of Local Courts visited in Lusaka, only one of six magistrates interviewed was able to produce a copy of the Handbook (Amaechi & Mildner, 2013). In addition, the Handbook is rarely updated to reflect prevailing international human rights norms and contains little guidelines as to what could qualify as a repugnant practice (Munsaka, July 2013). With little access to handbooks, funds to attend workshops or written guidelines on what qualifies as a repugnant practice, magistrates are limited in their knowledge of how to apply the repugnancy clause. To address this problem, the Director of the Local Courts stated that the judiciary is organizing a pilot course with 30 LCMs to educate magistrates on human rights issues, which will include usage of the repugnancy clause (Muma, July 2013). Because there are few programs in place to train LCMs on statutory law, many are unsure as to what the boundaries of their jurisdiction are or when to apply the repugnancy clause (Munsaka, July 2013). For example, when interviewed, all LCMs agreed that the act of sexual cleansing was repugnant. When asked why it was repugnant, however, no LCM interviewed specifically cited case law or the Anti-Gender-Based Violence Act as the impetus. Even though the LCMs' rulings do not conflict with written statutes in this case, their lack of training about statutory law poses dangerous implications if they are unaware of a conflict between their judgment and written law. The effects resulting from LCMs' inadequate training about statutory law are exacerbated by the fact that: "there are almost no meaningful appeals from the Local Courts on customary law cases due to the practical necessity for an advocate in the higher courts" since "more than 80% of Zambians who go to Local Courts on issues of customary law generally cannot afford an advocate" (Review of Local Court System, 2006). Consequently, the magistrates who have the least amount of legal training in the judicial hierarchy often make the final decision in determining access to justice for women.

2.1.3 Gender Imbalance of LCMs

The gender of the Magistrates influences their personal subjectivity. Men, especially in the rural areas, are more encouraged than females to attain education. While there is parity in education until grade one, this equality drops off after grade seven, right before secondary school begins (Mwale, July 2013). To meet the requirements for becoming an LCM, an applicant must have completed at least Grade 12. The disparity in gender ratios at the secondary school level means that men are more likely to be considered for an LCM position. As of 2013, over 77% of appointed LCMs are male (Chipende, July 2013). At the traditional courts or village-level proceedings not formally recognised by the government, a sample of 268 traditional rulers similarly found that over 80% were male (Kerrigan et al., 2012). This finding is especially significant considering that the majority of LCMs indicated deferring to traditional rulers in their decisions (Kerrigan et al., 2012). Ndulo (2011) points out the danger in men's overrepresentation in these positions, stating that: "such men are more inclined to defend what they see as traditional norms than the living law of communities". Thus, personal subjectivity on the basis of gender inhibits progressivism. Though the overrepresentation of men as LCMs creates a risk of continued discrimination towards women, merely increasing the number of female LCMs would not necessarily decrease this possibility. Our interviews with female LCMs revealed similar gendered attitudes to their male counterparts, rather than advocating for women's expanded rights in customary law. Many LCMs, regardless of gender, were found to have a conservative outlook on customary law and rule in favour of maintaining customary legal norms. As such, some LCMs are reluctant to rule in a liberal manner that would challenge customary norms, resulting in inconsistent interpretations of the repugnancy clause. This inconsistency was revealed in several interviews with LCMs who denounced discrimination but felt as if their "hands were tied" in giving deference to customary law. Despite this ambiguity, the Senior Local Court Officer stated that the clause should always be used to prevent customary practices that discriminate against women (Chipende, July 2013). However, without any directive on the use of the repugnancy clause from a higher court or government authority, it is unlikely that the repugnancy clause will be applied uniformly to prevent continued discrimination against women in customary law.

2.2 History of the Repugnancy Clause

The conservative application of the repugnancy clause dates back to colonial history. The British instituted the repugnancy provision to ensure that customary law would be respected, but that English common law would always take precedence if the two systems came into conflict (Ndulo, 2011). In Zimbabwe, English colonial rulers did not give "blanket

recognition" to customary law, which allowed for practices such as the killing of twins, trial by ordeal and non-consensual marriage (Bennett, 1981). Courts found such customs "obviously immoral" and adapted their application of the clause to that standard (Bennett, 1981). Therefore, even though there is the potential for the clause to be applied more expansively due to its broad wording, interviews at the Boma and Chelstone Local Courts reveal that LCMs have sustained a conservative approach. This approach is exemplified in the case of polygamy. While courts did not rule polygamy itself to be repugnant, they have found taking on extra wives solely for the sake of sexual slavery or forced labour to be repugnant (Longwe, July 2013). The clause's British origin has further reinforced the conservative application of the clause, as: "it has been regarded as a white man's tool of looking down on African customs and tradition" (ZLDC, 2006). LCMs may be reluctant to use the clause if they believe it will "westernize" their traditions (ZLDC, 2006).

Besides its conservative application, another legacy of the repugnancy clause includes its propagation of gender discrimination. Because the repugnancy clause was introduced by a colonial power with many patriarchal practices in its legal system, these biases have been carried over in the implementation of the clause. While the colonial courts ruled that woman-to-woman marriage was repugnant, practices such as polygamy remained "untouched" (Ndulo, 2011). Ndulo proposes that this patriarchal approach ironically set a precedent to strike down provisions that empowered women (Ndulo, 2011). This history may explain why the interviewed LCMs who were familiar with the repugnancy clause readily acknowledged that customary law was discriminatory towards women, but insisted it was not the place of the clause to correct this injustice.

In sum, vagueness in wording, lack of training amongst the LCMs, personal subjectivity, and the colonial origin of the clause substantially contribute to its sparse usage at the Local Court level. These prevailing issues in the Local Court make it unlikely that the repugnancy clause will be used to invalidate discriminatory customary laws. Zambia is bound to fall behind in the global advancement of women's rights if it does not address these factors, which may require an overhaul of the current judicial structure.

2.3 Equal Protection Legal Strategy

Botswana shows promise in closing the gap between men and women under customary law. Botswana's constitution, similar to Article 23(4) of Zambia's constitution, exempts customary law from review in discriminatory matters while providing for a repugnancy provision (Constitution of Botswana, art. XV, cl.4). However, when confronting a discrimination case based on customary law, the Botswana High Court relied on the equal protection clause, rather than the repugnancy clause, to make the ruling. Specifically, the Botswana High Court struck down a discriminatory customary inheritance law ruling that prevented women from inheriting property in the case *Mmusi v. Ramantele* (2012).

The ruling in *Mmusi* held that women had the right to inherit familial property, regardless of a customary tradition giving male relatives the sole right to property. The judge held that equal protection rights are "independent of the right to non-discrimination", and are therefore not subject to exemption (Customary Law). In this decision, the judge referenced the primacy given to equal protection rights throughout the world, citing decisions in South Africa, India, the United States, and the United Kingdom.

The provision relied upon in *Mumsi* is also present in Zambia's constitution. While Zambia has not yet used the equal protection clause to shield litigants from customary law's discriminatory exemption, it remains a potential legal strategy for Zambia. Equal protection argument, akin to Botswana warrants consideration and analysis in the Zambian context, however, such discussion is beyond the scope of this article.

3. Conclusion

Considering the developments in other Southern African countries, it remains to be seen how Zambia's courts will respond to the challenge of providing equal rights for women. Moreover, it remains to be seen if Zambia's current constitutional review process will preserve the customary law exception to discrimination. However, it is critical to emphasize that a response from the statutory courts or elimination of Article 23(4)(d) in the constitution is inconsequential without the training and oversight of LCMs to implement non-discriminatory rulings at the community level. The personal nature and high volume of cases brought before the Local Courts leave LCMs with the heaviest responsibility to ensure gender equality for Zambian women.

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Policy Brief

Determinants of the Exchange Rate and Policy Implications

Exchange rate policy in Zambia – as in most countries – excites a certain amount of controversy. On one side, politicians often want to see a "strong" currency (i.e. where a unit of the local currency buys more rather than less foreign currency), since imports, especially those of consumption goods, would then be cheaper. On the other side, many economists want to see a "competitive" currency (i.e. where a unit of the local currency buys less foreign currency), since that makes exports and import-substitutes cheaper, enabling local businesses, especially outside of the traditional mining products, to compete more effectively and expand their markets under certain circumstances.

Low short-term exchange rate volatility is particularly important for developing countries where people transacting internationally have little or no access to hedging mechanisms. An importer of food and intermediate input products, Zambia is not an exception. In the short-term, volatility affects inflation levels, trade financing and aid denominated in foreign currency. In the long-run, it has implications for competitiveness, trade, and market diversification.

When and why does a currency (the Kwacha) appreciate or depreciate; and how has its behaviour over the past years been determined? What is the impact on the economy and how should the Bank of Zambia (BoZ) respond?

These questions were examined in a paper commissioned by the International Growth Centre in Zambia (www.theigc.org) and prepared by Professor John Weeks of the School of African and Oriental Studies at the University of London. Covering the period 2004-2013, the study tested the statistical relationship between the nominal Kwacha/US dollar exchange rate, and the trade balance, relative interest rates (i.e. Kwacha vs. US dollar interest rates), and foreign exchange transactions conducted by the Bank of Zambia, (i.e. intervention by the central bank aimed at changing the exchange rate).

The volume and value of exports from Zambia are overwhelmingly determined by mining. Hence mining company policies regarding foreign exchange transactions play a major role in exchange rate determination, the effect of which becomes evident in capital account movements. Other factors influencing the value of the Kwacha are other exports, imports, international reserves, aid, debt service, capital flows and the interest rate spread between the Kwacha and the benchmark US federal fund rates.

The study found that the variability of the nominal exchange rate against major currencies has declined over recent years, and that the variability – or instability of the

currency-- is quite low compared to other countries. However, in recent months the nominal Kwacha has mildly depreciated, consistent with external indicators. The same conclusion holds for the purchasing power parity (PPP) (i.e. the nominal exchange rate adjusted for relative price levels in Zambia compared with trading partners). This exchange rate has been slightly more unstable than the nominal rate. The PPP exchange rate in recent years has changed little, and has shown no consistent tendency to appreciate.

By contrast, the "real" exchange rate, measured as the ratio of tradable goods prices (exports and importable goods excluding mining) to non-tradables has moved against the former since the late 1990s, based on the available data (which could be revised when the CSO re-bases the national accounts data). Tradables have therefore become relatively less profitable.

With relative prices highly influenced by policies of the mining companies regarding their export earnings and international prices, the BoZ has limited room to influence the Kwacha. Moreover, there is a trade-off between nominal depreciation and domestic inflation; while measurement bias of real exchange rates and equilibrium prices also plays a role.

Nevertheless, BoZ intervention to date can be considered reasonably effective regarding short-to-medium term volatility. The BoZ reduces short-run volatility of the exchange rate through the purchase and sale of foreign exchange and changes in the interest rate on public bonds, sterilising the effects on the money supply. If the objective is to moderate currency appreciation, it sells Kwacha per foreign currency at a cheaper price than the equilibrium price at the expense of losing international reserves. To moderate depreciation it must offer more foreign currency per Kwacha inducing traders to sell Kwacha. During 2005-2007 appreciation was partially mitigated, and since 2008, depreciation has been slowed by the BoZ with a slightly greater effect. It is estimated that during 2006-2013 Bank of Zambia operations reduced variation in the Kwacha from 9.2 percent of its quarterly value to 5.5 percent.

The study concludes that exchange rate policy is well managed. While it is not likely that a policy attempting to manage the long term exchange rate would be effective, it is possible, though costly in the short-term, to reinforce the current effectiveness of exchange rate policy to further reduce short-to-medium term volatility. However, limits set by reserve holdings and inherent instability of mineral prices hinders the Bank's ability to achieve a bigger reduction in the volatility of the currency.

The establishment of a sovereign-wealth fund to manage copper revenues should be considered. It could be used as a counter-cyclical mechanism to stabilise the fiscal balance, and to accumulate reserves to fund public investment. If well managed, it could become an important source of output growth, reinforce macroeconomic stability, and provide space for monetary policy.

While shifting incentives towards non-mining tradables is desirable for long-term growth, it would require more than better exchange rate management. In Zambia, the

exchange rate is not an effective instrument to foster competitiveness of non-copper exports. Although it could be part of a diversification strategy, effective developmental policies at the sectoral level would also be needed.

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Book Review

Review of Morten Jerven, *Poor Numbers. How we are Misled by African Development Statistics and What to Do about it* (Ithaca and London: Cornell University Press, 2013), 187 pp.

In 2007, while doing fieldwork in Zambia, Jerven was struck by the 'derelict state of the Central Statistical Office in Lusaka, with limited human resources, (3!), old computers, a dearth of publication', which made him wonder 'how good are these numbers?' (p. xi). Finding similar situations in other African countries, Jerven explores the consequences of poor statistics, especially in the light that many policies are dependent on these inaccurate numbers, with the potential of misleading scholars and policymakers. Jerven is especially puzzled by the fact that statistical offices were neglected in the decades of structural adjustment, when IMF and World Bank 'embarked on growth-oriented reforms without ensuring that there were reasonable baseline estimates that could plausibly establish whether the economies were growing or stagnating' (p. 5).

Jerven focuses on gross domestic product or gross national income statistics as his main object of study, giving an insightful historical account of the genesis of these terms in the wake of the United Nations System of National Accounts set up in 1939. His book provides compelling evidence that while 'there is always some variation between [national income] estimates, depending on which source of data was used and what method was chosen to express the data in international currency… the range of variation (and therefore uncertainty about the information) deriving from African economies is much larger' (p.20). A comparison with Latin American countries clearly demonstrates that the same data sources are more reliable on the Latin American countries than on the African countries.

The book then assesses the level, direction and causes of errors and points to what kind of reforms are needed to improve this situation. One striking example of the consequence of the poor state of numbers and a Western oriented definition of GDP (one which for example excludes the informal sector) has been the gross underestimation of Africa's growth and income rates. For example, when Ghana rebased its baseline for GDP calculations from 1993 to 2006, GDP doubled and it consequently moved from a lower income country to a middle-income country. His call is to give numbers (i.e. statistics and statistical offices) a more central place in future development policies.

Jerven's book has just been published and has already raised quite a lot of dust. Reading through the commentaries, we can discern two groups of readers. To a non-specialist reader this book is an eye-opener about the state of statistics, particularly

measures of economic growth in Africa. A second group of readers, specialists in the field of statistics, are aware of the well-documented shortcomings and might feel this book adds little to the debate. Some clearly feel irritated by what they perceive to be a 'Western' generalist and alarmist perspective and argue that little attention has been paid to recent initiatives in this field. Ultimately, it is clear that the book ignites for some or reignites for others an important debate about how to improve the scholarly and policy-making use of statistics in Africa.

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